THE 'ARBITRARY DEPRIVATION' VORTEX: CONSTITUTIONAL PROPERTY LAW AFTER *FNB*

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When I wrote the chapter in *CLoSA* on the constitutional property clause, I was not yet one of the editors. Stu Woolman's response on receiving my chapter was to say: 'This is not a chapter on constitutional property. This is an extended case note on a single decision – *FNB*.[1] And you don't cite enough foreign law!' I replied: 'But it has to be this way, because *FNB* sets out the framework for all future constitutional property cases, and in so doing renders foreign law largely irrelevant.' In this presentation I want to record my reasons for that reply – to explain why I thought that the only way to write a chapter on constitutional property law in the immediate aftermath of *FNB* was to write an extended case note on that decision, and why it is that *FNB*, which is itself heavily reliant on foreign law, renders foreign law largely irrelevant to the resolution of future constitutional property cases.

The letters 'FNB' stand for First National Bank – the claimant in the first case to come to the Constitutional Court under FC s 25, the property clause of the 1996 South African Constitution.[2] The opening gambit in Ackermann J's judgment for a unanimous court was to assert that the primary function of the clause is to strike 'a proportionate balance' between the public interest and individual property rights.[3] This is, of course, the traditional function performed by constitutional property clauses. The significance of the *FNB* decision, however, was that it purported to decide precisely how this balance should be struck in South Africa. Not only that, but the answer the Constitutional Court gave was one that none of the academic commentators on FC s 25 had predicted.

If one disregards *FNB* for the moment, there are theoretically six points in the South African constitutional property clause inquiry at which the competing interests of the public in a just and socially beneficial distribution of property rights, and the interests of individuals in the protection of their acquired property rights, can be resolved. The first point concerns the definition of constitutional property. If the court decides that the interest that the claimant is alleging ought to be protected is not the sort of interest that FC s 25 was designed to protect,[4] then that interest receives no protection, at least under the property clause, and the competition is resolved in favour of the state. In foreign law, categorical exclusions of this kind have played an important role in constitutional property cases, particularly those relating to novel forms of property.[5] This issue has also arisen in the American 'conceptual severance' debate, with *Penn*

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[1] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

[2] Constitution of the Republic of South Africa, 1996.

[3] *FNB* (supra) para 50.

[4] The phrase 'designed to protect' covers a number of different ways in which the judicial determination of constitutional property may be undertaken, from a search for the intention of the framers to a value-based inquiry into the purposes underlying the constitutional protection of property. The latter method is more in keeping with the South African approach to constitutional interpretation.

[5] The two most oft-cited Commonwealth cases in this regard are *Government of Malaysia v Selangor Pilot Association* [1978] AC 337 (PC) and *Societé United Docks v Government of Mauritius* (1985) LRC (Const) 801 (PC). In Germany, the extent to which a property interest is regarded as being inherently subject to social control will affect the likelihood of its being protected under the property clause, art 14 of the German Basic Law. See BVerfGE 58, 300 [1981] (the *Nassauskiesung* or *Groundwater Case*).

Central Transportation Co v City of New York[6] providing perhaps the best example of the divergent outcomes that may follow from judicial disagreement over whether or not to accept a particular interest as constitutionally protected property.[7]

The second opportunity for resolving competing public and private interests in property is provided by the court's approach to the concept of deprivation. A very strict approach would define out of the ambit of constitutional concern certain types of regulation, and thereby resolve the competition in respect of these sorts of regulation entirely in favour of the state.[8] Conversely, a generous approach would tend to admit into the constitutional property clause inquiry a broader range of types of regulation, leaving it to other parts of the inquiry to resolve the competition. In between these two extremes, a more cautious court – one that wanted to make this stage of the property clause inquiry do real analytic work – might approach the matter casuistically, offering no general definition of the term deprivation, but instead assessing on a case-by-case basis whether the regulation at issue was the sort of regulation that should be held to the standard imposed by FC s 25(1).

The third opportunity for resolving competing public and private interests in property concerns the application of the test for arbitrary deprivation in FC 25(1). Since this was the primary focus of the *FNB* decision, I am not going to say any more about it for the moment.

The fourth opportunity is provided by the distinction drawn in FC s 25(1) and (2) between the deprivation and expropriation of property. Under FC s 25(1), deprivation of property must occur in terms of law of general application, and 'no law may permit arbitrary deprivation of property'. Under FC s 25(2), the expropriation of property is permitted where it occurs in terms of law of general application, 'for a public purpose or in the public interest', and just and equitable compensation is paid. Since two different standards are prescribed, the text requires the interpreter to distinguish between the deprivation and expropriation of property. And, since the obligations attaching to the expropriation of property are more onerous from the state's perspective than those attaching to the deprivation of property, the way in which this distinction is drawn will affect the balance struck between the public interest and individual property rights. A distinction that gathered under the rubric of expropriation more types of conceivable state action than another would put a thumb on the individual side of the scales, and vice versa.

As with the definition of deprivation, the distinction between deprivation and expropriation is a conceptual one that could be drawn in a more or less categorical way. A purely categorical approach might reserve the term 'expropriation' for situations where the state forced the transfer of a (constitutionally highly valued) property right to itself or

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[6] 438 US 104 (1978).

[7] The term 'conceptual severance' was coined by Margaret Jane Radin 'The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings' (1988) 88 *Columbia LR* 1667. The term refers to the possibility that the court might isolate, for purposes of analyzing the property interest at stake, just that stick in the bundle, or topographical unit (in the case of land) or time period (in the case of temporary restrictions on use) actually affected by the regulation. After seemingly endorsing this approach in *Hodel v Irving* 481 US 704 (1987) and *First Evangelical Lutheran Church v County of Los Angeles* 482 US 304 (1987), the US Supreme Court has not since decided a case on this basis. See Gregory S Alexander *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 78-80.

[8] See *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett & Others v Buffalo City Municipality; Transfer Rights Action Campaign & Others v Member of the Executive Council for Local Government and Housing, Gauteng & Others* 2005 (1) SA 530 (CC).

to a third party. A less categorical approach might seek to develop some or other test for determining the circumstances under which the impact of a regulation on the property rights holder was so severe as to require formal justification under FC s 25(2)*(a)* and the payment of just and equitable compensation.[9] Either way, the rules developed would need to resolve competing public and private interests in property by defining a legal act, or legally ascertainable tipping point, at which the obligations specified in FC s 25(2) and (3) would arise.

The fifth opportunity for resolving competing public and private interests occurs once the court has decided that this legal act has occurred, or this tipping point has been reached, and consists in the determination of the 'amount', and 'time and manner' of any compensation that may be due.[10] The determination of these issues allows for a very fine-grained solution since the court is empowered to apportion the cost in monetary terms of the collective interest being pursued between the public (meaning the taxpayers as a whole) and the individual property rights holder. In this case, the South African compensation clause, FC s 25(3), expressly enjoins the court to determine these issues by using a multi-factor balancing test in which the court is required to strike 'an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances'.[11]

Finally, since the general limitations clause notionally applies to the limitation of all rights in the Bill of Rights, competing public and private interests in property could also conceivably be resolved by leaving some work for FC s 36 to do. On this approach, the rights guaranteed in FC s 25 (assuming the existence of law of general application, which is in any case a precondition for the application of FC s 36) would be rights against the arbitrary deprivation of property and the uncompensated expropriation of property, alternatively, the expropriation of property for an impermissible purpose, which rights could be limited if a sufficiently compelling justification could be found under FC s 36.

These, then, were the six possible ways, before *FNB*, in which competing public and private interests in property might have been resolved. Note that the first and second stages of the inquiry allow only a crude, all-or-nothing decision to be taken about whether or not to protect the individual interest at stake, or to subject the state action at issue to the discipline of the constitutional property clause. The fourth stage, the court's determination whether the impugned law provides for expropriation, could either be approached conceptually, in a manner similar to the first and second stages of the inquiry, or it could be turned into a multi-factor balancing test by listing a range of criteria that together determined the legal effect of the law in question, and hence the state's constitutional obligations. The fifth and sixth stages are both in their nature, or by reason of the constitutional text, multi-factor balancing tests in which the court must eschew conceptual distinctions in favour of an overarching assessment of the weight to be attributed to a range of criteria.

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[9] In its regulatory takings jurisprudence, the US Supreme Court has adopted both a categorical approach, in terms of which an exercise of the state's police power that results in the permanent physical occupation of property is regarded as being per se unconstitutional, and an ad hoc balancing approach, which applies in other cases. The *locus classicus* for the permanent physical occupation rule is *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982). The ad hoc balancing test was first announced in *Penn Central* (supra).
[10] FC s 25(3).
[11] Ibid.

Before *FNB*, the academic commentaries on the South African property clause took a broadly similar view of the way the Constitutional Court should approach these various stages.[12] The exception was the comprehensive commentary by AJ van der Walt, which contained an ingenious argument about how the test for arbitrary deprivation in FC s 25(1) and the general limitations test in FC s 36 might be combined.[13] The first striking thing about *FNB* is that it expressly rejects Van der Walt's approach whilst seeming in fact to endorse some aspects of it.[14] The other striking thing is that the decision divides the constitutional property clause inquiry into seven formally distinct stages,[15] corresponding – with one minor difference – to the six stages just discussed.[16] As it turns out, however, the focus of the court's inquiry falls on the third stage, the test for arbitrary deprivation. Not only this, but the test it articulates is so all-encompassing as to make the other stages, and the foreign law that might have assisted in explicating them, redundant. I shall leave it to AJ van der Walt to point out how the *FNB* Court's approach to the interpretation of FC s 25 might be said to approximate his own. My concern in this presentation is with the second issue – the way in which the court's test for arbitrary deprivation swallows up the other stages of the constitutional property clause inquiry.

The *FNB* case involved a constitutional challenge to s 114 of the Customs and Excise Act.[17] As it was then worded, s 114 authorized the Commissioner of the South African Revenue Service, in order to defray a customs debt, to detain and eventually sell property 'in the possession or under the control of' the customs debtor, even where such property belonged to a third party. FNB impugned s 114 under FC s 25(2), alleging that it provided for the uncompensated expropriation of property. On the authority of a passage in the chapter on property in the first edition of *CLoSA*, written by Matthew Chaskalson and Carole Lewis,[18] the *FNB* Court held that expropriations are a form of deprivation, and consequently that the impugned provision should first be tested against FC s 25(1).[19] Dispensing quickly with an argument that the legal form of a property right was less important than the right-holder's 'commercial interest' in it,[20] the Court restricted itself to two narrow holdings in respect of the first two stages of the inquiry: (1) that ownership of a corporeal movable, such as the motor vehicles at issue in this case, constituted property for purposes of FC s 25;[21] and (2) that 'dispossessing an owner of all rights, use and benefit to and of corporeal movable goods, is a prime example of deprivation in both its grammatical and contextual sense'.[22]

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[12] See the list of academic authorities cited in *FNB* (supra) para 57 n 79.

[13] AJ van der Walt *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (1997) 92-100.

[14] The express rejection occurs in *FNB* (supra) para 70. As we shall see, however, in prescribing its test for arbitrary deprivation, the Court renders the general limitations inquiry largely redundant. In addition, the test it applies for arbitrary deprivation and the (superfluous) test is later applies under FC s 36 are remarkably similar. The only real difference between the two approaches, therefore, is that the Court prefers a sliding-scale standard of review at the first stage of the constitutional inquiry, whereas Van der Walt's approach would have seen proportionality review applied cumulatively with the test for arbitrary deprivation.

[15] *FNB* (supra) para 46.

[16] The *FNB* Court's analytic framework consists of an extra stage because the general limitations stage is mentioned twice, first in respect of deprivations of property inconsistent with FC s 25(1), and then in respect of expropriations of property inconsistent with FC s 25(2) and (3).

[17] Act 91 of 1964.

[18] 'Property' in Matthew Chaskalson et al (eds) *Constitutional Law of South Africa* (1996) chapter 31.

[19] *FNB* (supra) para 57.

[20] Ibid para 55.

[21] Ibid para 51.

[22] Ibid para 61.

These two holdings set the stage for the primary focus of the *FNB* decision, the elaboration of the test for arbitrary deprivation. The judgment proceeds in three steps at this point. First, the court discusses – only to dismiss as unpersuasive – the academic commentaries on the meaning of the term 'arbitrary' in FC s 25(1).[23] Second, the court engages in an expansive comparative-law survey, ostensibly aimed at elucidating the test for arbitrary deprivation, but encompassing other issues as well.[24] Third, the court summarizes the principles emerging from its comparative-law survey as a prelude to stating its test for arbitrary deprivation, which is contained in a single, long paragraph, para 100. At first blush para 100 appears to be a kind of bluffer's guide to constitutional property law, encapsulating the whole of the court's test for arbitrary deprivation and therefore, if the reading suggested here is correct, all that one really needs to know about FC s 25. On closer inspection, however, para 100 turns out to be a chimera, promising more than it delivers, and ultimately reserving to the court a great deal of discretion to decide future cases as it deems fit.

Broken up into its constituent parts, this is what para 100 says:

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

There follow eight sub-paragraphs, each of which articulates a different consideration to be factored into the court's assessment of the constitutionality of the impugned law. The first sub-paragraph reads:

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

This sub-paragraph typifies the test for arbitrary deprivation as a means-end relationship test, in terms of which the public interest that the state claims to be pursuing must be assessed in relation to the legislative scheme adopted. But more than the relationship between legislative means and legislative ends is at issue, as appears from the next three sub-paragraphs:

> (b) A complexity of relationships has to be considered.
> (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose of the deprivation and the person whose property is affected.
> (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.

These sub-paragraphs purport to expand on the sorts of relationships to which the court must have regard. There is a semantic slippage here, however, because the relationships mentioned in sub-paras (c) and (d) are not all means-end relationships as suggested by the cross-reference in sub-para (b) to the word 'relationship' in sub-para (a). Thus, 'the person whose property is affected' and 'the nature of the property' affected by the legislative scheme may be entirely incidental to the means employed in that scheme. Along with 'the extent of the deprivation in respect of such property' these factors are better described as pertaining to the impact of the legislative scheme, rather than the

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[23] Ibid paras 67-70.
[24] Ibid paras 71-98.

means used to implement it. That the impact of the legislative scheme is the primary determinant of the standard of review to be applied appears clearly form the next sub-paragraph:

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

Sub-paragraph (e) broaches the question of the nature of the property right affected by the scheme, and proposes different levels of review according to the answer to that question. This is a novel approach to the analysis of constitutional property cases, with the closest equivalent in foreign law being the German Federal Constitutional Court's differentiated protection of property interests according to their social function.[25] In the Commonwealth, the nature of the property right affected by the legislative scheme is relevant only to the threshold question of whether the claimant's interest amounts to constitutional property.[26] Once this has been determined, a uniform standard of review is generally applied.[27] According to sub-para (e), by contrast, the nature of the property right remains relevant at the third stage of the constitutional inquiry, and influences the level of review.

Lest there was any doubt about this, sub-para (f) indicates the term 'property right' includes the traditional incidents of ownership recognized at common law:

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

In addition to specifying that the term 'property right' in sub-para (e) includes the traditional incidents of ownership, sub-para (f) makes it clear that the level of review will vary according to the number of 'incidents of ownership' affected, and that the total deprivation of one or more of those incidents is not a precondition for the application of the property clause. My reaction on first reading this passage was Archimedean. I didn't quite shout out 'Eureka!' but I think I might well have sat up a little straighter in my chair. In the Commonwealth jurisprudence on constitutional property,[28] the number of incidents of ownership affected by a regulation is, like the nature of the property right at issue, a consideration that goes to the threshold question of whether a constitutional property interest is at stake. By declaring this to be an issue relevant to the test for arbitrary deprivation at the third stage of the inquiry, the *FNB* court strongly implies that conceptual considerations of this sort will not be used to bar constitutional property claims at the threshold stage. Rather, the court's declared intention is to countenance all such claims as constitutional property claims, and deal with the number of incidents of ownership affected by the deprivation and the impact of the deprivation as factors bearing on the level of review to be applied. There could be no clearer signal than this that the Court intends to make a clean break, both with the conceptualist approach that has caused so many problems in other jurisdictions, and with the pre-1994 approach of

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[25] See Alexander (supra) 103.

[26] See Thomas Allen 'Commonwealth Constitutions and the Right Not To Be Deprived of Property' (1993) 42 *ICLQ* 523.

[27] In American regulatory takings jurisprudence, the right to exclude is privileged through the per se permanent physical occupation rule laid down in *Loretto* (supra), but property rights are not otherwise hierarchically ordered.

[28] See Allen (supra).

the South African courts to the Expropriation Act.[29] Rather than hinging on single, case-deciding categorizations of the property interest at issue or the character of the deprivation, para 100 indicates that future constitutional property cases will be decided according to an all-things-considered assessment of the seriousness of the deprivation and its impact on the claimant. The more drastic the deprivation and the more extensive its impact, the greater will be the state's justificatory burden. As the *FNB* Court states in the final two sub-paragraphs:

> (g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.
> (h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25.

In essence, therefore, the test for arbitrary deprivation is a means-end test, with the state's justificatory burden varying between rationality and proportionality depending on the considerations mentioned in sub-paras (b)-(f). The advantage of this approach is the discretionary power it confers on the court to adjust the level of review to fit the circumstances of the case. This power will enable South African courts to show the necessary deference when reviewing the impact on property rights of important social reform programmes, such as land reform or black economic empowerment. In other cases, where the state overzealously regulates property in pursuit of questionable goals, the courts will be able to ratchet up the level of review in order to provide adequate protection.

The problem with a flexible test like the one devised in *FNB*, however, is that the grounds for the application of one or the other level of review should be ascertainable in advance. It must be clear to the state when devising a regulatory scheme, and to persons affected by that scheme when deciding whether or not to challenge it, what level of review the court is likely to apply. The *FNB* test fails to provide this degree of certainty. Unlike the German Federal Constitutional Court in the *Groundwater Case*,[30] the Court in *FNB* does not tell us why certain types of property are more constitutionally valued than others. Indeed, there is a contradiction between the Court's recognition of land reform as a particularly valued purpose, which suggests a low level of review, and the ownership of land as a particularly valued property right, which suggests a higher level. The Court also does not tell us which incidents of ownership are more constitutionally valued, or how to analyse cases so as to distinguish the total deprivation of a conceptually severed stick in the bundle from the partial deprivation of a stick not so severed. All that we know for certain is that, after consideration of the factors in para 100, a level of review must be chosen somewhere between mere rationality and full proportionality, and that the choice of this level will largely determine the outcome of the case.[31]

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[29] Act 63 of 1975. See, for example, *Tongaat Group v Minister of Agriculture* 1977 (2) 961 (A) at 972D. The Constitutional Court endorsed a conceptual approach to the definition of expropriation *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC) paras 31-37, a case heard under the interim Constitution (Constitution of the Republic of South Africa, 1993). Although not expressly over-ruling *Harksen*, the *FNB* Court's test for arbitrary deprivation is likely to make the categorical distinction drawn in that case between expropriation and deprivation less important in future cases.

[30] Supra.

[31] This point is well-illustrated by the first case to be decided under the *FNB* test, *Mkontwana* (supra). In this case, a challenge to a regulation requiring landowners to pay outstanding municipal debts, including debts incurred by third parties, as a precondition for formal property transfer, the two lower courts reached

Fact-specific tests like these are good for courts but bad for rule-setting. Cases decided under the *FNB* test for arbitrary deprivation will necessarily be tied to their own circumstances, and hence have virtually no precedential value. This outcome is bad enough. It is made even worse by the fact that it renders all of the other stages of the constitutional property clause inquiry largely redundant, thus undermining the capacity of these stages to perform a rule-setting function as well. This is a serious charge. The rest of this presentation is devoted to substantiating it.

The *Concise Oxford Dictionary* (1982) defines the word 'vortex' as 'a system, occupation, pursuit, etc, viewed as swallowing up or engrossing those who approach it.' The reading of *FNB* offered here is that the test for arbitrary deprivation in para 100 is a vortex in this sense, swallowing up the other stages of the constitutional property clause inquiry. I have already hinted at the way in which the first stage is swallowed up. By making the nature of the property right and the number of sticks in the property rights bundle affected by the deprivation an issue for consideration in the test for arbitrariness, that test requires the court to de-emphasize the importance of these considerations at the first stage of the constitutional inquiry. What sense would it make, in light of sub-paras (e) and (f), for the court to reject a challenge at the first stage of the inquiry, either because the property interest at stake were not constitutionally protected, or because insufficient incidents of ownership were affected? A constitutional claimant litigating after *FNB* would rightly feel aggrieved by such a decision, since the promise held out by para 100 is that these issues will not be used to exclude claims at the first and second stages, but rather factored into the court's overarching test for arbitrary deprivation.[32]

The second stage of the property clause inquiry is swallowed up both by the test for arbitrary deprivation and also by the extremely broad definition of deprivation given in para 57 of the judgment. In this paragraph, the *FNB* Court states: 'In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned'. This dictum is strictly speaking obiter, and the Court's actual holding on the meaning of deprivation is, as we have seen, restricted to the facts of the *FNB* case.[33] Nevertheless, there are indications in para 100 that the Court will allow almost any claim against a regulation affecting property past the second stage of the inquiry, and deal with the severity of the regulation's impact on the claimant's rights in its test for arbitrary deprivation. This impression follows particularly from the reference to 'the extent of the deprivation' in para 100(d) and the notion in para 100(f) that a deprivation that 'embraces only some incidents of ownership and those incidents only partially' should be subject to a lower standard of review. These phrases strongly suggest that the second stage of the constitutional property clause inquiry will not be used as a conceptual barrier to exclude claims involving less extensive deprivations. Rather, as with claims where only one or two incidents of ownership are affected, the Court's inclination is to allow these claims

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opposing outcomes by choosing different levels of review. As AJ van der Walt has pointed out, even the Constitutional Court's reasons for adopting a low level of review in this case are not terribly convincing. See Van der Walt 'Retreating from the *FNB* Arbitrariness Test Already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng* (CC)' (2005) 122 *SALJ* 75.

[32] That this is the correct reading of para 100 is once again borne out by *Mkontwana* (supra). In this case, the only incident of ownership affected by the provision was the owner's right to sell, and yet this did not prevent the Court from applying its test for arbitrary deprivation.

[33] *FNB* (supra) para 61.

past the first two stages, and balance competing public and private interests in property through its more flexible test for arbitrary deprivation.

The fourth stage of the constitutional property clause inquiry, which concerns the distinction between deprivations and expropriations, is rendered largely redundant by the *FNB* Court's decision to treat expropriations as a 'subset of deprivations'.[34] What this means, as illustrated by the *FNB* case itself, is that claims which appear to involve uncompensated expropriations, or expropriations for an improper purpose, will be tested first against the standard set by FC s 25(1) for the arbitrary deprivation of property. Contrary to what some commentators have said,[35] this analytic framework is likely to make American-style regulatory takings jurisprudence, and all the difficulties attendant on distinguishing deprivations from expropriations, irrelevant in South Africa. The reason for this is that the sorts of governmental regulation that are typically the subject of such inquiries in the United States – exercises of the police power that go 'too far'[36] – will in South Africa be subject first to the test for arbitrary deprivation. A regulation that goes 'too far' in the American sense (because it interferes with 'distinct investment-backed expectations' or destroys all economically viable use of the property, for example) will in South Africa likely be struck down under FC s 25(1) as providing for the arbitrary deprivation of property. The question whether the regulation, whilst purporting to constitute an exercise of the state's police power, in fact provides for the expropriation of property, will never arise. Even an uncompensated expropriation, which was effectively what was at issue in the *FNB* case, will be treated as an arbitrary deprivation, the arbitrariness of which will lie precisely in the legislative scheme's failure to provide for compensation.[37]

As the *Du Toit* decision[38] handed down after *FNB* illustrates, there will still be a role for the fifth stage of the constitutional property clause inquiry in cases where the expropriatory purpose of the law is not in dispute and where compensation is offered. In such cases, the courts will skip directly to the fifth stage and determine whether just and equitable compensation has been paid. Where no compensation is provided for in the legislative scheme, however, and the stated intention of the legislature is merely regulatory, the state will presumably seek to defend the claim on the basis that the law merely deprives the claimant of property. Such a defence would require the court to apply the test for arbitrary deprivation, with all the consequences just illustrated.

The problem with this aspect of the *FNB* analytic framework is that, if the court strikes down a law that fails to provide for compensation under FC s 25(1), the claimant will not be able to demand compensation under FC s 25(2). As AJ van der Walt has pointed out, however, there may be instances where it would be desirable for the court not to invalidate the law, but to order the payment of compensation.[39] There are two possible ways out of this dilemma. The first would be to allow the claimant to go on to argue that the law, in addition to providing for the arbitrary deprivation of property, also

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[34] *FNB* (supra) para 57, quoting Chaskalson & Lewis op cit at 31—14.
[35] See Kevin Hopkins & Kate Hofmeyr 'New Perspectives on Property' (2003) 120 *SALJ* 48 at 57-58.
[36] This phrase was first used in *Pennsylvania Coal Co v Mahon* 260 US 393 (1922), the decision that is generally agreed to have introduced the idea of regulatory takings into American takings law.
[37] The claimant in *FNB* would not have challenged s 114 of the Customs and Excise Act had it provided that the state, from the proceeds of the sale in execution of the confiscated property and other state funds if necessary, should pay any third party with a right over that property an amount equivalent to the market value of its right, in this case the amount owing under the motor vehicle financing agreement.
[38] *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC).
[39] Van der Walt *Constitutional Property Law* (supra) 235-37.

provided for the expropriation of property without payment of just and equitable compensation. Although the Constitutional Court's usual practice is to terminate the constitutional inquiry as soon as a ground for constitutional invalidity has been established, it would be in the interests of justice, and also within the Court's FC s 38 power to grant appropriate relief, for the Court to allow the claimant to proceed to the expropriation stage.

The other possibility is that the Court might develop a remedial jurisprudence for the payment of constitutional damages in respect of violations of FC s 25(1). The door to such a remedy in constitutional cases was left open in *Fose*,[40] and eventually confirmed in *Modderklip*,[41] though not, at least in the Constitutional Court's decision, for a violation of FC s 25(1).[42] An order for the payment of constitutional damages under FC s 25(1) would not be equivalent to an order for the payment of just and equitable compensation under FC s 25(3). Rather, the point of such an order would be to make good any loss in excess of the loss the claimant might reasonably be expected to bear under the test for arbitrary deprivation. In this way, the payment of constitutional damages under FC s 25(1) would approximate the equalization payments made for disproportional regulation in German law.[43] Since the making of such an order would follow from a finding of violation under FC s 25(1), the development of such a remedial jurisprudence would not be tantamount to the acceptance of regulatory takings.[44] A constitutional claimant who sought just and equitable compensation would still need to meet whatever criteria were established for a finding of expropriation under FC s 25(2).

Given the 'algorithmic'[45] structure of the property clause inquiry, it is extremely unlikely that the final, general limitations, stage will ever be reached. If reached, it is even less likely that this stage will determine the outcome of a case. As we have seen, both laws that provide for the deprivation of property *and* those that provide for the expropriation of property will first be tested against FC s 25(1). Should the court find that FC s 25(1) has been infringed, either because the deprivation did not take place 'in terms of law of general application', or because the law authorizing the deprivation was arbitrary, the state could theoretically seek to justify such infringement under FC s 36. On closer analysis, however, the application of FC s 36 to infringements of FC s 25(1) is beset by conceptual difficulties.[46] Deprivations that limit FC s 25(1) because they do not occur 'in terms of law of general application' cannot be saved by FC s 36 because the precondition for the application of this section is that the limitation should have occurred 'in terms of law of general application'. And a law of general application that permits the arbitrary deprivation of property, either because it is procedurally unfair or because it provides insufficient reason for the deprivation, is hardly likely to be 'reasonable and justifiable in an open and democratic society', as required by FC s 36(1).

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[40] *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC).

[41] *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd (Agri SA & Others,* Amici Curiae) 2005 (5) SA 3 (CC).

[42] Cf the Supreme Court of Appeal's decision, which is based on a violation of FC s 25: *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre,* Amici Curiae*); President of the Republic of South Africa & Others v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre,* Amici Curiae*)* 2004 (6) SA 40 (SCA).

[43] See the discussion in Van der Walt *Constitutional Property Law* (supra) 221-23 and Alexander (supra) 120-21.

[44] Cf Alexander (supra) 121 (arguing that equalization does not mean 'that there is something like inverse condemnation in German law).

[45] The use of the term 'algorithm' in this context is drawn from Iain Currie's chapter on the property clause in Iain Currie & Johan de Waal *The Bill of Rights Handbook* 5ed (2005) 536.

[46] Ibid at 561-63.

In dealing with the question of justification in *FNB*, the Court acknowledged these difficulties, but assumed in favour of the state, without deciding, that FC s 36 *was* applicable to infringements of FC s 25(1).[47] The Court then proceeded to apply a pared down version of its FC s 36(1) limitation test to the facts, as follows:

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

This passage tends to confirm that FC s 36 has 'no meaningful application'[48] to infringements of FC s 25(1). The issues addressed by the Court are precisely the same as those addressed in its test for arbitrary deprivation. The fact that FNB's ownership of the vehicles was 'completely extinguished' is addressed in sub-paras (d) and (f) of that test, which require the Court to examine 'the extent of the deprivation' and whether it 'embraces all the incidents of ownership'. And the absence of a 'connection between FNB or its vehicles and the customs debt' was central to the Court's earlier finding that 'no sufficient reason' existed for the deprivation.[49]

In cases where the test for arbitrary deprivation approximates rational basis review the case for the non-application of FC s 36 is incontrovertible: a law that infringes FC s 25(1) for lack of means-end rationality will never be capable of justification under the general limitations clause. At the other end of the scale, where the test for arbitrary deprivation approaches the FC s 36 test for proportionality, the application of FC s 36 can at best confirm a conclusion already reached under FC s 25(1), as illustrated by *FNB*.[50]

FC s 36 also applies in theory to a law of general application that authorizes the expropriation of property other than for a public purpose or in the public interest, or which fails to provide for the payment of just and equitable compensation. No such law is ever likely to survive constitutional scrutiny until the final stage, and if it does, it is unlikely to be justifiable under FC s 36. For the reasons given earlier, a law providing for the expropriation of property that is not aimed at achieving a public purpose or is not otherwise in the public interest will in all likelihood fail the test for arbitrary deprivation. In the unlikely event that it survives constitutional scrutiny to the fifth stage, it will be struck down for violating FC s 25(2)*(a)*. Thereafter, the state would be faced with the conceptually impossible task of having to justify, as being reasonable and justifiable in an open and democratic society, a law that *ex hypothesi* was enacted in pursuit of a private purpose. Similarly, an expropriatory law that was struck down for failing to provide for just and equitable compensation could hardly be found to be reasonable and justifiable under FC s 36 unless the impact of the law was so inconsequential as not to require

[47] *FNB* (supra) para 110.
[48] Currie & De Waal (supra) 562.
[49] *FNB* (supra) para 109.
[50] See also *Janse van Rensburg NO v Minister van Handel en Nywerheid* 1999 (2) BCLR 204 (T) at 222E. The contrary finding, in *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 (2) SA 535 (C), that an infringement of FC s 25(1) was justified under FC s 36, is explicable on the basis that the limitations clause was applied to justify the infringement of other rights as well, meaning that the finding in this case that the law was justified was not specific to the finding that the law infringed FC s 25(1). In addition, the *Bathgate* decision predates that in *FNB* (supra), and accordingly did not apply the arbitrary deprivation test as laid down in that case.

compensation, in which case the better finding would be that the payment of nil compensation was just and equitable under FC s 25(2) and (3).[51]

For all these reasons the test for arbitrary deprivation will have the effect of minimizing the importance of the other stages of the property clause inquiry. No doubt, the courts will still go through the motions of considering the other stages, and it is not inconceivable that a claim may be rejected because the interest at stake is considered not to amount to constitutional property,[52] or because the regulation at issue is considered to be too inconsequential as to amount to deprivation.[53] But the focus of attention in all future cases, with the exception of disputes purely about the quantum of compensation, is likely to fall on the third stage. The implication of this prediction in turn is that foreign law will have little relevance to the resolution of future constitutional property cases. Multi-factor balancing tests like those prescribed in para 100 of *FNB* are impervious to foreign-law influence because their very purpose is to focus the court's attention on the facts of the particular case, rather than principles or rules laid down in other decisions. Indeed, as argued earlier, even South African decisions applying the test for arbitrary deprivation will have little precedential affect, unless and until the Constitutional Court begins to give thicker, substantive reasons for the weight it chooses to give the various considerations in para 100.[54]

[51] Cf Currie & De Waal (supra) 563 discussing *Nhlabathi & Others v Fick* [2003] 2 All SA 323 (LCC); 2003 (7) BCLR 806 (LCC).

[52] Cf Van der Walt *Constitutional Property Law* (supra) 72.

[53] In *Mkontwana* (supra) para 32 the Constitutional Court flirts with the dangerous idea that 'normal restrictions on property use or enjoyment found in an open and democratic society' might not amount to deprivation of property, but in the end declares this part of the judgment to be obiter. See the discussion in Van der Walt *Constitutional Property Law* (supra) 127.

[54] Cf Van der Walt *Constitutional Property Law* (supra) 40-42 (giving a more positive account of the *FNB* decision in this respect). As Van der Walt notes, Sachs J's judgment in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 15-23 *does* begin to supply these thicker, substantive reasons in explaining the relationship between FC s 25 and FC s 26(3) (protection against arbitrary eviction). But the Court's remarks in this decision are obiter dicta as far as the property clause inquiry is concerned. *Mkontwana* (supra) was disappointingly silent on the purposes informing constitutional property rights protection in South Africa, whilst the Constitutional Court's decision in *Modderklip* (supra) bypassed the property rights aspect of that case, choosing to decide the question under the right of access to courts (FC s 34).