

EXPROPRIATIONS AND DEPRIVATIONS OF PROPERTY

DEFINITIONS

There is an overlap between the concepts of deprivation (in section 25 (1) of the Constitution) and expropriation (in section 25 (2) of the Constitution). All expropriations of property are deprivations, but not all deprivations are expropriations. The concept of “deprivation” is therefore wider than, and overlaps with, the concept of “expropriation”.

See *First National Bank of SA Ltd t/a Westbank v Commissioner, South African Revenue Services* 2002 (4) SA 768 (CC): para 57.

The Constitutional Court has defined “deprivation” as:

“[A]ny interference with the use, enjoyment or exploitation of private property...”

See the *FNB* case: para 57; the *Mkontwana* case: para 32

It has also been said that:

“[W]hether there has been a deprivation of property depends on the extent of the interference or limitation of use, enjoyment or exploitation . . . substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.”

See the *Mkontwana* case: para 32

Also consider the remarks of O Regan J in her separate concurring judgment in the ***Mkontwana*** case:

“Some deprivations of property rights, although not depriving an owner of the property in its entirety, or depriving the holder of a real right of that real right, could nevertheless constitute a significant impairment in the interest that the owner or real right holder has in the property. The value of the property in material and nonmaterial terms to the owner may be significantly harmed by a limitation of the rights of use or enjoyment of the property. If one of the purposes of section 25(1) is to recognise both material and the non-material value of property to owners, it would defeat that purpose were deprivation to be read narrowly.”

See the *Mkontwana* case: para 89

The concept of “expropriation” is narrower and deeper. An expropriation is not simply an “interference” with property. It is an extinction of rights in property against the payment of compensation. Compulsory acquisition of ownership of property by the state, in return for payment some approximation of the value of the property is a classic example of an expropriation. The Constitutional Court has said:

“The word ‘expropriate’ is generally used in our law to describe the process whereby a public authority takes property (usually immovable) for a public purpose and usually against the payment of compensation.”

See *Harksen v Lane NO 1998 (1) SA 300 (CC)*: para 31

Section 28 (3) of the Constitution also says that an expropriation must be for a public purpose or in the public interest and must be made against the payment of compensation either agreed between the parties or determined by a court. In the Harken case, the Constitutional Court also said (controversially) that an expropriation must be directed toward a permanent divestment (or extinction) of rights. A mere temporary taking of property is not sufficient to amount to an expropriation.

See the *Harksen* case: paras 35 and 36

The concepts of deprivation and expropriation often run into one another. Sometimes a mere “interference” with property is so invasive that it amounts, for all practical

purposes, to a permanent extinction of rights. Even though a property holder is not formally and permanently deprived of rights, the practical effect of the interference is to expropriate the property.

In order to deal with this difficulty, the US Supreme Court has developed a concept of “constructive expropriation”. No such concept has yet been imported into South African law, but the Supreme Court of Appeal has said (without deciding) that there may be room for such a concept, in order to properly deal with the many practical complexities of state interference with property.

See *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA)

LAWFULNESS OF DEPRIVATIONS

Not all deprivations of property are unlawful. Section 25 (1) of the Constitution says that a deprivation must be authorised by a law of general application and must be non-arbitrary.

The ***Reflect All*** case also tells us what the purpose of the arbitrariness test is:

“The protection of property is a fundamental human right, one which for decades was denied to the majority of our society. However, property rights in our new constitutional democracy are far from absolute; they are determined and afforded by law and can be limited to facilitate the achievement of important social purposes. Whilst the exploitation of property remains an important incident of landownership, the state may regulate the use of private property in order to protect public welfare, e.g. planning and zoning regulation but such regulation must not amount to arbitrary deprivation. The idea is not to protect private property from all state interference but to safeguard it from illegitimate and unfair state interference.”

See the *Reflect All* case: para 33

Arbitrariness is a broad concept. It has been defined, minimally, by the court as a deprivation which authorised “without sufficient reason” and/or in a manner which is “procedurally unfair”.

See the *FNB* case: para 100

The meaning of “sufficient reason” varies according to context. It can mean anything from “a legitimate purpose” (commonly called a “rationality test”) to “proportional to the end to be achieved” (commonly called a “proportionality test”).

For example:

A metro police officer finds an informal trader trading in a zone where informal trading is prohibited. He has a number of powers at his disposal to stop the informal trading. He may move the trader on with his goods, issue a notice giving the trader a period of time to vacate the area with his goods, fine the trader for violating the prohibition or confiscate the trader’s goods.

He chooses to confiscate the trader’s goods. He thereby deprives the trader of his property. Does he have “sufficient reason” to do so? If the test is based on mere rationality, he clearly does. The confiscation takes place for a legitimate government purpose (the regulation of informal trading).

But if the test is one of proportionality things aren’t so clear. Is the confiscation proportional to the end to be achieved? Well, that depends on the context. What are the consequences (to the trader) of confiscating the trader’s property? How urgent is it to stop the informal trading? Has this particular trader been given an opportunity to comply with the law without a confiscation? Has he been fined? All of these factors may be relevant to whether the deprivation (and the legislation authorising it) is “arbitrary”.

The importance of context is emphasised in the *FNB* case. There, the Court sets out 8 factors it will take into account in interpreting the meaning of “sufficient reason”:

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

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

(c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose 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 moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.

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

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of the 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) Where there is sufficient reason to warrant the deprivation is a matter to be decided on all the facts of each particular case, always bearing in mind that the enquiry is concerned with arbitrary in relation to the deprivation of property under section 25.”

This passage says everything and nothing. What it adds up to is this: first consider the cluster of relationships between the property, the property holder, the state, the purpose of the deprivation, the nature of the deprivation and the kind of property in

question (a)-(f). Then decide what test to apply: rationality, proportionality or something in between (g). Then apply that test to the facts of the case.

The purpose of describing the meaning of “sufficient reason” in this way is probably to reserve as much discretion to the courts as possible.

See the *FNB* case: para 100

There are similar difficulties with procedural fairness. The requirements of procedural fairness also depend on context. Sometimes all that is required is notice of the deprivation; at other times, an opportunity to make written and oral representations will be required. Sometimes a complete departure from the normal precepts of procedural fairness will be warranted. The nature, invasiveness and consequences of the deprivation will have to be balanced against the practicalities and costs of notice and consultation.

See, for example, the *Reflect All* case: para 46; see also the *Mkontwana* case: para 65

AN APPLICATION AND DEVELOPMENT OF SECTION 25 (1) OF THE CONSTITUTION: MKONTWANA v NELSON MANDELA METROPOLITAN MUNICIPALITY

In the *Mkontwana* case, the Constitutional Court had to consider whether section 118 (1) of the Municipal Systems Act 32 of 2000 amounted to an arbitrary deprivation of property. Section 118 (1) prohibits the transfer of ownership of immovable property until the municipality having jurisdiction over it has certified that the water and electricity consumption charges levied against the property during the two years immediately preceding the transfer have been paid.

The applicants contended that section 118 arbitrarily deprived them of the right to sell their property, because it did not matter, for the purposes of the section, whether

the owner himself had run up water and electricity charges. The owner would still be barred from transferring his property to another even if the charges had been run up by a tenant or an unlawful occupier. The High Court decided section 118 was arbitrary because it effectively interfered with an owner's right to sell his property even if there was no connection between him, the property and the consumption charges run up on the property.

The Constitutional Court disagreed. In doing so, it applied, expanded on and reformulated the test as developed in **FNB**.

The Court reformulated the test as follows:

“To determine whether there is sufficient reason for a permitted deprivation, it is necessary to evaluate the relationship between the purpose of the law and the deprivation effected by that law. A complexity of relationships must be considered in this assessment including that between the purpose of the provision on the one side, and the owner of the property as well as the property itself on the other. If the purpose of the law bears no relation to the property and its owner, the provision is arbitrary. The customs law in issue in the FNB case fell into this category. It permitted total deprivation of property even when the customs debt bore no relationship either to the owner or to the property itself.

The FNB judgment also sets out the approach to be adopted if there is a connection between the purpose of the deprivation and the property or its owner. In these circumstances, there must be sufficient reason for the deprivation otherwise the deprivation is arbitrary. The nature of the relationship between means and ends that must exist to satisfy the section 25(1) rationality requirement depends on the nature of the affected property and the extent of the deprivation. A mere rational connection between means and ends could be sufficient reason for a minimal deprivation.

However, the greater the extent of the deprivation the more compelling the purpose and the closer the relationship between means and ends must be.”

See the *Mkontwana* case: paras 34 and 35

The Court found that there was a relationship between the owner, the property and the consumption charges, even if the owner had not run them up. It then considered whether the deprivation was arbitrary. Here, it held, the general question was: Is there an appropriate relationship between means and ends? In answering this question, there are three things to consider:

- (a) the nature of the property concerned and the extent of the deprivation;
- (b) the nature of the means-ends relationship that is required in the light of the nature and extent of the deprivation; and
- (c) whether the relationship between means and ends accords with what is appropriate in the circumstances and whether it constitutes sufficient reason for the section 25(1) deprivation.

See the *Mkontwana* case: para 44

The Court found that sufficient reason existed to render section 118 non-arbitrary on three broad bases:

1. The collection of municipal debt is an important public purpose. Municipalities must be able to collect debts owing in respect of water and electricity consumption charges. Property owners derive considerable benefit from having services supplied to their properties;
2. The deprivation envisaged by section 118, while significant, was not total. It only lasted for two years.
3. Owners can and should be expected to exercise reasonable care of their properties to ensure that excessive consumption charges are not run up, even by unlawful occupiers.

See the *Mkontwana* case: paras 44 to 64

It was also decided that the deprivation envisaged by section 118 was not procedurally unfair, so long as it is interpreted to imply an obligation on municipalities

to render monthly service accounts to an owner at his request. This would ensure that the owner had notice of the charges being levied against his property.

SOME FURTHER DEVELOPMENTS IN EXPROPRIATION: HAFFEJEE NO v ETHEKWINI MUNICIPALITY

A number of further important aspects of sections 25 (2) and 25 (3) of the Constitution were considered in ***Haffejee v eThekwini Municipality 2011 (6) SA 134 (CC)***. In this case, the state (in the form of eThekwini Municipality) expropriated land belonging to a trust on the banks of the uMngeni river. The date set for the expropriation of the trust's property passed, but, before the amount, time and manner of payment of compensation had been determined, the Municipality applied to evict the Trust. The Expropriation Act 63 of 1975, in terms of which the expropriation took place, allows for an expropriation to take place before the amount, time and manner of payment is determined.

The trust defended the application by arguing that the Expropriation Act is unconstitutional, because section 25 (2) of the Constitution states that expropriation is "subject to" just and equitable compensation, the amount, time and manner of payment of which "have been" determined by agreement or determined by a court. Emphasising these words in section 25 (2) of the Constitution, the trust argued that the Constitution requires that compensation must be determined before expropriation takes place, that the Expropriation Act is unconstitutional because it permits otherwise, that the expropriation of its land was unlawful and that the eviction order should be set aside.

The Constitutional Court held unanimously that section 25 of the Constitution does not require compensation to be determined or paid prior to expropriation in every case. Generally speaking, this is desirable, but there may be cases, such as a natural disaster, where it may not be possible.

The Court further held that section 25 (3) of the Constitution empowers a court to decide whether, on the facts of a particular case, compensation should be determined before or after expropriation, and can make orders to protect the expropriated owners in the meantime. For example, an expropriated owner with no ready access to alternative accommodation may be expropriated before compensation is determined, but probably would not be evicted before the compensation is paid, and has been afforded a reasonable opportunity to purchase alternative accommodation.