

CONSTITUTIONAL PROPERTY RIGHTS

We have now considered the various sources of property law in outline. The rest of this course will be devoted to an in-depth investigation of how these sources interact with each other to produce the body of rules, principles and concepts which is “property law” in South Africa today.

The starting point for this investigation is section 25 of the Constitution. This is the ultimate source of South African property law. In this lecture, we will consider the letter and purposes of Section 25. We will also consider, at a somewhat superficial level, the distinction between “expropriations” and “deprivations” of property. A basic understanding of this distinction is essential to come to grips with the meaning and impact of section 25 more generally.

Some history

Before we turn to the text itself, it is necessary to consider the background to the adoption of the Constitutional Property Clause. That is because the clause manages an inherent political tension. The text of the clause was negotiated reconciliation between disparate political ideals. On the one hand, the National Party and various liberal centre parties, wished to ensure that existing holdings of property by the white minority, and by large commercial enterprises (which were themselves controlled by the white minority) would be protected against undue state interference. On the other hand, more radical wings of the ANC and its partners in the communist party and the union movement, saw the need to take fairly far reaching steps to redistribute property rights in order to correct the imbalances in wealth and power created by colonialism and apartheid. While more conservative, nationalist traditions within the

ANC would have emphasised that simply lifting apartheid-era restrictions on black property ownership and commercial activity would go some way towards correcting these imbalances, there was doubtless a consensus within the liberation movement that some legal space was required to enable the state to interfere with property in the public interest, and to redistribute property to redress historical imbalances in the distribution of wealth and property.

As a result, Section 25 of the Constitution (as well as section 28 of the interim constitution – which need not concern us here) is an attempt to secure existing property holdings, while permitting rational, law-bound programmes for the redistribution of property rights. This can be seen from a close examination of the text.

The text

25 Property

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*
- (2) Property may be expropriated only in terms of law of general application -
 - (a) for a public purpose or in the public interest; and*
 - (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.**
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including-
 - (a) the current use of the property;*
 - (b) the history of the acquisition and use of the property;*
 - (c) the market value of the property;**

- (d) *the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*
 - (e) *the purpose of the expropriation.*
- (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.*
- (5) *The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.*
- (6) *A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.*
- (7) *A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.*
- (8) *No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).*
- (9) *Parliament must enact the legislation referred to in subsection (6).*

Section 25 can be considered as falling to two parts. The first part (subsections 1 to 3) constitutes the “protective” clauses. The second part (subsections 4 to 9) is made up by the “reforming” clauses. We will consider each, in turn below.

The Protective Clauses

The effect of the protective clauses is to freeze property holdings as they were on the day the Constitution was adopted. Accordingly, no-one who had legal title to property the day before the Constitution was adopted (however much their holding of that property depended on historical injustices, conquest or dispossession) could have the property taken away from them – save insofar as the property clause permitted.

Section 25 (1) of the Constitution deals with “deprivations”. A “deprivation” of property is any interference with the use or enjoyment of property. It extends to any sort of regulatory interference with a person’s property rights or interests. For example, planning regulations, environmental laws and health and sanitation laws all interfere, to some extent with property interests - you can’t building an extension to your house without getting planning permission; you can’t let a property out as a hotel without a permit; there are restrictions on what you can do with property which has a specific environmental or historic significance; if there are unlawful occupiers on your property, you cannot remove them without a court order, and you cannot get a court order if it would not be just and equitable to evict them. These are all of “deprivations” of property. They must be “non-arbitrary” and permitted by a “law of general application”.

As the Constitutional Court made clear in **First National Bank v Commissioner, SARS**, in order to be “non-arbitrary” there must be sufficient reason for a deprivation, and the deprivation must take place in a procedurally fair manner. There is sufficient

reason for a deprivation if there is a close enough link between the purpose of the deprivation and the property concerned. We will consider the meaning of “arbitrary” in great detail later on in the course.

Section 25 permits a “deprivation” of property without the payment of compensation. Given all of the regulatory interferences with property which amount to deprivations, we can readily understand why.

However, Sections 25 (2) and (3) of Constitution deal with “expropriations” of property, and makes extensive provision for the payment of compensation in the event of an expropriation.

The definition of “expropriation” and the distinction between expropriation and deprivation was dealt with in **Harksen v Lane NO**. In that case, the Court considered the issue of the constitutionality of section 21 of the Insolvency Act 24 of 1936.

Section 21 of the Act provided that, on the sequestration of the estate of an insolvent spouse, all the property of the solvent spouse vests in the Master and thereafter in a trustee (once one has been appointed) and that the solvent spouse's property shall be dealt with by the Master or the trustee as if it were the property of the sequestrated estate. The section also provided certain safeguards for the solvent spouse by allowing him or her to reclaim property upon proof that it falls into one of the following categories: (a) property of the solvent spouse acquired before her or his marriage to the insolvent; (b) property acquired by the solvent spouse under a marriage settlement; (c) property acquired by the solvent spouse during the marriage

by a title valid as against creditors of the insolvent; (d) policies of life insurance protected by the provisions of the Insurance Act 27 of 1943; (e) property acquired with, or with the income or proceeds of, property referred to in (a) to (d).

The applicant, a Mrs. Harksen, was married, in community of property to a (notorious) businessman known as Jurgen Harksen. Jurgen went insolvent. Mrs. Harksen's property was accordingly sequestrated together with his. She argued before the Constitutional Court that the sequestration provided for by section 21 of the Act constituted an uncompensated expropriation contrary to the Constitution. (Mrs. Harksen based her case on section 28 of the interim Constitution, but you need not worry about that – the principles applicable are the same).

The Constitutional Court decided that section 21 of the Act did not constitute an “expropriation” of property – it was merely a “deprivation”. It stated, at para 32, that –

“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 payment of compensation. Whilst expropriation constitutes a form of deprivation of property, s 28 makes a distinction between deprivation of rights in property, on the one hand (ss (2)), and expropriation of rights in property, on the other (ss (3)). Section 28(2) states that no deprivation of rights in property is permitted otherwise than in accordance with a law. Section 28(3) sets out further requirements which need to be met for expropriation, namely that the expropriation must be for a public purpose and against payment of compensation.”

Section 21, according to the Court at para 36, is not an expropriation, because -

“While the legal effect of s 21(1) may be to 'transfer' ownership of the property of the F solvent spouse to the Master or trustee, in order to determine whether or not such a 'transfer' constitutes an expropriation of that property for the purposes of the property clause, regard must be had to the broad context and purpose of s 21 as a whole. Apart from the question as to whether the transfer of the property of the solvent spouse is for a 'public' purpose, to regard G the vesting under s 21(1) as an expropriation, in my opinion, is to ignore the substance of the provision. The purpose

and effect is clearly not to divest, save temporarily, the solvent spouse of the ownership of property that is in fact his or hers. The purpose is to ensure that the insolvent estate is not deprived of property to which it is entitled. The fact that the *onus* of establishing his or her ownership of the property is placed upon the solvent spouse should not in any way be confused with the purpose of the provision. In any vindicatory action the claimant has to establish ownership. The *onus* of proof had to be placed on either the Master or the trustee or on the solvent spouse. Having regard to which of those parties has access to the relevant facts, the *onus* was understandably and justifiably placed on the solvent spouse.

“Again, on the assumption that the effect of s 21 is to 'transfer' ownership of the property of the solvent spouse to the Master or the trustee, the section does not contemplate or intend that such transfer should be permanent or for any purpose other than to enable the Master or the trustee to establish whether any such property is in fact that of the insolvent estate. Again, there is no intention to divest the solvent spouse permanently of what is rightfully hers or his or to prejudice the solvent spouse in relation to her or his property. Hence the provisions enabling the solvent spouse to seek the assistance of the court in order to obtain the release of that which is his or hers and to seek the protection of the Court in the event of the trustee wishing to sell such property prior to its release. So, too, the provision enabling the Court to order the exclusion of property of the solvent spouse from the operation of a vesting order in the event that such spouse is a trader or is likely to suffer serious prejudice by reason of an immediate vesting. The whole thrust of s 21 is merely to ensure that property which properly belonged to the insolvent ends up in the estate. The statutory mechanism employed is temporarily to lay the hand of the law upon the property of both the insolvent spouse and the solvent spouse and to create a procedure for the release by the trustee or the court of that which in fact belongs to the solvent spouse.”

Two things emerge from these passages. First, an “expropriation” of property is a particular kind of “deprivation”. All expropriations are deprivations, but not all deprivations are expropriations. Second, an expropriation is a particularly invasive deprivation – one that extinguishes rights completely, irrevocably and permanently. However, much depends on the context - even a transfer of ownership which might end up as permanent may only amount to a “deprivation” if regard is had to the purpose of the taking and the possibility that it may be revoked.

The protective clauses of Section 25 accordingly provide a comprehensive framework within which existing property holdings can be recognised and protected

while at the same time allowing interference with them for specifically identified public purposes.

Section 25 (2) makes it clear that expropriations must be in the public interest or for a public purpose, and subject to compensation calculated in a manner compatible with section 25 (3).

The Reforming Clauses

Having recognised and protected existing holdings of property, Section 25 set out a whole range of purposes and mechanisms through which property holdings can be interfered with, each potentially more invasive than the last –

- Section 25 (4) makes clear that the “public interest” for the purposes of the expropriation clause can include the need to redistribute land to correct historical imbalances, and that “property” is not limited to land. We dealt with the range of interests potentially protected as property in the last lecture.
- Section 25 (5) requires that state to take measures “to foster conditions which enable citizens to gain access to land on an equitable basis”. There’s not much more here than an injunction on the state to have some sort of policy which addresses landlessness. On the plain wording of the section, the state need not even do so directly – it need only “foster conditions” which enables anyone (not just previously disadvantaged groups) to access land on an equitable basis. At its most modest, this could mean simply having the machinery in place to sustain an efficient land market.

- Section 25 (6) goes further and requires Parliament to pass a law which allows people with “legally insecure tenure” to tenure which is legally secure, or to equitable redress. Under this banner we might include occupiers for the purposes of IPILA, the Conversion of Leasehold Rights to Ownership Act, the Labour Tenants Act or even ESTA. We will deal with these statutes in great detail later in the course. There is, however, no blanket statute providing legally secure tenure to people living precariously because of colonialism and apartheid. Would people living in inner city buildings and informal settlements count? Are their interests already adequately protected by the PIE Act? We will consider these questions later in the course.
- Section 25 (7) goes further and provides a positive right to restitution of specific land to people who were deprived of that land after 1913 as a result of racially discriminatory laws or practices. The Act of Parliament passed to give effect to this provision is the Restitution of Land Rights Act, which we will address in greater detail later in the course.
- Section 25 (8) is perhaps the most radical. It limits the application of section 25 by reserving to the state the right to undertake any “land, water or related” reform so long as the reform is embodied in legislation compliant with section 36 of the Constitution. This means, theoretically, that an Act could be passed which expropriates land without compensation (so long as the absence of compensation could be justified under section 36). It allows the state to embark upon a much more radical programme of land reform than permitted

either by the protective clauses, or by land reform programmes as have been adopted to date.

- Section 25 (9) compels Parliament to pass a tenure reform statute.

Accordingly, section 25 is a broad provision, which permits a whole host of interferences with property while in the meantime preserving property relationships as they stood at the end of apartheid. Despite much recent controversy about apparent threats to the Constitution through more radical programmes of land reform, the fact is that section 25 of the Constitution permits far more redistribution than is commonly understood. Even a very radical programme of redistribution would be accommodated in its terms – so long as it was orderly, properly reasoned and justified to the standards of equity and fairness implicit in the Constitution itself.