THE CONSTITUTIONAL VALIDITY OF COASTAL MANAGEMENT LINES IN SOUTH AFRICA: A CRITICAL ANALYSIS OF SECTION 25 OF THE NATIONAL ENVIRONMENTAL MANAGEMENT: INTEGRATED COASTAL MANAGEMENT ACT 24 OF 2008, READ TOGETHER WITH CHAPTER THREE OF THE ANNOTATED DRAFT COASTAL PROTECTION ZONE AND COASTAL SET-BACK REGULATIONS (OVERBERG DISTRICT) OF 2011, IN LIGHT OF THE CONSTITUTIONALLY ENTRENCHED RIGHT TO PROPERTY

BY

Karen Beverley Davis

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University of KwaZulu-Natal, Durban

Supervisor: Professor Warren Freedman

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DECLARATION

I, Karen Beverley Davis, do hereby declare that unless specifically indicated to the contrary in this text, this dissertation is my own original work and has not been submitted to any other university in full or partial fulfilment of the academic requirements of any other degree or other qualification.

Karen Beverley Davis
Student Number: 85285717
Masters in Environmental Law
School of Law
University of KwaZulu-Natal, Durban
February 2016

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CHAPTER ONE: INTRODUCTION

1. The South African coast

The South African coastline stretches from Mozambique in the east to Namibia in the west and is approximately 3100 kilometres in length. It spans three biophysical regions, namely the subtropical east coast, the warm temperate south coast and the cool temperate west coast.[1] It also encompasses two large marine ecosystems, namely the Agulhas Current Marine Ecosystem and the Benguela Current Marine Ecosystem. The warm Agulhas current flows south-ward along the east coast and supports a wide diversity of species. Its tropical waters, however, are poor in nutrients and biological productivity is low. The cold Benguela current wells up sporadically along the west coast. Although it is not as diverse as the Agulhas current, its waters are nutrient-rich and support large populations of fish, lobsters, seals and seabirds. It is highly productive and the focus of South Africa's fishing industry.[2]

Given these natural features, it is not surprising that the coastal zone has been described as "a rich and diverse national asset, providing important economic and social opportunities for the human population".[3] According to the 2014 *National Coastal Management Programme* the direct economic benefits from coastal resources are estimated to be approximately 35 percent of South Africa's annual gross domestic product (GDP), while the indirect benefits are estimated to be approximately 28 percent of GDP. Direct benefits include the fishing industry, port and harbour development and recreational and tourism opportunities. Indirect benefits include erosion control, waste assimilation, detoxification and recycling.[4]

Apart from economic benefits, the 2014 *National Coastal Management Programme* states further that the coastal zone also provides enormous social benefits for many South Africans. For some South Africans it is a place of cultural significance and for others a place of spiritual significance. In addition, it is also a place where many South Africans walk, run, swim,

[1] Department of Environmental Affairs *South Africa's National Coastal Management Programme* (2014) at 40.
[2] B McLean & J Glazewski "Marine Systems" in HA Strydom and ND King (eds) *Fuggle and Rabie's Environmental Management in South Africa* 2ed (2009) at 455.
[3] DEA *National Coastal Management Programme* (note 1) at 23.
[4] Ibid.

sunbathe, fish, surf and engage in other recreational activities. Besides the cultural, spiritual and recreational benefits it provides, the coastal zone also offers the people of South Africa a wide range of educational and scientific opportunities that are difficult to quantify in monetary terms.[5]

Unfortunately, the coastal zone is facing a number of threats, mainly as a result of the exploitation of natural resources such as unsustainable fishing practices, damaging mining activities, excessive and inappropriate development of land to serve an ever increasing coastal population growth density along the coastline, environmentally damaging mariculture as well as pollution from land based and marine sources.[6] One of the most significant of these threats is human induced global warming.

2. Global warming

Global warming may be defined as the increase in the average air temperature near to the Earth's surface measured over the past 150 years.[7] Although the current process of global warming is not the first time that the earth's climate system – which is made up of the atmosphere, the land, the oceans and the cryosphere – has undergone a process of change, all previous changes have occurred as a result of natural causes and have taken place over thousands of years. The current process of global warming, however, cannot be explained by natural causes alone.[8]

Instead, it is generally accepted by the scientific community that the current process of global warming is the result of human induced (anthropogenic) changes in the earth's climate system. These human induced changes include:

- changes in the composition of the atmosphere caused as a result of the emission of various greenhouse gasses and particles by industry, vehicles, agriculture and so on;
- changes in the shape of the surface of land as a result of the development and spread of farms and cities into previously natural wilderness;

[5] DEA *National Coastal Management Programme* (note 1) at 23.
[6] W Freedman "The Coastal Environment" in J Glazewski (ed) *Environmental Law in South Africa* 3ed (2014) 11-1 at 11-5 and McLean & Glazewski *Environmental Law in South Africa* (note 2) 455 at 486.
[7] B Scholes, M Scholes & M Lucas *Climate Change: Briefings from Southern Africa* (2015) at 1.
[8] Ibid.

- changes in the oceans as a result of fishing, pollution, warming and the uptake of carbon dioxide (CO2); and
- the melting of glaciers, ice caps, permafrost, snow cover and sea-ice.[9]

Underlying all of these changes is the dominant role human beings now enjoy on the planet. This rise to dominance may be traced back to the dramatic increase in the number of human beings since the Neolithic Revolution as well as the development of the technical ability to exploit the earth's natural resources and to transform its natural features, especially since the start of the Industrial Revolution.[10]

The consequences of global warming on natural and human systems are observed, studied and assessed by the Intergovernmental Panel on Climate Changes (the "IPCC"), which was established by the United Nations Environment Programme and the World Meteorological Organisation in 1988. One of the functions of the IPCC is to publish an assessment report every six years. The fifth and most recent assessment report was released in 2014 (the "AR5"). According to AR5 one of the most significant consequences of global warming is sea-level rise.[11]

3. Sea-level rise

As was pointed out above, one of the most serious consequences of global warming is a rise in the level of the sea. Sea-level rise is defined as "a rise in mean sea-level as a consequence of global climate change, and driven by the melting of glaciers, the expansion of ocean volume through temperature rise and changes to the amount of water stored on land".[12] The change in the global mean sea level is relative to the center of the earth and not to adjacent land. The change in the global mean level of the sea is referred to as eustatic change. It is important to note

[9] Scholes, Scholes & Lucas *Climate Change: Briefings from Southern Africa* (note 7) at 1.
[10] Ibid.
[11] PP Wong et al *Coastal systems and low-lying areas. In: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014) at 361-409.
[12] G van Weele, T Breetzke and R Kamish *Coastal Management/Set Back Lines for the West Coast District: Final Project Report for the Western Cape Government: Department of Environmental Affairs and Development Planning* (2014) at i and vii.

that local mean sea levels may vary and more often than not be accompanied by dramatic tidal and storm events. [13]

In the same way that the earth's climate has changed over time due to natural processes, the level of the sea has also changed over time due to natural processes. Over the last 800 000 years, for example, sea levels have varied by 130 meters as ice levels advanced and then retreated during various glacial and inter-glacial periods. Since the peak of the last ice age 23000 years ago sea levels have been rising again.[14] The rate at which the level of the sea is rising, however, has accelerated over the last 150 to 200 years and this is as a result of global warming. According to AR5 the level of the sea is rising at an average rate of 3.2 millimeters per year and is expected to rise between 0.55 and 1 meters by the end of the twenty-first century.[15]

In AR5, the IPCC explains that the accelerated rise in the level of the sea may be traced back to several causes. Among these are the following:

- thermal expansion of the ocean;
- melt-water from land based glaciers;
- melt-water from the Greenland and Antarctic ice-sheets; and
- unsustainable pumping of water from land-based aquifers.[16]

It is essential to note that sea-level rise will not occur at the same rates on all coastlines globally, certain communities in different countries and on all levels of development have been identified as being at risk.[17] It is therefore clear that in respect of rising sea-level there will be global as well as regional implications depending on various contributing factors such as the topography of a particular country's coastline and the interaction with storms of varying ferocity with it, as

[13] A Cartwright "Coastal Vulnerability in the Context of Climate Change: A South African Perspective" paper presented at the *Climate Justice Conference* 27-29 October 2009. Available at: http://www.90x2030.org.za/oid%5Cdownloads%5coastal20%vulnerability%20south%20african%20perspectivepdf, accessed 12 October 2015. Pages not numbered.
[14] Scholes, Scholes & Lucas *Climate Change: Briefings from Southern Africa* (note 7) at 77-80.
[15] Ibid.
[16] Wong P et al *Coastal systems and low lying areas* (note 11) at 370-373.
[17] R Pachauri & L Meyer (eds) *Synthesis Report Contribution of Working Groups 1, II and II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (2014) at 13.

well as the range of options open to each particular country in terms of resources and indeed the political will to do so.

4. Sea-level rise and its consequences for South Africa

The rise in the level of the sea around South Africa appears to follow the global trend with some variations. Tide-gauge data over the past fifty years shows that the level of sea along the west coast has risen by 1.87 millimeters, along the south coast by 1.48 millimeters and along the east coast by 2.74 millimeters.[18]

The regional differences in sea-level rise around South Africa are caused largely by the cooling of the inshore southern Benguela current and the warming of the Agulhas current. Long-term measurements of the sea surface temperature shows that the inshore southern Benguela current has cooled by 0.2 to 0.3 degrees Celsius per decade and that the Agulhas current is warming by 0.3 to 0.5 degrees Celsius per decade.[19]

The rise in sea levels around South Africa's coast has significantly increased its exposure to a wide variety of serious risks, especially when combined with tropical cyclones and storm surges. These risks include coastal erosion, coastal flooding and over-wash events.[20] Over the past three decades or so, coastal erosion has emerged as a particular concern especially among coastal municipalities, several of which have already begun to take steps aimed at adapting to and/or mitigating predicted sea-level rise.[21]

5. Coastal erosion

[18] Scholes, Scholes & Lucas *Climate Change: Briefings from Southern Africa* (note 7) at 79.
[19] Ibid at 88-91.
[20] Scholes, Scholes & Lucas *Climate Change: Briefings from Southern Africa* (note 7) at 109.
[21] Van Weele, Breetzke & Kamish *Coastal Management/Set Back Lines for the West Coast District: Final Project Report* (note 12) at 1-7. Areas that have been identified as being vulnerable to coastal erosion, coastal flooding and over-wash events as a result of sea-level rise include "the Cape Flats, Muizenberg, and the Strand in False Bay, parts of the South Durban Basin and developments along the shores of estuaries, lagoons, coastal wetlands and fore-dunes" (see Scholes, Scholes & Lucas *Climate Change: Briefings from Southern Africa* (note 7) at 137).

Coastal erosion may be defined as the reduction of coastal land as a result of wave action along the shore. Like climate change, coastal erosion is a natural phenomenon by which the coastline adjusts itself to accommodate wave energy and preserves beaches, barriers and dunes as well as accommodating ecosystems. It is, however, classified as problematic when it encroaches on and begins to threaten human development and property.[22] Coastal erosion and the accompanying loss of beach width reduces the coastline's resilience to climate change and where the coastline cannot be further varied by nature there will be significant implications ecologically as well as in respect of property under threat.[23]

Cartwright stresses the need for an understanding of all the drivers of sea-level rise and their threats to the coastline like coastal erosion, in a context specific manner which includes the "history, legislation, distribution of people and assets as well as scientific data relating to each specific area of vulnerability".[24] Although not specifically listed as a key hotspot by the AR5, it is clear that the consequences of sea-level rise for South Africa will be significant. Areas identified as under pressure or vulnerable by Theron and Rossouw are "Northern False Bay, Table Bay, Saldanha Bay area, the South Cape coast, Mossel Bay to Nature's Valley, Port Elizabeth and developed areas of the KwaZulu-Natal Coast".[25]

According to AR5, and contrary to the majority of consequences for sea-level rise in other countries, South Africa's vulnerability to sea-level rise is not disproportionately loaded on the poor. Ironically as the result of previous exclusionary policies imposed by the apartheid regime a large proportion of the nation's coastal property is owned by the local authorities and the affluent. Rumsey and King identify the "huge" economic impact of declining values of coastal properties.[26] In contrast to other countries the poor in coastal areas in South Africa are affected in the main in relation to health issues as well as access to housing.[27]

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[22] J Cooper and J McKenna "Social Justice in coastal erosion management: The temporal and spatial dimensions" (2008) 39 *Geoforum* 294 at 296.
[23] A Theron and M Rossouw *Analysis of Potential Coastal Zone Climate Change Impacts and possible Response Options in the Southern African Region* at 1. Available at http://www.csir.co.za, accessed on 13 October 2015.
[24] Cartwright *Climate Justice Conference* (note 13) pages in paper not numbered.
[25] Theron & Rossouw *Analysis of Potential Coastal Zone Climate Change Impacts and possible Response Options in the Southern African Region* (note 22) at 1.
[26] A Rumsey and N King "Climate Change: Impacts, Adaptation, and Mitigation; Threats and Opportunities" in H Strydom and N King (eds) *Fuggle and Rabie's Environmental Management in South Africa* (2009) at 1048, 1061.
[27] Cartwright *Climate Justice Conference* (note 13) pages in paper not numbered.

6. Coastal management lines

One of the ways of dealing with coastal erosion is through the imposition of coastal management lines.[28] As previously discussed, the rapid rate of development on the coastline is one of the driving factors which exacerbate coastal erosion. The imposition of coastal management lines (also known as set-back lines) as an adaptation strategy obviates the need in some instances, for protective measures such as sea-wall and dykes and enables changes to the coastline as a consequence of sea-level rise to occur naturally.[29]

Coastal management lines are essentially lines that have been demarcated in accordance with legislation beyond which a person is not allowed to engage in any form of development or in which development will be controlled to facilitate the achievement of the objects of the National Environmental Management: Integrated Coastal Management Act[30] (the "ICM Act") or coastal management objectives.

Coastal management lines were first introduced on a national scale when the ICM Act came into operation and the relevant provisions have recently been amended by the National Environmental Management: Coastal Management Amendment Act[31] which came into effect on the 1 May 2015. Section 25 of the Act confers the power on an MEC[32] the right to establish these coastal management lines on South Africa's coastline.

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[28] In order to adapt to the consequences of sea-level rise a number of different measures and strategies may be adopted. These measures and strategies are usually divided into three different categories, namely: accommodation measures, protection measures and retreat strategies. Accommodation measures include those that are aimed at changing human activities in order to minimise the negative consequences of sea-level rise. They include building modification, ecosystem protection, land reclamation and restrictions on activities that are damaging to the coastline. Protection measures include those that are aimed at building hard and soft structures in order to prevent or minimise the negative consequences of sea-level rise. They include groynes, revetments, sea walls (hard measures) and beach renourishment (soft measure). Retreat strategies include those in which humans retreat from the coast in order to allow nature to take its course. They include the abandonment of land, development restrictions and land acquisition. Coastal management lines are usually classified as a form of retreat. See Wong et al *Coatal Systems and low lying areas* (note 11) at 361-409

[29] Cartwright *Climate Justice Conference* (note 13) pages in paper not numbered.

[30] 24 of 2008.

[31] 36 of 2014.

[32] MEC is defined in section 1 of the ICM Act as "the member of the Executive Council of a coastal province who is responsible for the designated provincial lead agency in terms of this Act".

Section 25 of the Act provides in this respect as follows:

"(1) An MEC must by notice in the *Gazette* establish or change coastal management lines:

(a) to protect coastal public property, private property and public safety;

(b) to protect the coastal protection zone;

(c) to preserve the aesthetic values of the coastal zone; or

(d) for any other reasons consistent with the objectives of this Act.

(1A) An MEC may, in regulations published in the Gazette, prohibit or restrict the building, erection, alteration or extension of structures that are wholly or partially seaward of that coastal management line.

(1B) When establishing coastal management lines in terms of subsection (1), the MEC must consider the location of immovable property and the ownership and zonation of vacant land.

(2) Before making or amending a notice referred to in subsection (1) or making the regulations referred to in subsection (1A), the MEC must:

(a) consult with any local municipality within whose area of jurisdiction the coastal management line is, or will be, situated; and

(b) give interested and affected parties an opportunity to make representations in accordance with Part 5 of Chapter 6.

(3) A local municipality within whose area of jurisdiction a coastal management line has been established must delineate the coastal management line on a map or maps that form part of its zoning scheme in order to enable the public to determine the position of the coastal management line in relation to existing cadastral boundaries.

(4) A coastal management line may be situated wholly or partially outside the coastal zone.

(5) The Minister, after consultation with the relevant MEC, must exercise the powers and perform the functions granted to the MEC in this section, if such power relates to any part of an area that:

(a) is a national protected area as defined in the Protected Areas Act;

(b) straddles a coastal boundary between two provinces; or

(c) extends up to, or straddles, the borders of the Republic".

As section 25(1A) expressly states, after a coastal management lines has been established, an MEC through the mechanism of regulations may prohibit or restrict a landowner from building,

erecting, altering or extending a structure that is wholly or partially on the seaward side of a coastal management line.

While this section is aimed at giving legal effect to the underlying purpose of coastal management lines, it will inevitably restrict a landowner's entitlement to develop his or her immovable property. The extent to which it does so will depend on the nature of the restrictions and the location of the coastal management line.[33]

As Chapter Three of the *Annotated Draft Coastal Protection Zone and Coastal Set-back Regulations (Overberg District)*[34] (the "draft Overberg Coastal Regulations") demonstrate, however, section 25 of the ICM Act may impose very significant restrictions on a landowner's entitlement to economically exploit and benefit from his or her land.

In order to be constitutionally valid, therefore, section 25 of the ICM Act read together with, for example, Chapter Three of the draft Overberg Coastal Regulations must satisfy the requirements of section 25 of the Constitution. Section 25 of the Constitution provides, *inter alia*, that:

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

(2) Property may only be expropriated in terms of law of general application if:

(a) it is 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.

[33] Coastal Development is defined in section 1 of the ICM Act as "being in relation to a place, means any process initiated by a person to change the use physical nature or appearance of that place, and includes (a) the construction, erection,, alteration, demolition or removal of a structure or building: (b) a process to rezone, subdivide or consolidate land; (c) changes to the existing or natural topography of the coastal zone; and (d) the destruction or removal of indigenous or protected vegetation".

[34] Western Cape Department of Environmental Affairs and Development Planning *Annotated Draft Coastal Protection Zone and Coastal Set-back Regulations (Overberg District)* of 2011. Available at: www.rooi-els.co.za, accessed on 12 August 2015. Although they were never brought into operation, these regulations do provide an indication of the manner in which the provisions of section 25(1A) might be implemented and especially the extent to which they might limit a landowner's entitlement to develop his or her property. The provisions of Chapter Three of the draft Overberg Coastal Regulations are set out and discussed in Chapter Two of this dissertation.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including:

(a) the current use of the property;
(b) the history of the acquisition and use of the property;
(c) the market value of the property;
(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) the purpose of the expropriation.

(4) For the purposes of this section:

(a) the public interest includes the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources; and
(b) property is not limited to land".

In light of the provisions of section 25 of the Constitution, the purpose of this dissertation is to critically examine the restrictions that section 25 of the ICM Act read together with Chapter Three of the draft Overberg Coastal Regulations imposes on a land owner's entitlement to develop his or her property and to determine whether these restrictions satisfy the requirements of section 25 of the Constitution and, in particular, the requirements of section 25(1), namely the right not to be arbitrarily deprived of property.

7. Research question

As pointed out above, the purpose of this dissertation is to critically examine the restrictions that section 25 of the ICM Act read together with Chapter Three of the draft Overberg Coastal Regulations impose on a landowner's entitlement to develop his or her property and to determine whether these restrictions satisfy the requirements of section 25 of the Constitution, and in particular, the requirements of section 25(1), namely the right not to be arbitrarily deprived of property.

More specifically, the purpose of this dissertation is to:

(a) discuss what is meant by the constitutional idea of "property";

(b) discuss what is meant by the constitutional idea of "deprivation";
(c) discuss what is meant by the constitutional idea of "law of general application";
(d) discuss what is meant by the constitutional idea of an "arbitrary deprivation";
(e) determine whether section 25 of the ICM Act read together with Chapter Three of the draft Overberg Coastal Regulations satisfies the requirements of the right not to be arbitrarily deprived of property.

The answers to the questions set out above will hopefully provide a better understanding of the relationship between regulatory measures aimed at conserving and protecting the environment and the constitutional right to property.

8. Research methodology

This is a desk-top study. It is based largely on primary and secondary materials. These materials include statutes, judgments and common law principles. In addition, they also include textbooks, journal articles, reports and internet websites.

9. Structure of the study

This dissertation is divided into five chapters.

Chapter One: Introduction
The aims and objectives of the dissertation are laid out in Chapter One. Apart from the aims and objects, the background to the dissertation, the research methodology, the structure and the limits of the dissertation are also set out.

Chapter Two: Coastal management lines
The relevant provisions of the NEM: ICMA and the draft Overberg Coastal Regulations and their implications for the right of ownership are set out and discussed in Chapter Two.

Chapter Three: The right to property

The scope and ambit of the constitutional right not to be arbitrarily deprived of property is considered in Chapter Three.

Chapter Four: Analysis and recommendations

Using the concepts and requirements set out in the previous three chapters, the constitutional validity of the restrictions that section 25 of the ICM Act read together with Chapter Three of the draft Overberg Coastal Regulations impose on landowners will be analysed in Chapter Four.

Chapter Five: Conclusion

A number of concluding points are made in Chapter Five.

CHAPTER TWO: THE INTEGRATED COASTAL MANAGEMENT ACT

1. Introduction

The ICM Act was assented to by President Kgalema Mothlanthe on 9 February 2009 and, with the exception of two provisions, came into operation on 1 December 2009.[35] Together with the National Environmental Management: Protected Areas Act,[36] the National Environmental Management: Biodiversity Act,[37] the National Environmental Management: Air Quality Act[38] and the National Environmental Management: Waste Act,[39] it is one of a suite of specific environmental management Acts referred to in Chapter 7 of the National Environmental Management Act.[40]

This means that the ICM Act must be read together with NEMA. In this respect it is important to note that NEMA contains a number of principles that are applicable to the appropriate management of the coastline. These guiding principles are set out in section 2(4)(a)-(p) and include amongst others the cautionary approach in section 2 (4)(a)(vi); integrated environmental management in section 2(4)(b) ; co-operative governance in section 2(4) (l); conflict resolution procedures in section 2(4)(m); international responsibilities in section 2(4)(n) and the public trust in section 2(4)(o).

Apart from these guiding principles, NEMA also supports the ICM Act's aims and objects by providing that environmental assessments ("EIAs") must be carried out in respect of certain activities in the coastal zone.[41] In addition, the EIA Regulations and Listing Notices issued under NEMA provide that there are certain activities that may not commence without an EIA.[42] In

[35] The two provisions that did not come into operation on 1 December 2009 were section 11, which vests ownership of coastal public property in the citizens of South Africa, and section 98, which repeals the Sea-shore Act 21 of 1935.
[36] 57 of 2003 (hereafter the NEM:PAA).
[37] 10 of 2004 (hereafter the NEM: BA).
[38] 39 of 2004 (hereafter the NEM: QAA).
[39] 59 of 2008 (hereafter the NEM: WA).
[40] 107 of 1998 (hereafter NEMA).
[41] Section 24 NEMA.
[42] Regulations: GN R982 in *GG* 38282 of 4 December 2014.
(b) Listing Notice 1: GN R983 in *GG* 38282 of 4 December 2014.

those cases where EIAs are required for activities in the coastal zone, the consideration of the likely impact of the proposed activity on the coastal environment, including the cumulative effect of its impact together with those of existing activities, and the likely impact of coastal processes on the proposed activity, must be considered by the competent authorities.[43]

Besides NEMA, the ICM Act should also be read together with the Marine Living Resources Act which provides for the conservation and management of the marine ecosystem, the long term sustainable utilization of marine living resources and provision for equitable access to exploitation, utilization and protection of certain marine living resources.[44]

2. Objects of the ICM Act

The objects of the ICM Act are set out in section 2. This section provides that that the objects of the Act are to:

- determine the coastal zone of the Republic;[45]
- provide for the co-ordinated and integrated management of the coastal zone by all spheres of government in accordance with the principles of co-operative governance;[46]
- preserve, protect, extend and enhance the status of coastal public property as being held in trust by the state on behalf of all South Africans, including future generations;[47]
- secure equitable access to the opportunities and benefits of coastal public property;[48]
- provide for the establishment, use and management of the coastal protection zone;[49] and
- give effect to the Republic's obligations in terms of international law regarding coastal management and the marine environment.[50]

(c) Listing Notice 2: GN R984 in *GG* 38282 of 4 December 2014.
(d) Listing Notice 3: GN R985 in *GG* 38282 of 4 December 2014.
[43] Section 63(1).
[44] 18 of 1998.
[45] Section 2(a).
[46] Section 2(b).
[47] Section 2(c).
[48] Section 2(d).
[49] Section 2(D).
[50] Section 2(f).

In order to determine the coastal zone of the Republic, the ICM Act defines the coastal zone in section 1 of the Act as "the area comprising coastal public property, the coastal protection zone, coastal access land, coastal protected areas, the seashore and coastal waters, and includes any aspect of the environment on, in, under and above such area".

As this definition indicates, the coastal zone consists of a combination of adjacent and overlapping zones. The components that make up each of these zones, as well as their legal status, are set out in Chapter Two of the ICM Act. Chapter Two is divided into seven parts. The first three parts deal with coastal public property, the coastal protection zone and coastal access land respectively. Part 4 deals with the control and management of coastal waters, Part 5 deals with the excision of protected areas from the coastal protection zone, Part 6 deals with the declaration and management of special management areas and, finally, Part 7 deals with the establishment of coastal management lines.

3. The legal provisions governing coastal management lines

Part 7 of the ICM Act consists of one section only, namely section 25. When the Act first came into operation it read as follows:

"(1) An MEC must in regulations published in the *Gazette* -

(a) establish or change coastal set-back lines –
  (i) to protect coastal public property, private property and public safety;
  (ii) to protect the coastal protection zone;
  (iii) to preserve the aesthetic values of the coastal zone; or
  (iv) for any other reasons consistent with the objectives of this Act; and

(b) prohibit or restrict the building, erection, alteration or extension of structures that are wholly or partially seaward of that coastal set-back line.

(2) Before making or amending the regulations referred to in subsection (1), the MEC must –

(a) consult with any local municipality within whose area of jurisdiction the coastal set-back line is, or will be, situated; and

(b) give interested and affected parties an opportunity to make representations in accordance with Part 5 of Chapter 6.

(3) A local municipality within whose area of jurisdiction a coastal set-back line has been established must delineate the coastal set-back line on a map or maps that form part of its zoning scheme in order to enable the public to determine the position of the set-back line in relation to existing cadastral boundaries.

(4) A coastal set-back line may be situated wholly or partially outside the coastal zone".

In 2014, section 25 of the ICM Act was amended. Apart from changing the name of set-back lines to coastal management lines so that they would not be confused with the EIA development set back lines, section 25(1) was amended to enable the MEC to establish or change coastal management lines simply by publishing a *notice* in the *Gazette*, rather than by having to publish a set of *regulations* in the *Gazette*.

Although the power to establish or change coastal management lines can now be exercised simply by publishing a notice in the *Gazette*, the power to prohibit or restrict the building, erection, alteration or extension of structures that are wholly or partially seaward of that coastal management line still has to be exercised by publishing a set of *regulations* in the *Gazette*.[51]

It is also important to note that while the amendments have made it easier for the MEC to establish coastal management lines, they have also imposed an obligation on the MEC to take certain factors into account before establishing a coastal management line. These factors include the location of immovable property as well as the ownership and zoning of vacant land.[52]

Finally, the addition of subsection 25(5) provides that the Minister, after consultation with the relevant MEC, must exercise the powers and perform the functions granted to the MEC in section 25, if the power relates to part of an area that is a national protected area as defined in NEMPA;[53] if it straddles a coastal boundary between two provinces;[54] or extends up to, or straddles, the borders of the Republic of South Africa.[55]

[51] Section 25(1A).
[52] Section 25(1B).
[53] Section 25(5)(a).
[54] Section 25(5)(b).
[55] Section 25(5)(c).

As Sano et al have pointed out "[a] coastal setback is a buffer space where permanent constructions are not allowed, defined by a specific distance from the shoreline's highest water mark".[56] It has been argued that it amounts to a simple, cost effective mechanism to manage coastal development. [57]Somewhat similarly, Colenbrander and Sowman define coastal management lines as critical risk aversion "spatial planning mechanisms that define areas along the coast within which restrictions are applied to regulate the location and design of infrastructure" in coastal areas.[58]

As these definitions indicate, coastal management lines are an attempt to provide a safe buffer zone between ocean processes that are potentially hazardous as a result of sea-level rise and humans and the built environment that are threatened by these hazardous processes. In addition, they are also an attempt to protect natural ecosystems and their functioning.

"Set-back lines", Cartwright argues, "will assist in controlling development along an ecologically sensitive or vulnerable area, or any area that poses a hazard or risk to humans . . . In effect, coastal set-back lines prohibit or restrict the construction, extension or repair of structures that are either wholly or partly seaward of the line. The intention of the coastal set-back line is to protect or preserve".[59]

4. Background and history of coastal management lines

There is extensive literature on the implementation of coastal management lines internationally and in South Africa upon which municipalities can rely to inform themselves in formulating common guiding principles to establish coastal management lines. These lines have been widely implemented internationally in Australia, Canada, Europe, the Eastern Caribbean Islands and the United States. However, it is important to note that each country is unique in relation to its resource capacities and that each region must adapt its own particular strategy tailored to its own

[56] M Sano, J Jiminez, R Medina, A Stanica, A Sanchez-Arcilla and I Trumbic "The role of coastal setbacks in the context of coastal erosion and climate change" (2011) 54 *Ocean and Coastal Management* 943 at 943.
[57] B Goble and C MacKay "Developing risk set-back lines for coastal protection using shoreline change and climate variability factors" (2013) 65 *Journal of Coastal Research* 2125 at 2130.
[58] D Colenbrander and MR Sowman "Merging socioeconomic imperatives with geospatial data: A non-negotiable for coastal risk management in South Africa" (2015) 43 *Coastal Management* 270 at 272.
[59] Cartwright *Climate Justice Conference* (note 13) the pages in this paper are not numbered.

coastline and geography, climatic conditions and socioeconomic context. Indeed the position is such that municipalities are mandated to do so and have made much progress in moving towards a method of practical implementation of the establishment of coastal management lines.[60]

One of the advantages of establishing regulatory coastal management lines is that there is an established history in South Africa of curtailing private property use, particularly to further environmental law objectives, and there is no reason not to include these objectives and policies through land use planning and management as a response to threats from sea-level rise.

Another advantage is that the process of establishing management lines allows for public involvement, education and reciprocal flow of knowledge whilst formulating a coordinated and comprehensive approach to land use planning and development in response to sea-level rise and other coastal hazards whilst allowing for continued monitoring over a period of time.[61]

It is also one of the most cost effective methods of guarding against sea-level rise as opposed to hard protection measures and complete retreat, a consideration which has to be taken into account in respect of financial resource capacities of various municipalities as well as provision for sustainable development.

However, it has also been argued that the research required to establish a base line for a coastal management line is time consuming and requires significant financial and human resources. In addition there are negative socioeconomic implications such as loss of development potential, loss of rates on properties that are reduced in value as well as raised insurance costs or properties rendered uninsurable.[62]

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[60] Colenbrander and Sowman *Coastal Management* (note 58) at 270 at 272.
[61] Arlington Group Planning, Architecture Inc, EBA, D Jardine Consulting & Sustainability Solutions *Group Sea Level Rise Adaptation Primer: A Toolkit to Build Adaptive Capacity on Canada's South Coasts* (2013). Available at: www2:gov.bc.ca/assets/…change/…/…/adaptation/sea-level-rise/slr-primer.pdf, accessed 20 November 2015 at 32.
[62] J Kavonic *A preliminary evaluation of the socio-economic implications of the implementation of coastal setback lines: A case study of the Kogelberg coast in the Overberg district* Unpublished Masters Research Project, University of Cape Town, (2013). Available at: http://acdi.uct.ac.za/sites/default/files/KVNJES001_2012_ACDI_Dissertation.pdf, accessed on 28 September 2015.

It has also been suggested that coastal management lines will lead to challenges with regard to property rights, which would have to be dealt with by novel methods by the judiciary which could "strain the traditional understandings of property rights in land";[63] However these methods, for example, the expansion of traditional concepts of the definition of ownership accompanied by regulatory controls would allow for gradual changes in regulating the use of land in a manner which provides for all stakeholders interests.

5. The draft Overberg Coastal Regulations

5.1 Introduction

Following the coming into operation of the ICM Act, the Western Cape Provincial Department of Environmental Affairs and Development Planning (the "Western Cape DEA&DP") began the process of designating coastal management lines along the length of the province's coastline.[64] A study conducted at Milnerton and Langebaan in 2010 had previously been undertaken to formulate a methodology for the delineation of coastal set-backs but the pilot project took place in the Overberg District Municipality in 2012.

The goal of this pilot project was to delineate coastal management lines between Rooi Els and Cape Infanta. The process of delineating these coastal management lines was roughly divided into two phases. During the first phase a draft coastal management line was delineated using numerical models of the biophysical processes that occur along this part of the coast such as erosion trends, the movement of sand and the predicted rise in sea-levels. During the second phase, the draft coastal management lines were presented to the public through a formal public participation process and then opened for public comment.[65]

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[63] JP Byrne "The Cathedral Engulfed: Sea-Level Rise, Property Rights and Time" (2012) 73 *Louisiana Law Review* at 69-118.
[64] Apart from the Western Cape Provincial Department of Environmental Affairs and Development Planning, the cities of Cape Town, Durban and Port Elizabeth have also begun the process of designating coastal management lines along the length of the coast line that falls within their respective jurisdictions.
[65] Colenbrander and Sowman *Coastal Management* (note 58) at 277-279.

Unfortunately, the draft coastal management lines were never finalized. This is because landowners whose property was located on the seaward side of the coastal management lines argued that they would devalue their property and that this would lead to a decrease in the amount of rates the municipality could collect which in turn would affect the municipality's ability to provide basic services to the inhabitants of the district. These landowners also argued that the coastal management lines infringed their constitutional right to property and they threatened to sue the Provincial Government.[66]

As a part of the Overberg District Municipality pilot project, the Western Cape DEA&DP also drew up a draft set of coastal regulations – the draft Overberg Coastal Regulations – one of whose objects was to give effect to the provisions of (what is now) section 25(1)(1A) of the ICM Act.[67] Given that the draft coastal management lines were never finalised, the Regulations were also never brought into operation. They do nevertheless provide an indication of the manner in which the provisions of section 25(1A) might be implemented and especially the extent to which they might limit a landowner's entitlement to develop his or her property.

5.2 The objects of the draft Overberg Regulations

As their short title indicates, the object of the draft Overberg Coastal Regulations was not only to give effect to the provisions of section 25(1A) of the ICM Act, but also to give effect to the provisions of sections 16 and 17 of the ICM Act which deal with the composition and purpose of the coastal protection zone. Regulation 2 provides in this respect that the objects of the regulations are:

"(a) to determine and adjust the inland boundary of the coastal protection zone in the Overberg District;
(b) to prohibit, restrict and regulate development within the coastal protection zone in the Overberg District in order to promote effective and integrated coastal management;
(c) to establish a coastal set-back line within the Overberg District;
(d) to prevent further development seaward of the coastal set-back line except development that
    (i) enhances the coastal environment

[66] Colenbrander and Sowman *Coastal Management* (note 55) at 284-285.
[67] Western Cape DEA&DP *Annotated Draft of Coastal Protection Zone and Coastal Set-back Regulations: Overberg District* (note 34).

(ii) contributes to the fulfilment of a coastal management objective; or

(iii) meets an essential need and could not occur elsewhere;

(e) to protect and retain the scenic landscapes, sense of place and coastal identity of the coastal zone within the Overberg District; and

(f) to provide for incidental matters".

The regulations intended to give effect to objects (a) and (b) (i.e. those that deal with the coastal protection zone) are set out in Chapter Two, while the regulations intended to give effect to objects (c) and (d) (i.e. those that deal with coastal management lines) are set out in Chapter Three.[68]

5.3 Chapter Three of the draft Overberg Coastal Regulations

Chapter Three, which contains regulations 7 to 15, begins by setting out the purpose of coastal management lines. Regulation 7(2) provides in this respect that coastal management line must be established in order to:

"(a) protect people, property, and economic activities from risks arising from dynamic coastal processes, climate change and sea-level rise including by:

(i) avoiding increasing the effect or severity of natural hazards on the coastline; and

(ii) protecting and enhancing natural coastal systems and features that act as protective buffers;

(b) to protect and enhance the high ecological, cultural, heritage and economic value of the coastal zone;

[68] Briefly as the coastal protection zone is not the focus of this dissertation regulation 4 demarcated the limited development line of the inland boundary of the coastal zone within the Overberg District, the position of which was to be demarcated on any map which formed part of its zoning scheme within 60 days of the commencement of the regulations. Implementation of the legislation is dealt with in regulation 5 which emphasizes that such implementation must be consistent with sections 2, 17 and 62 the ICM Act as well as to take into account any proposed development within the coastal protection zone, if they are consistent therewith and the likely harm or adverse effect which could not be mitigated in future. In addition the implementation would provide important public services on a site inherently suitable for the intended use which would be in the interests of the whole community. In assessing the suitability of a land use the competent authority is obliged to assume that the site is undesirable and contrary to the interests of the whole community until proven otherwise if the development may have a significantly negative impact on the functioning or integrity of ecosystems or the nature and appearance of the coastal zone would be changed. Exceptions are if the development would enhance the coastal environment, contribute to the fulfilment of a coastal management objective or meet an essential need which cannot occur elsewhere as set out in regulations. Regulation 5(3) directs decision makers to disregard the zoning or past use of a site as proof of its suitability and instead directs them to consider factors such as whether or not the development could take place outside of the coastal protection zone, whether the natural features and location of the site make it demonstrably suitable for that use and the extent to which the nature or position of the site would cause exposure to persons or property of erosion, floods, storm surge or land-slip and regulation 6 set out the restricted and permissible activities within the coastal protection zone.

(c) to protect and enhance the natural character of the coastal zone, including the natural beauty, aesthetic value and sense of place associated with coastal landscapes and seascapes;

(d) to maintain and enhance the diversity, health and productivity of coastal ecosystems and to rehabilitate and restore the integrity and functioning of degraded coastal ecosystems;

(e) to protect and conserve indigenous species;

(f) to prevent any development seaward of that coastal set-back line other than development that:

(i) enhances the coastal environment;

(ii) contributes to the fulfilment of a coastal management objective; or

(iii) meets an essential need and cannot occur elsewhere".

After setting out the purpose of the coastal management line, Chapter Three goes on to distinguish between those activities which can be undertaken on the seaward side of the coastal management line without a coastal permit and those which cannot.

Regulation 8 deals with those activities which can be undertaken on the seaward side without a coastal permit. It provides in this respect that the activities listed in Schedule 2 to the regulations can be undertaken without a coastal permit. These activities relate in general to emergency or disaster measures and the rendering services to the municipality as well as temporary structures. Regulation 8 specifically does not exempt any person who wishes to undertake a permissible activity from complying with any other legal requirement which may apply to that activity.[69]

Regulation 9 deals with those activities which cannot be undertaken on the seaward side without a coastal permit. It provides in this respect that no developments, other than those deemed permissible, are to be undertaken unless the person is authorised to do so in terms of an environmental authorisation; a coastal permit; or an authorisation given by the Minister in term of section 67 of the ICM Act. [70]

In terms of Regulation 10 a person who wishes to undertake an activity listed in Schedule 1 to the regulations (essentially the construction or erection of infrastructure that would prevent or impede access to coastal public property or any activity for which an environmental

[69] Regulation 8(1)-(3).
[70] Section 67 of the ICM Act grants the Minister the power to authorize the temporary occupation of land and various activities within the coastal zone.

authorisation would have been required prior to the demarcation of the set-back line) is obliged to apply to the Head of the Provincial Department (the "HPD") for a coastal permit to do so. Coastal permits are not necessary in respect of permissible activities; the undertaking of an activity which had been assessed and authorised in terms of an EIA under NEMA; and any authorisation issued in terms of section 67 of the ICM Act. A coastal permit is also not required for the completion of infrastructure in those cases where construction had commenced prior to the commencement of the regulations.

When applying for a coastal permit the onus is on the applicant to describe the activity; to consider the environmental and socio-economic impacts which it would or could have;[71] and to set out the measures taken to inform interested and affected parties of the application.[72] In addition, an applicant also has to indicate the extent to which the activity sought to be undertaken is consistent with the objects of the ICM Act, its regulations and applicable coastal management programmes.[73] Furthermore, an applicant has to clarify and provide supporting documentation as to how the activity will be in the interests of the whole community and that the site is suitable.[74] Before granting the application, the HPD may call for further information, require public participation or direct the applicant to conduct an EIA in terms of NEMA.[75]

Regulation 12(2) imposes onerous restrictions on a landowner's entitlement to develop his or her property. This is because it provides that the HPD may not issue a coastal permit unless he or she is satisfied that the proposed development or activity:

"(a) will only alter the physical nature appearance, or sense of place of the coastal zone to the extent necessary to further the objects of the Act and these regulations or to achieve a coastal management objective;[76] and

(b) will be undertaken at a site that is suitable for the intended use as determined in accordance with regulation 5(3);[77] and

(c) is in the interests of the whole community".[78]

[71] Regulation 11(2)(a).
[72] Regulation 11(2)(b).
[73] Regulation 11(2)(c).
[74] Regulation 11(2)(d) and (e).
[75] Regulation 11(3).
[76] Regulation 12(2)(a).
[77] Regulation 12(2)(b).
[78] Regulation 12(2)(c).

The onerous nature of this regulation is reflected in the fact that land on the seaward side of a coastal management line may only be developed if the changes it brings about to the physical appearance and sense of place of the coast furthers the objects, not only of the Act, but also the regulations and coastal management in general. In addition, the development must not only serve the interests of the owner, but of the entire community.

Apart from Regulation 12(2), Regulation 12(3) also imposes extensive restrictions on the entitlement of a landowner to develop his or her property. Regulation 12(3) provides in this respect that, without limiting the generality of the need for the development or activity to be in the interests of the whole community, a development or activity will be deemed to further the objects of the Act and Regulations, *in the absence of evidence to the contrary*, if it:

"(a) is necessary to reduce risks to human health or safety, to property or to the environment and will not have a significant adverse effect on the environment; or

(b) will enhance the integrity and functioning of dynamic coastal processes, ecosystems or the coastal environment; or

(c) will enhance the appearance or sense of place of any place within the coastal zone; or

(d) will enhance access to, or the use and enjoyment of, coastal public property by the public without having a significant adverse effect on the environment; or

(e) is necessary to provide essential services or to meet an essential need and it is not feasible to undertake it outside the coastal protection area".[79]

The interests of the community and especially the essential purpose of public safety and health are a compelling reason for the deprivation of some or all incidents of ownership to serve this purpose, especially where the deprivation is not significant enough to deprive the landowner of all his use and enjoyment in and to the property. Thus the inclusion of this factor in Regulation 12(3)(a) is one of the most compelling reasons to allow or prohibit development depending on which evidence is produced.

The content of coastal permits are specific to the location, duration and conditions under which it is appropriately granted and may be amended revoked, suspended or cancelled in accordance

[79] Regulation 12(3)(a)-(e).

with section 68 of the ICM Act.[80] Appeals are dealt with in terms of Regulation 15 in terms of sections 74-78 of the ICM Act.

The Regulations specifically provide for the consistency of land use plans with the establishment of coastal management lines as it prohibits the municipality from adopting or amending any integrated development plan, spatial planning instrument, urban structure plan, zoning scheme or land use policy or plan inconsistent with the establishment of the set-back lines. [81] In addition the Municipal Coastal Management Programmes must give effect to the purpose of the coastal protection zone as established in section 17 of the ICM Act and the purposes of the coastal set back lines as established in Regulation 7(2) and additional restrictions in the form of by-laws could be imposed and implemented on activities within the coastal protection zone or seaward of the coastal set-back line.[82]

5.4 Enforcement of the draft Overberg Coastal Regulations

The enforcement of the regulations is governed by Regulation 18. This regulation provides that an enforcement notice may be issued either by the HPD in terms of section 60 of ICM Act; or by an environmental management inspector in terms of section 31L of NEMA; or by a Municipal Manager under the powers granted by the MEC in terms of section 60 of the ICM Act.[83] Failure to comply with the regulations constitutes an offence and is punishable with a fine of no more than 5 million rand or 10 years imprisonment. A court may also impose rehabilitation or compensation orders as a result of the contravention.[84]

5.5 Expropriation in terms of the draft Overberg Coastal Regulations

Even though the regulations do not explicitly authorise the expropriation of land, Regulation 21 provides that compensation can be claimed if a property owner can prove that his or her property had been expropriated in terms of the regulations. In an accompanying footnote, however, the

[80] Regulation 13 and 14.
[81] Regulation 16(a)-(b).
[82] Regulations 17(1) and (2).
[83] Regulation 18(1) and (2).
[84] Regulations 19 and 20.

drafters of the regulations explain that although the regulations impose restrictions on a landowner's entitlements, they do not expropriate rights. It is, therefore, very unlikely that a landowner would be entitled to claim compensation. The purpose behind Regulation 21, therefore, the drafters explain further, it to make it difficult to challenge the regulations on the basis that they have the effect of expropriating property rights without just compensation.[85]

6. Conclusion

Coastal management lines are one of a number of tools that can be used as an adaptation measure against climate change and its accompanying hazards, especially sea-level rise and coastal erosion. However, the task involves a complexity of relationships and numerous stakeholders, especially in urban, developed areas. The process of doing so is unique to each region and South Africa is in the process of formulating and refining its methodology in implementing this mandatory process.

The provisions of section 25 of the ICM Act and the draft Overberg Coastal Regulations clearly indicate that coastal management lines have the potential to severely restrict a landowner's entitlement to develop his or her property either by prohibiting such development or by subjecting it to a process in terms of which: (a) the landowner must first apply for permission to develop his or her land; and (b) the relevant authority may only grant permission in very narrow circumstances.

It is, consequently, not surprising that landowners, developers and other interested and affected parties in the Overberg District Municipality objected so strongly to the draft Overberg Coastal Regulations and that the MEC eventually decided not to formally adopt them.

[85] Regulation 21, footnote 14.

CHAPTER THREE: THE CONSTITUTIONAL RIGHT TO PROPERTY

1. Introduction

Over the past 10 years, the Constitutional Court has examined the provisions of section 25 which contains the guarantee of property rights in the Constitution on a number of occasions. Out of all of these judgments, however, the Court's judgment in *First National Bank First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Service,*[86] (the "'*FNB* case") is perhaps the most significant. One of the reasons why this judgment is so significant is because the Court adopted a framework in terms of which section 25 should be analysed in it.[87]

The framework adopted in the *FNB* case consists of a series of questions. These questions are as follows:

> "(a) Does that which is taken away by the operation of the legislation amount to 'property' for the purpose of section 25?
> (b) Has there been a deprivation of such property by the relevant authority?
> (c) If so, is such deprivation consistent with the provisions of section 25(1)?
> (d) If not, is such deprivation justified under section 36 of the Constitution?
> (e) If so, does it amount to expropriation for the purpose of section 25(2)?
> (f) If so, does the deprivation comply with the requirements of section 25(2)(a) and (b)
> (g) If not, is the expropriation justified under section 36?"[88]

When it comes to determining whether a statute or statutory provision has infringed section 25 of the Constitution, therefore, a court should 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, the court should ask whether the holder has been deprived of his or her property by the statute or statutory provision in question (question (b)). If the answer to this question is also yes, then the court should ask whether the deprivation complies with the requirements set out in section 25(1)(a) and (b) (question (c)).

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[86] *First National Bank First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Service* 2002 (4) SA 768 (CC).
[87] Ibid at para 46.
[88] Ibid.

If the answer to question (c) yes, then the court must jump to question (e), but if the answer is no, then the court must go onto question (d) and ask if the deprivation can be justified in terms of section 36; the limitation clause.[89] If the answer is no, the section 25 analysis ends here and the deprivation must be declared unconstitutional and invalid by the court. However, if the deprivation does comply with section 25(1)(a) and (b) or if the deprivation can be justified in terms of section 36, then the court must ask whether it can be defined as an expropriation for the purposes of section 25(2) (question (e)).

If the answer to question (e) is yes, then the court must ask whether the expropriation complies with the requirements of section 25(2)(a) and (b) (question (f)). If the answer is yes, then the expropriation must be declared to be constitutionally valid by the court. If the answer is no, then the court must ask if the expropriation can be justified in terms of section 36 (question (g)). If the answer to this question is no, then the expropriation must be declared unconstitutional and invalid by the court.[90]

Although the framework set out above embraces both section 25(1) and section 25(2) of the Constitution, this dissertation will focus only the part that applies to section 25(1), namely questions (a), (b), (c) and (d). This is largely because the common law does not confer the power to expropriate property on the state. An important consequence of this fact is that the state can only expropriate property if the power to do so is conferred upon it by a statute. This means that if a statute does not explicitly confer the power to expropriation property on the state, then the state cannot expropriate the property in question.[91]

Given that neither section 25 of the ICM Act nor Chapter Three of the draft Overberg Coastal Regulations explicitly confers the power to expropriate property on the MEC or the municipal council, it can be argued that the prohibitions and/or restrictions on development imposed by section 25 of the ICM Act or Chapter Three of the draft Overberg Coastal Regulations can be

[89] Rights may only be limited if they comply with the obligations set out in section 36 of the Constitution, which provides that the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.
[90] AJ van der Walt *Constitutional Property Law* 3ed (2011) at 73-74.
[91] Ibid at 344.

classified as an expropriation for the purposes of section 25(2) of the Constitution. It is not necessary, therefore, to consider whether these provisions satisfy the requirements of section 25(2) and (3).

Before turning to consider questions (a), (b), (c) and (d), however, it is important to note that the property clause should not be read in isolation insofar as it relates to the environment, since there are other sections in the Bill of Rights that are aimed at protecting the environment, most notably section 24 of the Constitution which embodies the right of everyone to an environment that is not harmful to health or well-being as well as to have the environment protected through reasonable legislative and other measures. These measures prevent pollution and ecological degradation, promote conservation and secure ecologically sustainable development and use of natural resources whilst promoting justifiable economic and social development.[92]

Section 24 gives the state additional police power leverage (that is the power of the state to regulate the use of private property in the interests of the whole community by imposing restrictions on an owner in order to promote public health and safety through environmental restrictions, building regulations) to regulate the use of property to further environmental conservation objectives, especially when those objectives clash with property rights. Cullinan and Glavovic have identified this as one of the challenges of previous coastal management practices coupled with the need to provide compensation for those who suffer loss as a result of restrictive limitations on private property.[93]

Environmental measures include provisions with prohibited activities as well as provisions obliging activities to be carried out, the consequences of which within the negative provisions may amount to deprivation. Examples of these measures include the use and management of

[92] Section 24 reads as follows: "Everyone has the right: (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that: (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development".

[93] C Cullinan and B Glavovic "The Coast" in HA Strydom and ND King (eds) *Fuggle and Rabie's Environmental Management in South Africa* 2ed (2009) 868 at 880

natural resources to laws concerned with declaration and protection of heritage sites to the regulation of land planning.[94]

According to Theart the importance and influence of the environmental right are often underestimated and the success of would be litigants would depend on the court's readiness to implement policy as well as in effect binding the state to expend funds in areas it may not have budgeted for in respect of effective climate change adaptation measures such as land planning use measures which lead to compensation.[95]

Although there is a growing body of jurisprudence giving an indication as to how the courts interpret conflicting rights in a constitutional context there is no specific jurisprudence in South Africa with regard to a constitutional challenge to restrictive regulatory legislation in respect of coastal management lines as exists in the United States of America. It remains to be seen in view of the introduction of the new legislation and progressive environmental policies which emphasise the responsibilities and duties of property owners how the judiciary will rule should the challenge arise.

Significant to this discussion is the power of the state to regulate as opposed to take private property as the state is not required to pay compensation for regulating private property for the benefit of all whereas if the state takes or expropriates property it is required to compensate the owner who would otherwise be the only one unjustly burdened. However, even if regulatory restrictions depriving one of their rights to property fall on a continuum into which the deprivation may well amount to a loss of the use and enjoyment in and to the property "environmental measures which impose restrictions falling short of outright expropriation of property do not appear at first glance to attract the benefit of the compensatory measures spelt out in the Constitution".[96]

[94] E Witbooi "Restrictive Environmental Issues: (When) Do They Justify Compensation for the Property Owner?" (2001) 8 *SAJELP* 215 at 218.
[95] M Theart "The Duty to Adapt to Climate Change" (2011) 18 *SAJELP* 1 at 21.
[96] Witbooi *SAJELP* (note 94) at 219.

In addition, the role that section 25(4) plays in the court's interpretation of section 25(1) and (2) of the property right is of the utmost significance. Its purpose is to ensure that section 25 is interpreted in a certain manner. Section 25(4)(a) provides that "the public interest" includes the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources. This clause ensured that land reforms would be legitimate and free from constitutional challenge on the "public purpose or interest" requirement in section 25 leaving only the consideration in respect of equitable compensation. Thus land reform initiatives to redress the inequalities of the past will not be impeded by the property clause.[97]

Furthermore, section 25(4)(b) provides that "property is not limited to land" and in doing so explicitly precludes a restrictive interpretation and confirms that other forms of property such as "movable incorporeal property and intangibles such as commercial interests and intellectual property are included under the protection of section 25 as a matter of course".[98]

2. Question (a) - the constitutional concept of property

South Africa's system of private property has traditionally adopted a narrow approach towards the notion of property. In terms of this narrow approach, the notion of property is restricted to the right of ownership in corporeal movable and immovable things.[99] Unlike the narrow private law notion of property, the constitutional notion is a broad one and encompasses a number of other interests, rights and objects, as illustrated by relevant case law.[100] Among these are limited real rights,[101] personal rights,[102] intellectual property rights[103] and liquor licences,[104] clearly illustrating the broad nature of the constitutional nature of property.

[97] Van der Walt *Constitutional Property Law* (note 90) at 20.
[98] Ibid at 20.
[99] N Rajak *Greening Durban: The constitutional validity of the Durban Metropolitan Open Space System in Light of Section 25 of the Constitution,* Unpublished LLM Dissertation, University of KwaZulu-Natal (2015) at 29.
[100] Ibid.
[101] See *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at para 50. In this case the Constitutional Court held that a mineral right falls into the constitutional concept of property.
[102] See *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) at para 63. In this case the Constitutional Court held that a personal right to claim restitution on the grounds of unjustified enrichment falls into the constitutional concept of property. See also *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC) and *Phumelela Gaming and Leisure Ltd v Grundlingh* 2006 (8) BCLR (CC).

Apart from the interests, rights and objects referred to above, it is important to note for the purposes of this dissertation that the constitutional notion of property also encompasses at least some of the entitlements that form the content of ownership. In *Mkontwana v Nelson Mandela Metropolitan Municipality* ("*Mkontwana*"), for example, the Court held that the right to alienate property is an important incident of its use and enjoyment and is protected by section 25(1) of the Constitution.[105] And, importantly for the purposes of this dissertation, in *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* ("*Reflect-All*") the Court held that a landowner's entitlement to develop his or her land is also protected by section 25(1).[106]

The extremely broad nature of the constitutional concept of property is clearly illustrated by the Constitutional Court's judgment in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape* ("*Shoprite Checkers*"). In this case a majority of the Court held that a liquor licence could be classified as property for the purposes of section 25 of the Constitution.

In arriving at this decision, a majority of the Constitutional Court held that the constitutional notion of property should be interpreted widely so as to include all constitutional rights and further transformation. The majority held that a liquor licence had the characteristics of what could be termed "traditional property" and confirmed the High Court's finding that "once the licence is granted, an enforceable personal incorporeal right is vested in the recipient to trade in accordance with the conditions attached. These rights are transferable, subject to approval by the

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

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

[105] See *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) at para 33. See also *Geyser v Msunduzi Municipality* 2003 (5) SA 18 (N) at para 37A, where the High Court held that "[t]he property that is protected by s 25 of the Constitution includes property rights such as ownership and the bundle of rights that make up ownership such as the right to use property or to exclude other people from using it or to derive income from it or to transfer it to others".

[106] See *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 (6) SA 391 (CC).

licensing authority. The right to sell liquor is thus clearly "definable and identifiable by persons other than the holder; has value; is capable of being transferred; and is sufficiently permanent, in the sense that the holder is, in terms of administrative law, protected against arbitrary revocation by the issuing authority".[107]

Marais argues that a broad interpretation of the notion of property is correct and that "modern economic considerations require that commercially valuable rights, which fall outside ownership in the traditional private law sense – such as limited real rights and certain personal rights should receive constitutional protection".[108] It is important to note, however, that this broad approach to the constitutional notion of property does not mean that all intangible interests of value will amount to constitutional property. A key requirement is that it must have vested in terms of established legal principles. Furthermore, the interest must be a concrete, specific asset and not merely relate to a person's general wealth or financial status.[109] "The fact that an incorporeal interest has economic value is therefore insufficient (on its own) for it to qualify as constitutional property".[110]

3. Question (b) – the constitutional concept of a deprivation

The manner in which the Constitutional Court has defined the constitutional concept of a deprivation has changed over time. In the *FNB* case the Court initially adopted a very broad approach when it defined the concept as "any interference with the use, enjoyment or exploitation of property" including those interferences in terms of which the state restricts the manner in which the property holder may exercise his or her entitlements as well as those in terms of which the state acquires the property.[111]

Not long thereafter, however, and without explanation, the Constitutional Court rejected the broad approach it had set out in the *FNB* case and adopted a much narrower approach in

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[107] See *Shoprite Checkers Case* (note 104) at para 68.
[108] E Marais "The Constitutionality of Section 89(5)(c) of the National Credit Act Under the Property Clause: *National Credit Regulator v Opperman & Others*" (2014) 131 *SALJ* 215 at 221.
[109] Ibid at 220.
[110] Ibid.
[111] See *FNB* (note 86) at para 57.

Mkontwana. In this case the Court held that the presence of a deprivation depends on the "extent of interference with or limitation of use, enjoyment, exploitation" of property and that "at the very least, substantial interference or limitation that goes beyond the normal restrictions on property uses and enjoyment found in an open and democratic society would amount to a deprivation".[112]

Since then the Constitutional Court has swung between the two approaches. In *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government,* for example, the Court followed the broader approach set out in *FNB*,[113] while in *Offit Enterprises (Pty) Ltd v COEGA Development Corporation (Pty) Ltd*;[114] *National Credit Regulator v Opperman*;[115] and most recently *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd*[116] it followed the narrower approach set out in *Mkontwana*.

The narrower approach adopted in *Mkontwana* has been criticised by Van der Walt on the grounds that it has the potential of unduly complicating the deprivation question by excluding certain interferences from protection under the property clause. He contends that by restricting the concept of a "deprivation" to actions that go beyond the standard regulatory functions of the democratic state, the Court has rendered section 25(1) superfluous. In addition, he also argues that "it is unclear why the definition of deprivation should be linked to the notion of what is normal in an open democracy" as regulatory controls are not only utilised by democratic societies. He found it unduly restrictive and problematic to limit deprivation to excessive regulatory deprivation as this seems to suggest that normal deprivations cannot be tested against section 25 of the Constitution.[117] He suggests that a deprivation should be defined as a "properly authorized and fairly imposed regulatory limitations on the use, enjoyment, exploitation or disposal of property, for the sake of protecting and promoting public health and safety or other legitimate public purposes, without compensation".[118]

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[112] *Mkontwana* (note 105) at para 32.
[113] *Reflect All* 1025 (note 106) at para 36.
[114] *Offit Enterprises (Pty) Limited v Coega Development Corporation (Pty) Ltd* 2011 (1) SA 293 (CC) at paras 38-39.
[115] *National Credit Regulator v Opperman & Others* 2013(2) SA 1 (CC) at para 66.
[116] *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 (11) BCLR 1265 (CC) at para 160-173.
[117] Van der Walt *Constitutional Property Law* (note 90) at 205.
[118] Ibid at 212.

4. Question (c) – the requirements for a valid deprivation

4.1 Introduction

The requirements for a valid deprivation are set out in paragraphs (a) and (b) of section 25(1). Paragraph (a) provides in this respect that the deprivation must be authorised by law of general application and paragraph (b) provides that the law authorising the deprivation must not be arbitrary. Each of these requirements will be discussed in turn.

4.2 Law of general application

As we have already seen a deprivation will be valid only if it is authorised by a law of general application. This requirement may be broken down into two elements. First, the deprivation must be authorised by a law and, second, the law must apply generally.

Insofar as the first element is concerned, it is widely accepted that the "word 'law' includes original legislation, subordinate legislation, common law and customary law. It does not, however, include guidelines and policies". In addition, it also does not include administrative, executive, judicial and private actions. "The law that authorises the deprivation must also be formally valid". This is because the requirement that a deprivation must be authorised by a law of general application gives effect to the principle of the rule of law.[119]

Insofar as the second element is concerned, it is widely accepted that "a law which applies generally is one which does not target individuals or groups for arbitrary treatment. In addition, it also means that the law must be clear, open and relatively stable. In other words, the law should not be vague, secret or subject to constant change". Those persons and bodies which are subject

[119] I Currie and J de Waal *Bill of Rights Handbook* 6ed (2013) at 155. See also Rajak *Greening Durban: The constitutional validity of the Durban Metropolitan Open Space System in Light of Section 25 of the Constitution* (note 99) at 37.

to a law must know what it states so that they can exercise the powers it confers on them and comply with the obligations it imposes on them.[120]

4.3 The deprivation must not be arbitrary.

(a) Introduction

Apart from being authorised by a law of general application, a deprivation will be valid only of the law authorising the deprivation is not arbitrary. This requirement lies at the very heart of the section 25 analysis. This is because in the *FNB* case the Constitutional Court held that it will use the non-arbitrariness requirement to strike a balance between protecting private property, on the one hand, and promoting the interests of society, on the other.

Besides holding that the non-arbitrariness requirement lies at the very heart of the section 25 analysis, the Constitutional Court also held in the *FNB* case that, like the law of general application requirement, the non-arbitrariness requirement may be broken down into two elements. First, the deprivation must be procedurally fair (i.e. that it must be procedurally non-arbitrary) and, second, there must be a sufficient reason for deprivation (i.e. that it must be substantively non-arbitrary).

(b) The procedural fairness element

Although the Constitutional Court held in the *FNB* case that a deprivation must not only be procedurally fair, but must also have a sufficient reason in order to satisfy the non-arbitrariness requirement, the Court did not discuss the procedural fairness element in any detail. Instead, it focused on the sufficient reason element. This is because the key question in the *FNB* case was whether there was a sufficient reason for the deprivation in question. The Court ultimately found that there was not.

[120] Ibid.

The scope and ambit of the procedural fairness element, however, was dealt with in some detail by the Constitutional Court in the *Mkontwana* case. Not unexpectedly, the Court held in this case that the scope and ambit of the procedural fairness element in terms of section 25(1) of the Constitution is the same as the scope and ambit of procedural fairness element in other branches of the law, namely that it is a "flexible standard that depends on the circumstances of each case".[121]

In the *Opperman* case the Constitutional Court added to the points it made in *Mkontwana* and held that a deprivation would be procedurally unfair if the law that authorised the deprivation did not afford the courts a discretion to make a just and equitable order. In other words, the Court held that if the law that authorises the deprivation does not provide for judicial oversight it will be procedurally unfair.[122]

In the *City of Tshwane v Link Africa* case the majority judgment found that legislation which unilaterally rendered a landowner's rights subservient to a licensee's without a procedurally fair process is procedurally arbitrary as it is not consistent with the Constitution which seeks to ensure that these constitutionally protected rights reinforce each other in order to promote human rights in general. In addition, Froneman J stressed that constitutional validity demands that rights created by statute cannot extinguish rights protected by the Bill of Rights.[123]

Insofar as the procedural fairness requirement is concerned, Van der Walt argues that it is important to distinguish between:

- deprivations which could have been caused by administrative action[124] *(Reflect-All and Offit cases*) and, therefore, can b contested under the Promotion of Administrative Justice Act[125] (the "PAJA"). In these instances the procedural fairness question would then be assessed and asked in terms of PAJA and not section 25(1) of the Constitution; and

[121] *Mkontwana* (note 105) at para 65.
[122] *Opperman* (note 102) at para 69.
[123] *Link Africa* (note 116) at para 64.
[124] See the definition of "administrative action" under section 1 of PAJA, in particular paragraph (b): A decision is administrative if it is taken in the exercise of public power or in the performance of a public function. In the absence of an empowering provision, there can be no public power or public function.'
[125] 3 of 2000.

- deprivations brought about by legislation in the absence of administrative action (such as in the *FNB, Mkontwana and City of Tshwane v Link Africa* cases) where an analysis in terms of PAJA would not be possible.

This being so, it would be pertinent in these cases to establish whether the legislation was imposed in procedurally fair manner. If it was not, then under the provisions of PAJA the deprivation would immediately be arbitrary and the legislation could then be challenged under section 25(1) of the Constitution. Should there be an instance in which the deprivation is both procedurally unfair and substantively arbitrary as well then Van der Walt argues that both courses of action should be available to the aggrieved party, with reference to the authorising or common law as to which would be preferable.[126]

(c) The sufficient reason element

As was pointed out above, the key question in *FNB* case was whether there was a sufficient reason for the deprivation in question. Before it could answer this question, however, the Constitutional Court had to set out and discuss the scope and ambit of the sufficient reason element. In this respect the Court held that the element is a flexible one and thus encompasses a wide range of tests.

In some cases, the Constitutional Court held further, the law authorising the deprivation has to be rational. This means there must simply be a rational connection between a legitimate governmental purpose and the manner in which the state seeks to achieve that purpose. This test is located at the low end (thin) of the range of tests as it imposes very few restrictions on the state's power to interfere with private property and must solely be capable of achieving the state's purpose.

In other cases, the Constitutional Court has also held, the law must be proportional. This means that there must be a proportional relationship between a legitimate governmental purpose and the

[126] Van der Walt *Constitutional Property Law* (note 90) at 264-270.

burden imposed by the state, which must be the least restrictive method. This test is located at the high (thick) end of the range of tests because it provides that there must be a link between a legitimate government purpose and the restriction imposed by the state and the method must be the least restrictive in order to achieve the state's purpose.[127]

When it comes to deciding which test must be applied, the Constitutional Court went on to hold in the *FNB* case, that the nature of the right, the nature of the property and the extent of the deprivation must to be taken into account with instances in which the complete deprivation of all rights has occurred the purpose of the restriction would have to be more compelling. In the *FNB* case the Court provided specific determining factors to be considered when determining whether there are sufficient reasons to justify a deprivation and they were as follows:

"(a) It is to be determined by evaluating the relationship between the means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.

(b) A complexity of relationships has to be considered.

(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.

(d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

(e) Generally speaking, where the property in question is ownership of land or a corporeal movable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive.

(f) Generally speaking, when the deprivation in question embraces all of the incidents of ownership, the purpose of the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents partially.

(g) Depending on such interplay between variably means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant a deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25".[128]

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[127] Van der Walt *Constitutional Property Law* (note 90) at 246.
[128] *FNB* (note 86) at para 100.

The Constitutional Court having explained the term "arbitrary" then considered the facts of the case and found that although the purpose sought to be achieved by the legislation was legitimate and important the means used to do so were too drastic as it totally deprived the property holder of his property in the absence of a nexus between that person and the debt owing, therefore sufficient reason did not exist and the legislation was consequently arbitrary, infringed section 25(1) and was thus invalid.

In his discussion of the *Opperman* case, Marais points out that the Constitutional Court emphasised three factors when it carried out the substantive arbitrariness test; namely:

- the relationship between the means utilised and the end result to be achieved by the deprivation;
- the relationship between the purpose of the deprivation and the nature of the property; and
- the extent of the deprivation in respect of the property.

He concludes that there must be a sufficient link between the deprivation, the reasons for it, the nature of the property and the impact of the deprivation on the owner.[129] He thereafter confirms that in each case the context must be considered and sufficient reason must exist through either a rationality or proportionality test, rationality and proportionality representing opposing ends on a continuum.[130] Marais further criticizes the court for not considering the relationship between the purpose of the deprivation and the nature or strength of the property and how this could have influenced the application of the substantive arbitrariness test. He argues that it may "denote either that the non-proprietary and incorporeal nature of the property will not have a significant effect in every case on the level of scrutiny demanded by the arbitrariness test or alternatively that the mere fact that the affected interest is 'property' presupposes a proportionality based enquiry".[131]Marais confirms that courts have a wide judicial discretion as to how to apply the

[129] Marais *SALJ* (note 108) at 228.
[130] Marais *SALJ* (note 108) at 229-231.
[131] Ibid.

arbitrariness test and argues that instead of concentrating on two of the three factors identified by the court all should have been addressed.[132]

Marais further criticises the courts for relying on a criminal case decided under the interim Constitution to decide the way in which the proportionality test was to be conducted: closer to the proportionality end of the continuum, because of its far reaching consequences[133] pointing out that the property clause did not feature in the criminal case at all.[134]

The tests differ according to the nature of the purpose that is served with the regulation and the impact the regulation has on private property rights. In the case of planning regulations that serve the primary aim of promoting public health and safety, something closer to a mere rationality may be required. Once a finding has been made that a deprivation is not in terms of law of general application and/or it is arbitrary or procedurally unfair, it is constitutionally invalid unless it can be justified in terms of section 36(1) which is unlikely.[135]

Van der Walt suggests that with regard to necessary and legitimate regulatory deprivations which are potentially on the basis of the *FNB* decision would not reach the stage of justification in terms of section 36(1). He advocates for more research to explore avenues which would moderate the impacts of these deprivation so as not to elevate a deprivation into an expropriation.[136]

5. Conclusion

In our constitutional democracy an increased emphasis has been placed upon the characteristic of ownership that entitlements can only be exercised in accordance with the social function of law and in the interests of the community. Inherent responsibilities of ownership towards the community in the exercise of entitlements have been increasingly emphasized. A balance must be struck between the protection of ownership and the exercise of entitlements of the owner

[132] Ibid.
[133] Marais *SALJ* (note 108) at 229-231.
[134] *S v Bhulwana, S v Gwadiso* 1996 (1) SA 388 (CC).
[135] Van der Walt *Constitutional Property Law* (note 90) at 285 and 288.
[136] Van der Walt *Constitutional Property Law* (note 90) at 274.

regarding third parties on the one hand, and the obligations of the owner to the community on the other. It is clear that the development of a constitutionally aware concept of property rights into which regulatory measures such as the imposition of coastal management lines to control land use may come at the cost of private property owners rights as the social and political framework within which the courts are to interpret the protections afforded in terms of the Constitution is increasingly leaning in favour of socio economic and environmental rights. In addition, the purpose for which coastal management lines are established are extremely persuasive especially if couched in terms of an essential aim such as public health and safety.[137]

[137] RK Craig "Of Sea-Level Rise and Superstorms: The public health police power as a means of defending against "Takings" challenges to coastal regulation" *SJ Quinney College of Law University of Utah Legal Studies Research Paper Series Law Research Paper No 51* at 3. Available at: http://ssrn.com/abstract=2372353, accessed on 25 September 2015.

CHAPTER FOUR: ANALYSIS AND RECOMMENDATIONS

1. Introduction

As pointed out above, the common law does not confer the power to expropriate property on the state. The state can only expropriate property, therefore, if the power to do so is explicitly conferred upon it by a statute. Given that neither the ICM Act nor the draft Overberg Coastal Regulations explicitly confer the power on the state to expropriate property in order to establish coastal management lines and/or achieve their objects, it follows that none of these provisions can unjustifiably infringe section 25(2) of the Constitution. It is nevertheless possible that these provisions do unjustifiably infringe section 25(1).

In order to determine whether section 25 of the ICM Act read together with regulations 9, 10 and 12 of the draft Overberg Coastal Regulations do unjustifiably infringe section 25(1) of the Constitution the analysis adopted by the Constitutional Court in *FNB* must be applied.[138] In this case the Court held that in order to determine whether section 25(1) has been unjustifiably infringed or not, the following questions must be answered:

- Does the affected interest qualify as property for the purposes of section 25?
- If yes, has the holder has been deprived of his or her property by the law in question?
- If yes, does the deprivation comply with the requirements of section 25(1)?
- If not, can the deprivation be justified in terms of the limitation clause?

Each of these questions will be answered in turn. As will become apparent, the key question that has to be answered is whether the restrictions imposed on landowners by section 25 of the ICM Act read together with regulations 9, 10 and 12 of the draft Overberg Coastal Regulations are arbitrary or not, or, more particularly, whether there is a sufficient reason for the restrictions imposed on landowners by section 25 of the of the ICM Act read together with regulations 9, 10 and 12 of the draft Overberg Coastal Regulations.

[138] *FNB* (note 86) at para 46.

2. Do coastal management lines interfere with constitutional property?

In order to determine whether section 25 of the ICM Act read together with regulations 9, 10 and 12 of the draft Overberg Coastal Regulations interfere with constitutional property, it will be helpful to begin by briefly re-examining these provisions and highlighting their implications for coastal land owners.

For our purposes, the most relevant provisions of section 25 of the ICM Act are sections 25(1) and (1A). Section 25(1) provides that an MEC must by notice in the *Gazette* establish or change coastal management lines in order to achieve the objects set out in paragraphs (a) to (d) of that section and section 25(1A) provides that an MEC may, in regulations published in the *Gazette*, prohibit or restrict the building, erection, alteration or extension of structures that are wholly or partially seaward of a coastal management line.

The objects set out in paragraphs (a) to (d) of section 25(1) of the ICM Act are:

"(a) to protect coastal public property, private property and public safety;
(b) to protect the coastal protection zone;
(c) to preserve the aesthetic values of the coastal zone; and
(d) for any other reason consistent with the objectives of [the ICM Act]".

On its plain meaning, section 25(1A) clearly empowers the MEC to prohibit or restrict a coastal landowner's entitlement to develop his or her land by publishing the necessary regulations in the *Gazette*, provided they apply to structures that are located wholly or partially on the seaward side of a validly established coastal management line.

The extensive nature of the prohibitions or restrictions that an MEC may impose on a landowner in terms of section 25(1A) are illustrated by regulations 9, 10 and 12 of the Draft Overberg Coastal Regulations.

Regulation 9 provides in this respect that no one may undertake any development, other than those deemed permissible, on the seaward side of a coastal management line unless the person is authorised to do so in terms of, *inter alia*, a coastal permit.[139]

Regulation 10 provides further that a person who wishes to undertake an activity listed in Schedule 1 of the Regulations[140] must apply to the Head of the Provincial Department (the "HPD") for a coastal permit, except in the following circumstances:

(a) where the person wants "to undertake a permissible activity" listed in Schedule 2;[141]

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[139] Regulation 9(a)(ii).

[140] The activities referred to in Schedule 1 of the Regulations were further divided into Part A and Part B; Part A set out the activities which could not be undertaken within the coastal protection zone without a coastal permit which included the following: construction or erection of any infrastructure that prevents or impedes access to coastal public property via coastal access land, coastal walkways or paths, or boat launching sites; any activity for which an environmental authorisation would have been required prior to the demarcation of the coastal set-back line and provision was made for the insertion of other activities.
Part B related to activities which could not be undertaken seaward of the coastal set back line without a coastal permit and included

- any activity that changes the topography, vegetation, physical nature, appearance or sense of place of the place affected, including the erection of any permanent or non-permanent structure and the undertaking of gardening or landscaping activities;
- any activity which significantly interfered with, impedes or restricts a dynamic coastal process;
- The collection, harvesting , harassing, or harming of any indigenous species by any person who is not in possession of a valid authorisation to do so issued by an organ of state in the national or provincial sphere of government.
- The removal of
- sand, shells, stones or rocks unless done by: an individual collecting shells or stones for personal use only (—beach-combing‖); or by a person in possession of a valid authorisation to do so issued by a competent authority an organ of state.
- Any activity that causes pollution of the environment that has not been authorised in writing by an organ of state that is competent to do so.

[141] The activities referred to in Schedule 2 of the Regulations include the following permissible activities that may be undertaken within the coastal protection zone or seaward of the coastal set –back line without a coastal permit:
1. 'The construction, erection, alteration, demolition or removal of a temporary structure or temporary building for films and events which is done in accordance with an authorisation granted by a municipality with jurisdiction over the area in question.
2**.** Any activity undertaken by a municipality or other organ of state in order to respond to a disaster or emergency including, but not limited to:
(a) the stranding of a vessel;
(b) spills of oil or other polluting or hazardous substances;
(c) strandings of large marine animals; and
(d) operations to rescue people or animals.
3. Any act undertaken by a municipality or by a person rendering services to a municipality -
(a) that is reasonably necessary to implement a municipal coastal management programme, management policy, guideline, operational procedure or protocol that has been approved by the municipality;
(b) to deliver or supply utility services that cannot conveniently be provided inland of the coastal set-back line or the limited development line, as the case may be;
(c) to clear alien vegetation, including by controlled burns;
(d) to upgrade and maintain existing municipal amenities and coastal resorts;

(b) where the person wants to undertake an activity that has been authorised in terms of an environmental authorisation under NEMA;
(c) where the person wants to do anything that has been authorised by the Minister in terms of section 67 of the ICM Act; or
(d) to complete the construction of any infrastructure that commenced prior to the commencement of the regulations.[142]

Regulation 12 goes on to provide that the HPD cannot issue a coastal permit except in very narrow circumstances, namely where he or she is satisfied that the proposed development or activity:

(a) "will only alter the physical nature appearance, or sense of place of the coastal zone to the extent necessary to further the objects of the Act and these regulations or to achieve a coastal management objective";[143]
(b) "will be undertaken at a site that is suitable for the intended use as determined in accordance with regulation 5(3)";[144] and
(c) "is in the interests of the whole community".[145]

On their plain meaning these regulations clearly prohibit or restrict a landowner's ability to develop his or her land, except in the narrowest of circumstances, and thus impact directly on a landowner's use and enjoyment of his or her property.

Having found that the effect of section 25 of the ICM Act read together with regulations 9, 10 and 12 of the Draft Overberg Coastal Regulations is to interfere, quite severely, with a landowner's entitlement to develop his or her property, the next stage of the analysis is to consider the key question, essentially the starting point of the section 25 analysis, namely: does a

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(e) to manage and remove wind-blown beach sand that has accumulated on, or impedes or threatens infrastructure;
(f) to manage, rehabilitate and clean beaches and rocky shores;
(g) to provide coastal safety measures that reduce risks to the health and safety of users of the coastal zone;
(h) to modify estuary mouths; or
(i) to construct or repair infrastructure that is required to reduce or mitigate the risks of coastal erosion, storm surge events and sea level rise.'

[142] Regulation 10(3)(a)-(d).
[143] Regulation 12(2)(a).
[144] Regulation 12(2)(b).
[145] Regulation 12(2)(c).

landowner's entitlement to develop his or her property fall into the constitutional concept of property.

In answering this question it is noteworthy that one of the most important features of the common law concept of ownership is that it confers a wide range of entitlements on its holder. Among the best known of these are the entitlement to possess the thing (*ius possidendi*), to dispose of the thing (*ius disponendi*), to reclaim the thing (*ius vindicandi*), to use the thing (*ius utendi*), to enjoy the fruits of the thing (*ius fruendi*) and consume the thing (*ius abutendi*). The *ius utendi* includes the right to develop the thing.[146]

In the *Mkontwana* case the Constitutional Court held that the constitutional concept of property includes a landowner's entitlement to alienate his or her property. In arriving at this conclusion, the Court held that the constitutional concept of property does not only encompass the right of ownership itself, but also the entitlements that it confers on an owner.[147] This decision was confirmed by the Constitutional Court in *Reflect-All* when it held that a landowner's entitlement to develop his or her land is also protected by section 25(1).[148]

Given the approach adopted in *Mkontwana* and *Reflect-All*, it may be argued that section 25 of the ICM Act read together with regulations 9, 10 and 12 of the draft Overberg Regulations do interfere with constitutional property.

3. Do coastal management lines deprive a landowner of his or her property?

As we have already seen, a wide interpretation of the concept of deprivation was adopted in the *FNB* case,[149] namely: "any interference in the use and enjoyment of property". As we have also seen, this wide interpretation was rejected in the *Mkontwana* case and replaced with a

[146] See Rajak *Greening Durban: The constitutional validity of the Durban Metropolitan Open Space System in Light of Section 25 of the Constitution* (note 119) at 48.
[147] *Mkontwana case* (note 105) at para 33.
[148] *Reflect-All case* (note 106) at para 53.
[149] *FNB case* (note 86) at para 38.

significantly narrower definition, namely a "substantial interference" that goes beyond "the normal restrictions on property use and enjoyment found in an open and democratic society".[150]

While both the broad definition adopted in *FNB* and the narrower definition adopted in *Mkontwana* have been applied by the Constitutional Court in subsequent cases, it is unnecessary for the purposes of this dissertation to determine which approach is correct. This is because irrespective of which approach is followed, the provisions of section 25 of the ICM Act read together with regulations 9, 10 and 12 of the draft Overberg Coastal Regulations satisfy both approaches. It is submitted that the reason is that their extensive and intrusive nature goes beyond what is considered normal in an open and democratic society. Although at first glance it appears that the entitlement to develop has not been taken away from land owners and developers and that application can be made to do so, the factors that must be taken into consideration by the HPD when deciding whether or not to grant a coastal permit are particularly restrictive.

In applying for a coastal permit the onus is on the applicant to describe the activity; to consider the environmental and socio-economic impacts which it would or could have[151] as well as to set out the measures taken to inform interested and affected parties of the application.[152] In addition, the applicant has to indicate the extent to which the activity sought to be undertaken is consistent with the objects of the ICM Act, its regulations and applicable coastal management programmes.[153] Furthermore, the applicant has to clarify and provide supporting documentation as to how the activity would be in the interests of the whole community and that the site is suitable.[154] The HPD could also call for further information, require public participation or direct the applicant to conduct an EIA in terms of NEMA.[155]

[150] *FNB* (note 86) at paras 38 and 41.
[151] Regulation 11(2)(a).
[152] Regulation 11(2)(b).
[153] Regulation 11(2)(c).
[154] Regulation 11(2)(d) and (e).
[155] Regulation 11(2) and (3).

4. Do coastal management lines satisfy the requirements for a valid deprivation?

4.1 The deprivation must be authorised by a law of general application

While there is no doubt that section 25 of the ICM Act is a law of general application, it is not so clear whether regulations 9, 10 and 12 of the draft Overberg Coastal Regulations fall into the definition of "law". This is because regulations are usually classified as a form of "administrative action" and not "legislative action".[156]

Insofar as this issue is concerned, however, it appears that while the courts have accepted that regulations are a form of "administrative action" for the purposes of section 33 of the Constitution and the PAJA,[157] they have also accepted that the phrase "law of general application" in section 36 of the Constitution is wide enough to include "legislative or rule making administrative action", the most common example of which are regulations.[158]

Given that the courts have accepted that "legislative or rule making administrative action" is encompassed by the word "law" in the phrase "law of general application," it is submitted that Regulations 9, 10 and 12 of the Overberg Coastal Regulations do fall into the definition of "law" for the purposes of section 25(1) of the Constitution.

4.1 The law authorising the deprivation must not be arbitrary

In the *FNB case* the Constitutional Court held that the non-arbitrary requirement may be broken down into two elements. First, the deprivation must be procedurally fair (i.e. that it must be procedurally non-arbitrary) and, second, there must be a sufficient reason for deprivation (i.e.

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[156] C Hoexter *Administrative Law of South Africa* 2ed (2012) at 51, 181 and 200 and G Quinot and P Maree "Administrative Action" in G Quinot (ed) *Administrative Justice in South Africa: An Introduction* (2015) at 80.
[157] In *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) the Constitutional Court was famously unable to agree whether regulations should be classified as "administrative action" or "legislative action". Despite this fact, in *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA), the Supreme Court of Appeal held that regulations are a form of "administrative action" and cited the judgment in *New Clicks* as authority for this proposition. A similar approach was followed in *Hospital Association of South Africa Ltd v Minister of Health* 2010 (10) BCLR 1047 (GNP).
[158] Currie and De Waal (note 119) at 155-162.

that it must be substantively non-arbitrary). Section 25 of the ICM Act read together with regulations 9, 10 and 12 of the draft Overberg Coastal Regulations will be tested against each of these elements, starting with the requirement that the deprivation must be procedurally fair.

4.3 Are coastal management lines procedurally unfair?

(i) Introduction

In order to determine whether section 25 of the ICM Act read together with regulations 9, 10 and 12 of the draft Overberg Coastal Regulations are procedurally fair it is important to distinguish between three different exercises of power: first, the decision of the MEC to establish coastal management lines in terms of section 25(1); second, the decision of the MEC to publish regulations in terms of section 25(1A); and, third, the decision of the HPD to grant or refuse a coastal permit in terms of regulations 9, 10 and 12. Each of these will be discussed in turn.

(ii) The decision to establish coastal management lines in terms of section 25(1)

First, the MEC must establish coastal management lines by publishing a notice in the *Gazette* in terms of section 25(1). Section 25(1B) provides that when doing so the MEC must consider the location of immovable property and the ownership and zonation of vacant land. In addition, section 25(2) provides that before making or amending the regulations referred to in subsection (1), the MEC must (a) consult with any local municipality within whose area of jurisdiction the coastal set-back line is, or will be, situated; and (b) give interested and affected parties an opportunity to make representations in accordance with Part 5 of Chapter 6.[159]

As these provisions indicate, the ICM Act itself imposes an obligation on the MEC to follow a fair procedure whenever he or she establishes a coastal management line in terms of section 25(1). In addition, the MEC's decision may be classified as an administrative act. It is, therefore,

[159] Section 53 of the ICM Act provides for consultation with all levels of government in accordance with the principles of cooperative governance, the publishing of intentions and provides for public participation.

governed by PAJA and the MEC would have to follow a fair procedure in terms of section 4 of PAJA.

(iii) The decision to publish regulations in terms of section 25(1A)

Second, after establishing a coastal management line, the MEC must publish regulations prohibiting or restrictions on a landowner's entitlement to develop his or her land. Section 84(1)(e) of the ICM Act provides that when doing so the MEC must include the process to be followed for acquiring permission to do so including the authority by whom, the circumstances in which and the conditions upon which the permission may be given.

In addition section 85 which contains general provisions applicable to regulations provides that the Minister or MEC must publish draft regulations for public comment and must take any submissions into account before making regulations in terms of sections 83 and 84 of the ICM Act,[160] which regulations may, *inter alia*, restrict, prohibit or control any act that may have an adverse effect on the coastal environment, which could apply throughout the Republic or be restricted to certain areas, persons, activities or types of waste as well as making provision for a fine and/or imprisonment for any failure to comply with such provisions. [161]

As these provisions indicate, the ICM Act itself imposes an obligation on the MEC to follow a fair procedure whenever he or she publishes regulations in terms of section 25(1A). In addition, the decision to publish regulations may be classified as an administrative act.[162] It is, therefore, governed by PAJA and the MEC would have to follow a fair procedure in terms of section 4 of PAJA.

(iv) The decision to grant or refuse a coastal permit in terms of regulations 9, 10 and 12

[160] Section 85(1).
[161] Section 85(3)(a)-(d).
[162] See *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC); *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 (SCA); and *Hospital Association of South Africa Ltd v Minister of Health* 2010 (10) BCLR 1047 (GNP). See also Hoexter *Administrative Law of South Africa* (note 156) at 51, 181 and 200 and G Quinot and P Maree *Administrative Justice in South Africa: An Introduction* (note 156) at 80.

Third, the draft Overberg Coastal Regulations do not simply prohibit landowners from developing their land. Instead, they provide a process by which the necessary permission in the form of a coastal permit may be obtained from the relevant administrator, who must make a decision as to whether a landowner is allowed to develop his or her land and the extent to which he or she may do so.

In deciding whether or not to grant a coastal permit the HPD is obliged to take certain considerations into account especially principle 2(4)(o) of NEMA which relates to the public trust[163] and section 63(1) of the ICM Act which requires certain factors to be taken into account in granting environmental authorisations. These factors were duplicated within the regulations to ensure consistency between the Act and these regulations.[164]

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[163] This principle states that the environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and be protected as the people's common heritage.

[164] Section 63 Environmental authorisations for coastal activities: (1) Where an environmental authorisation in terms of Chapter 5 of the National Environmental Management Act is required for coastal activities, the competent authority must take into account all relevant factors, including:
(a) the representations made by the applicant and by interested and affected parties;
(b) the extent to which the applicant has in the past complied with similar authorisations;
(c) whether coastal public property, the coastal protection zone or coastal access land will be affected, and if so, the extent to which the proposed development or activity is consistent with the purpose for establishing and protecting those areas;
(d) the estuarine management plans, coastal management programmes, coastal management lines and coastal management objectives applicable in the area;
(e) the socioeconomic impact if the activity—
(i) is authorised;
(ii) is not authorised;
(f) . . . . . .
(g) the likely impact of coastal environmental processes on the proposed activity;
(h) whether the development or activity—
(i) is situated within coastal public property and is inconsistent with the objective of conserving and enhancing coastal public property for the benefit of current and future generations;
(ii) is situated within the coastal protection zone and is inconsistent with the purpose for which a coastal protection zone is established as set out in section 17;
(iii) is situated within coastal access land and is inconsistent with the purpose for which coastal access land is designated as set out in section 18;
(iv) is likely to cause irreversible or long-lasting adverse effects to any aspect of the coastal environment that cannot satisfactorily be mitigated;
(v) is likely to be significantly damaged or prejudiced by dynamic coastal processes;
(vi) would substantially prejudice the achievement of any coastal management objective; or
(vii) would be contrary to the interests of the whole community;
(i) whether the very nature of the proposed activity or development requires it to be located within coastal public property, the coastal protection zone or coastal access land;
(j) whether the proposed activity or development will provide important services to the public when using coastal public property, the coastal protection zone, coastal access land or a coastal protected area; and

In addition any relevant national, provincial or municipal coastal management programme is to be consulted as well as addition consultation with the Overberg or any other local municipality if the site of the proposed activity is in their jurisdiction. [165]

Hence the administrator may authorise development, albeit in rare circumstances, and in doing so the regulations impose an obligation on the administrator to follow a fair procedure.

In addition, the decision to grant or refuse a coastal permit may be classified as an administrative act. This is because the MEC's satisfies all of the requirements of "administrative action" as defined in section 1 of PAJA.[166] It is, therefore, governed by PAJA and the MEC would have to follow a fair procedure in terms of section 3 of PAJA.

4.4 Is there a sufficient reason for coastal management lines*?*

The sufficient reason component is central to the analysis of whether the deprivation has been arbitrary as it must be decided whether there is a sufficient legislative purpose for depriving the person of that property with the impacts flowing therefrom not excessive in respect of the purpose.[167] A deprivation of an owner's right to develop will be substantively arbitrary if the authorising provision does not provide sufficient reason for it.

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(5) The competent authority must ensure that the terms and conditions of any environmental authorization are consistent with any applicable coastal management programmes and promote the attainment of coastal management objectives in the area concerned.
(6) Where an environmental authorisation is not required for coastal activities, the Minister may, by notice in the *Gazette* list such activities requiring a permit or licence.

[165] Regulation 12(1)(a) and(b).

[166] Administrative action is defined in section 1 of PAJA as "any decision taken, or any failure to take a decision, by: (a) an organ of state, which (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation; or (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect [but excluding the powers listed in paragraphs (aa) to (ii)]".

[167] Van der Walt *Constitutional Property Law* (note 90) at 238 and 265-266.

This is a complex issue. This is because the decision has to be made, first, whether the test for rationality or the test for proportionality should be applied; and, second, to actually apply the test that is most appropriate to the situation.

With regard to the first question this consideration determines the depth of analysis the court must apply and depending on the interplay between means and ends, there may be circumstances when sufficient reason is established simply by a rational relationship between the means and the ends. In other circumstances this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution. The test set out in *FNB* provides that we have to take into account three factors:[168]

First, the *nature of the property*. There is a different application of the test where different forms of property are involved and where the property is a corporeal movable or immovable, the test for proportionality applies. If it is another form of property then the test for rationality is applied. Given that we are dealing with the entitlement to develop land, and given further that land is a corporeal immovable, the test for proportionality will be applied to this analysis.

[168] The *first* inquiry the *FNB* methodology employs is one into the relationship between the means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.
The *second* inquiry is a consideration of the complexity of the relationships that are at stake and in this respect it is clear that there are many stakeholders in the establishment of coastal management lines including the provincial and municipal authorities, the public, vulnerable communities, the business community, conservationists, property developers as well as private property owners. In evaluating the deprivation in question, *thirdly*, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
Fourthly regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
Fifthly in general, there is a different application of the test where different forms of property are involved and where the property in question is ownership of land or a corporeal movable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive.
The *sixth* consideration is that in general, when the deprivation in question embraces all of the incidents of ownership, the purpose of the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents partially.
In addition the nature of the property and extent of the deprivation is the *seventh* aspect taken into consideration, and, depending on such interplay between variably means and ends, there may be circumstances when sufficient reason is established simply by a rational relationship between the means and the end; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.
Finally the *eighth* consideration is whether there is sufficient reason to warrant a deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25." As per Ackermann J at para 100 of the *FNB case*.

Second, the *nature of the right*. If the right is ownership or a limited real right, the test for proportionality is appropriate. If it is something else, the test for rationality will be used. Given that we are dealing with one of the entitlements of ownership and a very important one, the test for proportionality will be applied. In this instance a more compelling purpose for the deprivation will have to be established in order for the depriving law to constitute sufficient reason than in the case when the property is something different and the property right something less extensive.

Third, the *extent of the deprivation*. In cases where the deprivation is substantial, the test for proportionality is applied. If the deprivation is trivial, then the test for rationality is applicable. Given that regulations 9, 10 and 12 of the draft Overberg Coastal Regulations impose fairly onerous restrictions on the entitlement to develop, the test for proportionality is appropriate. [169]

5. Applying the test

Given that in the circumstances the appropriate test is the one of proportionality. In this analysis the test for proportionality essentially entails an enquiry into the goal or purpose of the deprivation and the identification of the infringement of the right and the consequences thereof. In conclusion to decide with reference to all the circumstances whether the law is proportional or not and whether or not it could have been achieved with less restrictive means.

5.1 The goal or purpose of the deprivation

In attempting to identify the goal or purpose of the deprivation caused by coastal management lines, that is the restriction or prohibition on developing one's land in terms of regulations 9, 10 and 12 of the draft Overberg Coastal Regulations it is important to note that the imposition of coastal management lines is an internationally accepted method of providing a buffer zone between potential coastal hazards faced by humans and property on the coastline by setting back all or some development some distance away from the coastline. This objective of safeguarding public health and safety is an essential one.

[169] Van der Walt *Constitutional Property Law* (note 87) at 209-213.

In addition, coastal management lines are compatible with the right to the environment as contained in section 24 of the Constitution and South Africa's use of regulatory methods to restrict the use of private property for environmental purposes. Coastal management lines serve to conserve and protect vulnerable and sensitive ecological areas and systems.

It is also one of the most cost effective methods of guarding against sea-level rise as opposed to hard protection measures and complete retreat and allows for gradual changes in land regulation.

These are forceful arguments in favour of the state's legitimate imposition of limitations on the use of private property and hard to counter even if the deprivation is substantial in view of the importance of the goal in terms of the environmental and social good the legislation is attempting to achieve.

5.2 The extent of the infringement of the fundamental right to property

It is important to highlight the severe extent of the infringement of the fundamental right to property. Although there is provision for development under certain circumstances the chances of being successful appear to be remote.

Coastal management lines prohibit or restrict development and in so doing deprive private property owners, business owners and developers of economic growth opportunities. In addition, communities previously disadvantaged by apartheid's exclusionary policies are deprived of an opportunity to own highly coveted and potentially high value properties on the coastline. In the preamble of ICM Act it is acknowledged that previously economic, social and environmental benefits of the coastal zone have been distributed unfairly in the past. This is relevant in respect of political objectives and policies and constitutional imperatives such as economic growth and poverty alleviation.[170]

[170] D Colenbrander, A Cartwright and A Taylor "Drawing a line in the sand: managing coastal risks in the City of Cape Town" (2015) 97 *South African Geographical Journal* 1 at 9.

5.3 Is the legislation proportional?

To conclude the test it is necessary to attempt to balance competing interests and in doing so to conclude whether the law is proportional or not. In addition, it is necessary to enquire whether there are less restrictive means of achieving the same goal. In carrying out this balancing exercise, it is useful to look at how the courts in other countries, in this instance the United States of America, have engaged in this task. In this respect there is a relevant decision of the US Supreme Court, namely *Lucas v South Carolina Coastal Council*.[171]

In this case the applicant applied for an order declaring the South Carolina Beach Management Act of 1988 to be unconstitutional on the grounds that it infringed the Fifth Amendment of the United States Constitution which provides, *inter alia*, that private property may not "be taken for public use, without just compensation" (the "taking's clause"). The Beach Management Act infringed the taking's clause, the applicant argued, because it prohibited him from developing two beach front lots he owned purely because they were located on the seaward side of a coastal management line established in terms of the Act, without the payment of just compensation.

A majority of the United States Supreme Court upheld the applicant's argument. In arriving at this conclusion, the Supreme Court held that the Beachfront Management Act infringed the taking's clause, not because it actually took away the applicant's ownership, but rather because it denied him "all economically beneficial and productive use" of his beach front properties. It thus constituted a so-called "regulatory taking" and as such fell with the scope and ambit of the taking's clause.

The American concept of regulatory takings/constructive expropriations does not exist in South African constitutional property law. The concept of constructive expropriation refers to a regulatory deprivation that has such a severe impact on a private property owner that it cannot be justified in respect of its' purpose and requires compensation.[172] The *Lucas case*, however, is still useful because a coastal management line that deprives a landowner of "all economically

[171] *Lucas v South Carolina Coastal Council* 505 US 1003 (1992).
[172] Van der Walt *Constitutional Property Law* (note 90) at 205.

beneficial and productive use" would be disproportional and in most cases, therefore, would be substantively arbitrary. In other words, in the South African context it appears that such a restriction would fail to pass section 25(1).

Apart from this extreme case and those that come very close to it, however, all other cases are unlikely to fail the proportionality test. This is because the goal or purpose of coastal management lines is so important. In addition, it is an internationally accepted and promoted practice. That coastal management lines are an appropriate response to protection and conservation adaptation measure to coastal hazards and threats are undeniable and the good that coastal management lines achieve would outweigh the harm they cause. Even though the draft Overberg Coastal Regulations impose fairly onerous restrictions, therefore, except in extreme circumstances they would not infringe section 25(1).

5.4 Conclusion

In order to determine whether section 25(1) has been unjustifiably infringed or not in terms of section 25(1) of the Constitution the analysis adopted by the court in the *FNB* case was utilised in term so which a number of questions were asked in turn and answered leading up the crux of the matter. This is the issue of whether the restrictions imposed on landowners by section 25 of the ICM Act read together with regulations 9, 10 and 12 of the draft Overberg Coastal Regulations are arbitrary or not, or, more particularly, whether there is a sufficient reason for the restrictions imposed on landowners by section 25 of the of the ICM Act read together with regulations 9, 10 and 12 of the draft Overberg Coastal Regulations.

It is clear that section 25(1) can be interpreted in such a way that regulatory deprivation of the right to develop property that is brought about by regulations in terms of section 25(1A) of the ICM Act could be justified, in terms of the *FNB* decision, to the extent that the restrictions that these laws place on a private landowner's rights will not be arbitrary, even if they also have the effect of depriving them of some or most of their entitlements in respect of property. Unless the deprivation is so extreme as to deprive the property owner completely of his right to develop

and/or in a manner in which he or she alone will bear the burden of the imposition of the regulation it seems unlikely that the regulations would be declared arbitrary.

In any event it appears that a less restrictive method of achieving the same goals as the regulations is nearing completion and is the result of a refinement of the process by abandoning rigid regulations for a more practical and context specific method of implementation of coastal management lines which is property rights sensitive.[173]

[173] Van Weele G, Breetzke T & Steenkamp T *Refinement of the coastal management (set-back) lines for the Overberg District': Final Project Report for the Western Cape Government: Department of Environmental Affairs and Development Planning* (2015)

CHAPTER FIVE: CONCLUSION

The importance of the coastal zone as a national asset with untold economic and social benefits is well documented and undeniable. It is increasingly under threat from various avenues including over exploitation of natural resources, activities such as mining, excessive and inappropriate development of land and growing populations of coastal dwellers. In addition environmentally damaging mariculture as well as pollution from land based and marine sources is a problem. One of the most significant of these threats is that of human induced global warming.

One of the consequences of global warming is sea-level rise which occurs primarily from accelerated ice melt. There is no uniformity to rising sea levels which occur on a regional basis and interact with site specific dynamic coastal processes. This interaction with other coastal processes like wave height and wind velocity accompanied by more frequent and intense storms systems poses one of the most significant threats to humans and ecological systems.

The IPCC, every six years, assesses observed climate change, the impacts of it as well as measures in respect of mitigation and adaptation. This is the most authoritative compilation of information on climate change and is used to inform political decision makers globally. In terms of this report one of the internationally accepted measures to adapt to sea-level rise and its accompanying consequences is the implementation of set-back; or as they are known in South Africa, coastal management lines. These lines are demarcated in accordance with legislation and are essentially lines beyond which any form of development is prohibited, restricted or subject to controls.

Coastal management lines were introduced in South Africa in terms of the NEM:ICMA in 2008 although they only came into effect in terms of amending legislation in 2015. Section 25 of the Act confers power on an MEC the right to establish these coastal management lines on South Africa's coastline and regulate them through the mechanism of regulations to give legal effect to their purpose. However, the regulations will contain restrictions or prohibitions on a land owner's entitlement to develop his or her property to varying degrees depending on the nature

and location of the coastal management line. Depending on the severity of the restriction these regulations may infringe on the constitutional right to property as embodied in section 25(1) of the Constitution. This section provides that no one may be deprived of their rights of property except in terms of legitimate state interference.

A critical examination of the restrictions that section 25 of the ICM Act impose on a land owner to determine whether they satisfy the requirements of section 25 of the Constitution, with particular reference to the requirements of section 25(1) and regulations 9, 10 and 12 of the Western Cape Department of Environmental Affairs and Development Planning *Annotated Draft Coastal Protection Zone and Coastal Set-back Regulations (Overberg District)* was undertaken.

In doing so and utilising relevant legislation and case law it was determined that the right to develop one's property clearly formed part of what is regarded in South African law as constitutional 'property'. Indeed it is a very strong right and one that requires a compelling reason to limit or restrict it. Thus it was also obvious that a deprivation had occurred and that what remained to be answered was if this deprivation comprised legitimate state interference or not.

The requirements for legitimate deprivations are essentially that the deprivation that occurs must be in terms of a law of general application and that it must not be arbitrary. While it is accepted that the deprivation is in terms of a law of general application the question as to whether or not the deprivation was arbitrary was at the crux of the analysis.

Employing the methodology as set out in the FNB case it was found that the draft regulations proposed for the Overberg District were wide ranging and extensive. They comprised severe limitations and restrictions on, particularly private land owners as the regulations did not make allowance for the excision of existing property rights or recognize existing zonation. However it was also clear that there were avenues available to motivate for development, even if the chances of being successful were remote. In addition the process has checks in place in the ICM Act as well as PAJA in respect of decisions in terms of the legislation.

The most crucial factor however was the question of whether the purpose of the legislation has the element of "sufficient reason". Applying the more appropriate proportionality test, as the right to develop is an important entitlement of ownership, it became clear that the legislation serves an essential purpose. The importance of the purposes of protection of human and ecological systems and especially those in the interests of public health and safety are fundamental. Therefore, unless the deprivation is so extreme so as to deprive a landowner of all his rights then section 25 of the ICM Act satisfies the requirements of the right not to be arbitrarily deprived of property guaranteed in section 25(1) of the Constitution.

BIBLIOGRAPHY

PRIMARY SOURCES

Statutes

Constitution of the Republic of South Africa, Act 200 of 1993

Constitution of the Republic of South Africa, 1996

Marine Living Resources Act 18 of 1998

National Environmental Management Act 107 of 1998

National Environmental Management: Protected Areas Act 57 of 2003

National Environmental Management: Biodiversity Act 10 of 2004

National Environmental Management: Air Quality Act 39 of 2004

National Environmental Management: Waste Act 59 of 2008

National Environmental Management: Integrated Coastal Management Act 24 of 2008

National Environmental Management: Integrated Coastal Management Amendment Act 36 of 2014

Sea-shore Act 21 of 1935

Regulations

Regulations: GN R982 in *GG* 38282 of 4 December 2014

(b) Listing Notice 1: GN R983 in *GG* 38282 of 4 December 2014

(c) Listing Notice 2: GN R984 in *GG* 38282 of 4 December 2014

(d) Listing Notice 3: GN R985 in *GG* 38282 of 4 December 2014

Draft Regulations

Western Cape Department of Environmental Affairs and Development Planning *Annotated Draft of Coastal Protection Zone and Coastal Set-back Regulations (Overberg District)* (2011)

International Treaties and Conventions

Copenhagen Accord, 2010

Kyoto Protocol to the United Nations Framework Convention on Climate Change, 1997

Montreal Protocol on Substances that Deplete the Ozone Layer, 1987
Rio Declaration on Environment and Development, 1992
United Nations Convention on the Law of the Sea, 1982
United Nations Convention on Biological Diversity, 1992
United Nations Framework Convention on Climate Change, 1992

Case Law

International

Lucas v South Carolina Coastal Council 505 US 1003 (1992)
Pennsylvania Coal Co. v Mahon 260 US 393 (1922)
Stop the Beach Renourishment Inc v Florida Department of Environmental Affairs Protection 560 US 702 (2010)

South African

Agri SA v Minister for Minerals and Energy 2013 (4) SA 1 (CC)
City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd 2010 (3) SA 589 (SCA)
City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd) 2015 (11) BCLR 1265 (CC)
First National Bank t/a Wesbank v Commissioner of SARS 2002 (4) SA 768 (CC)
Geyser v Msunduzi Municipality 2003 (5) SA 18 (N)
Harksen v Lane NO 1998(1) SA 300 (CC)
Law Society of South Africa v Minister of Transport 2011 (1) SA 400 (CC)
Laugh it Off Promotions CC v SAB International (Finance) BV t/a Sabmark International 2006 (1) SA 144 (CC)
Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)
Mkontwana v Nelson Mandela Metropolitan Municipality 2005 (1) SA 530 (CC)
National Credit Regulator v Opperman & Others 2013(2) SA 1 (CC)
Offit Enterprises (Pty) Limited v Coega Development Corporation (Pty) Ltd 2011 (1) SA 293 (CC)
Phumelela Gaming and Leisure Ltd v Grundlingh 2006 (8) BCLR 883 (CC).

Reflect All 1025 v MEC, Public Transport 2009 (6) SA 391 (CC)
Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape 2015 (6) SA 125 (CC)
S v Bhulwana, S v Gwadiso 1996 (1) SA 388 (CC)

SECONDARY SOURCES

Books and Chapters in Books

Couzens EWF "Sea and Sea Shore" in *LAWSA Vol 24* 2ed LexisNexis: Durban (2010)
Cullinan C and Glavovic B "The Coast" in Strydom HA & King ND (eds) *Fuggle and Rabie's Environmental Management in South Africa* 2ed Juta: Cape Town (2009) 898
Currie I and De Waal J *Bill of Rights Handbook* 6ed Juta: Cape Town (2013)
Freedman W "The Coastal Environment" in Glazewski J *Environmental Law in South Africa* 3ed (2014) Butterworths: Durban 11-1
Glazewski J "The Bill of Rights and Environmental Law" in Glazewski J *Environmental Law in South Africa* 3ed Butterworths: Durban (2014) 5-1
Glazewski J and du Toit L "International Climate Change Law" in Glazewski J *Environmental Law in South Africa* 3ed Butterworths: Durban (2014) 3-1
Hunt J and Mandia SA *Rising Sea Levels: An Introduction to Cause and Impact* McFarland & Company, Inc Publishers Jeffrson: North Carolina, and London (2012)
Kidd M *Environmental Law* 2 ed (2011) Juta: Cape Town 142-208
McLean B and Glazewaki J "Marine Systems" in Strydom HA & King ND (eds) *Fuggle and Rabie's Environmental Management in South Africa* 2ed Juta: Cape Town (2009) 455
Quinot G and Maree P "Administrative Action" in Quinot G (ed) *Administrative Justice in South Africa: An Introduction* Cape Town: OUP: Cape Town (2015)
Rumsey A and King N *"*Climate Change: Impacts, Adaptation, and Mitigation; Threats and Opportunities*"* in Strydom HA & King ND (eds) *Fuggle and Rabie's Environmental Management in South Africa* 2ed Juta: Cape Town (2009) 1048
Scholes B, Scholes M & Lucas M *Climate Change: Briefings from Southern Africa* Wits University Press: Johannesburg (2015)
Van der Walt A *Constitutional Property Law* 3ed Juta: Cape Town (2011)

Journal Articles

International

Adler JH "Taking Property Rights Seriously: The Case of Climate Change" (2009) 26 *Social Policy and Philosophy* 296.

Byrne JP "The Cathedral Engulfed: Sea-Level Rise, Property Rights and Time" (2012) 73 *Louisiana Law Review* 69-118.

Caldwell L "Rights of Ownership or Rights of Use? - The Need for a New Conceptual Basis for Land Use Policy" (1974) 15 *William & Mary Law Revue* 759.

Caldwell M and Segall C "No Day at the Beach: Sea Level Rise, Ecosystem Loss, and Public Access along the California Coast" (2007) 34 *Ecology L.Q.* 533.

Callies D and Robyak, D "The Categorical (Lucas) Rule: Background Principles, Per Se Regulatory Takings and the State of Exceptions" (2014) 30 *Touro Law Review* 10.

Carpenter C (ed) *Earth Negotiations Bulletin*© <enb@igc.apc.org> written and edited by Chad Carpenter <carpente+aWWFUS%WWFUS@mcimail.com>, Pamela Chasek <pchasek@pipeline.com>, Anilla Cherian <cherian@titan.ucs.umass.edu> and Steve Wise <swise@igc.apc.org>. The managing editor is Langston James Goree VI "Kimo" <kimo@pipeline.com>. vol 12 No 12 Page 2 accessed 10 October 2015.

Cooper J and Pilkey O "Sea-level Rise and shoreline retreat: time to abandon the Bruun Rule" (2004) 43 *Global and Planetary Change* 157.

Cooper J and McKenna J "Social Justice in coastal erosion management: The temporal and spatial dimensions" (2008) 39 *Geoforum* 294.

Craig RK "Of Sea-Level Rise and Superstorms: The Public Health Police Power As A Means Of Defending Against 'Takings' Challenges To Coastal Regulation" (2014) 22 *NYU Environmental Law Journal* 84.

Higgins M "Sea Level Rise Impacts On Beaches And Coastal Property" (2008) 1 *Sea Grant Law and Policy Journal* 43.

Ruhle JB and Salzman J "Climate Change Meets the Law of the Horse" (2013) 62 *Duke Law Journal* 975.

Sano M, Jiminez JA,Medina R,Stanica A, Sanchez-Arcilla A, Trumbic I "The role of coastal setbacks in the context of coastal erosion and climate change" (2011) 54 *Ocean and Coastal Management* 943.

Sax J "The Accretion/Avulsion Puzzle: Its Past Revealed, Its Future Proposed" (2009) 23 *Tulane Environmental Law Journal* No 5.

Serkin C "Passive Takings: The State's Affirmative Duty to Protect Property" (2014) 113 *Michigan Law Review* 34.

Titus J "Rising Seas, Coastal Erosion, and the Takings Clause: How to Save Wetlands and Beaches Without Hurting Property Owners" (1998) 57 *Maryland Law Review* 1281.

Tol R "An Analysis of Mitigation as a Response to Climate Change" 6 tbl 1 (2009). Available at: http://fixtheclimate.com/uploads/tx_templavoila/AP_Mitigation_Tol_v_3.0.pdf , accessed on 29 July 2015.

Wolf M "Strategies for Making Sea-Level Rise Adaptation Tools 'Takings-Proof'" (2013) 28 *Journal Land Use & Environmental Law* 157.

South African

Cartwright A "Coastal Vulnerability in the Context of Climate Change: A South African Perspective" paper presented at the *Climate Justice Conference* 27-29 October 2009. Available at: http://www.90x2030.org.za/oid%5Cdownloads%5coastal20%vulnerability%20south%20african%20perspectivepdf, accessed 12 October 2015. Pages not numbered.

Colenbrander D, Cartwright A and Taylor A "Drawing a line in the sand: managing coastal risks in the City of Cape Town" (2015) 97 *South African Geographical Journal* 1.

Colenbrander D and Sowman MR "Merging socioeconomic imperatives with geospatial data: A non-negotiable for coastal risk management in South Africa" (2015) 43 *Coastal Management* 270.

Ginsburg T and Dixon R "The South African Constitutional Court and Socio-Economic Rights as 'Insurance Swaps" *Case Sandor Institute for Law and Economics Working Paper No 650* (2013). Available at: http://www.law.uchicago.edu/Lawecon/index.html, accessed on 2 November 2015.

Goble B, Lewis M, Hill T & Phillips MR "Coastal Management in South Africa: Historical perspectives and setting the stage of a new era" (2014) 91 *Ocean and Coastal Management Journal* 32.
Goble BJ and MacKay CF "Developing risk set-back lines for coastal protection using shoreline change and climate variability factors" (2013) 65 *Journal of Coastal Research* 2125.
Marais E "The Constitutionality of Section 89(5)(c) of the National Credit Act Under the Property Clause: *National Credit Regulator v Opperman & Others*" (2014) 131 *SALJ* 215.
Rochette J, Bille R & Glazewski J "Recent Developments in Implementing Integrated Coastal Zone Management (ICZM) within Regional Seas Frameworks: The Development of ICZM Protocols" (2011) 18 *SAJELP* 95.
Ruppel C and van Wyk S "Climate Induced Movement of Persons in Africa: Human Rights Responses to Aspects of Human Security?" (2011) 18 *SAJELP* 49.
Slade B "Public purpose or public interest and third party transfers" (2014) 17 *Potchesfstroom Electronic Law Journal* 167.
Theart M "The Duty to Adapt to Climate Change" (2011) 18 *SAJELP* 1.
Theron A and Rossouw M *Analysis of Potential Coastal Zone Climate Change Impacts and possible Response Options in the Southern African Region* at 1. Available at http://www.csir.co.za, accessed on 13 October 2015.
Van der Walt AJ "Constitutional Property Law" (2013) *Annual Survey of SA Law* 216.
Van der Walt AJ "Notes on the Interpretation of the Property Clause in the New Constitution" (1994) 3 *THRHR* 181.
Witbooi E "Restrictive Environmental Issues: (When) Do They Justify Compensation for the Property Owner?" (2001) 8 *SAJELP* 215
Ziervogel et al "Climate change impacts and adaptation in South Africa" WIREsClimChange2014,5:605-620.doi:10.1002/wcc.

Reports

<u>International</u>

Arlington Group Planning, Architecture Inc, EBA, D Jardine Consulting & Sustainability Solutions *Group Sea Level Rise Adaptation Primer: A Toolkit to Build Adaptive Capacity on*

Canada's South Coasts (2013). Available at: www2:gov.bc.ca/assets/…change/…/…/adaptation/sea-level-rise/slr-primer.pdf, accessed 20 November 2015.

Kirkpatrick, S *The economic value of natural and built Intergovernmental Panel on Climate Change (IPCC)* 2014: Climate Change 2014: Synthesis Report Contribution of Working Groups 1, II and II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (Core Writing Team, Pachauri RK, and Meyer LA (eds)) PICC, Geneva, Switzerland 151 pp

Wong, P.P., I.J. Losada, J.-P. Gattuso, J. Hinkel, A. Khattabi, K.L. McInnes, Y. Saito, and A. Sallenger, 2014: Coastal systems and low-lying areas. In: Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects. Contribution of Working Group II to the *Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Field, C.B., V.R. Barros, D.J. Dokken, K.J. Mach, M.D. Mastrandrea, T.E. Bilir, M. Chatterjee, K.L. Ebi, Y.O. Estrada, R.C. Genova, B. Girma, E.S. Kissel, A.N. Levy,S. MacCracken, P.R. Mastrandrea, and L.L. White (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, pp. 361-409.

South African

Breetzke T and Mather A *Defending Durban's Beaches – A Recipe for Succcess* (no publication date given). Avaible at: www.royalhaskoningdhv.com/iaiasa%2013defending%20durbans%2013beaches%2013, accessed on 4 November 2015.

Breetzke, T, Parak, O, Celliers, L, Mather, A and Colenbrander, D. *Living with coastal erosion in KwaZulu-Natal: a short-term, best practice guide* (2007). Available at: www.kzn.dae.gov.za, accessed on 4 November 2015.

Celliers L, Breetzke T, Moore, L and Malan D *A User-friendly Guide to South Africa's Integrated Coastal Management Act* (2009).

DEA *A National Framework for Sustainable Development in South Africa* (2011-2014). Available at: http://www.environment.gov.za, accessed on 4 November 2015.

Imbewu *Implications of the Coastal Management Bill*. Available at: http://www.imbewu.co.za/documents/implications%20Intgrated%20Coastal%20Management%20Bill.pdf, accessed 30 July 2015

Department of Environmental Affairs *South Africa's National Coastal Management Programme* Available at: https://www.environmental.gov.za, accessed on 9 October 2015.

Van Weele G, Breetzke T and Kamish R *Coastal Management/Set Back Lines for the West Coast District: Final Project Report for the Western Cape Government: Department of Environmental Affairs and Development Planning* (2014)

Van Weele G, Breetzke T and Steenkamp T *Refinement of the coastal management (set-back) lines for the Overberg District': Final Project Report for the Western Cape Government: Department of Environmental Affairs and Development Planning* (2015)

Theses

Erasmus J *The Interaction Between Property Rights and Land Reform in the New Constitutional Order in South Africa*, Unpublished LLD Thesis, University of South Africa (1998).

Kavonic J *A preliminary evaluation of the socio-economic implications of the implementation of coastal setback lines: A case study of the Kogelberg coast in the Overberg district,* Unpublished Masters Research Project, University of Cape Town (2013).

Koch *The right to a view: Common law, legislation and the Constitution*, Unpublished LLD Thesis, University of Stellenbosch (2012).

N Rajak *Greening Durban: The constitutional validity of the Durban Metropolitan Open Space System in Light of Section 25 of the Constitution,* Unpublished LLM Dissertation, University of KwaZulu-Natal (2015).