

# Trends in the South African Constitutional Court's jurisprudence on property protection and regulation

by Hanri Mostert

In South Africa, property protection and regulation is a captivating issue. Section 25 of the 1996 Constitution represents one of the most complex deals that resulted from the negotiations for a new democracy. This property clause regulates the extent to which the state can justifiably place restrictions on private property; and the circumstances under which compensation can be claimed for such restrictions. It goes further, by providing a blueprint for reforming existing patterns of control over land. It contains a commitment to the objectives of access to land, provision of legally secure land tenure, land restitution and related reforms. This contribution discusses the South African Constitutional Court's treatment of the dialectic interests for which section 25 caters.

By now it is trite that the South African property clause is characterised by inherent tension between its dichotomously protective and reformative aspects (AJ van der Walt, *Constitutional Property Law*, (2005) 17). This is reinforced by the interaction of section 25 with other fundamental rights provisions, such as the right to housing (s 26), just administrative action (s 34) etc. The exact provisions of section 25 read:

## 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 tenure which is legally secure or to comparable 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).

The general tenor of academic work regarding South African constitutional property law is that the political compromise embodied in the property guarantee, alongside the many comparative influences that shaped its character, caused some uncertainty as to the exact meaning and content of the property clause.<sup>1</sup> The burgeoning body of case law<sup>ii</sup> in which section 25 had been considered, shows that the universally unavoidable problem, regardless

of the intricacies of any given case, still is to determine and justify the parameters of permissible legislative interference with specific property rights. This refers to issues concerning (i) the kind of interferences with property envisaged; (ii) the purposes that would justify such interference; (iii) the kind of interference that would give rise to compensation; and (iv) how compensation should be determined in such cases.

Central to the resolution of all of these issues is the relation between existing private property interests and state purposes. This resounds in questions, frequently broached in case law, about the kinds of duties attributed to the state in dealings with private property and public interest; and the responsibilities befalling individuals whose property rights are affected by state conduct. To explore the South African Constitutional Court's take on this central and influential element of the emerging law on constitutional property protection, the standards set by the Constitutional Court's first major engagement with section 25 in the well-known case of *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) / 2002 (7) BCLR 702 (CC) are briefly considered. This forms the point of departure for a closer analysis of three further decisions of the Constitutional Court, and the impact they have on issues relating to the parameters of permissible legislative interference with specific property rights.

## CONSTITUTIONAL STANDARDS

The 2002 Constitutional Court decision in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* ("the FNB decision") was the first major engagement with section 25. It still represents the most comprehensive consideration to date of the structure and application of section 25 to particular disputes. As such, it remains a valuable account of the framework for constitutional property protection and regulation in South Africa.

The case dealt with the constitutionality of a law (s 114 of the Customs and Excise Act 91/1964) permitting the confiscation, by the Revenue Service, of movable property (vehicles) belonging to First National Bank, to settle the tax debt of some of the bank's debtors, who were purchasing the property by way of installments. In applying section 25 to the matter, the court confirmed (para 59 ff) that the South African Constitution foresees a broad range of limitations on property rights generally designated as "deprivations." "Expropriations" are deprivations that give rise to compensation, and which form a special "subcategory" within the system of limitations. Under section 25(1), the basic requirements for all deprivations (also expropriations) are that they must be undertaken by a law of general application and may not be arbitrary. They must also, in terms of section 36(1) be reasonable and justifiable in an open and democratic society based on

human dignity, equality and freedom. In addition, *expropriations* are expressly required by section 25(2)(a) to be for a public purpose or in the public interest. A constitutionally valid expropriation must give rise to the payment of compensation, in terms of section 25(2)(b) read with section 25(3)(a) to (e), which determines how such compensation should be calculated.

Then the court used the requirement in section 25(1), that deprivations of property may not be "arbitrary", to develop a flexible test, by which to determine whether there was "sufficient reason" for an infringement upon property rights (para 100 ff). The test entailed the consideration of various relationships between the infringement, its purpose, the law effecting it, the property affected and its nature. In this particular case, the court found that the "net [was cast] far too wide", and the provision was accordingly declared unconstitutional (para 108).

The court's stance on how the "sufficient reason" test should be understood, gives some idea on the purposes that would justify the infringement of property rights: The more extensive the affected property interest or restriction, the more compelling the purpose of the restriction would have to be (para 100(e)-(f)). Through this engagement with the complex relationship between the individual and the state, it becomes clear that the instances where the additional requirements for expropriation are not applicable will be most problematic. In the case of expropriation, it is expressly stated that the public interest or a public purpose must justify the infringement. There is no such express requirement for deprivations in general. It is assumed that restrictions promoting public health or safety should be permissible, because it is a traditional function of the state to regulate the use and enjoyment of private property for these reasons (A J van der Walt, *The Constitutional Property Clause*, 1997, 103 ff, 129 ff). But whether *other* state functions warrant infringement, and to what extent, were matters that could not be clarified in *FNB*.

## SUBSEQUENT DEVELOPMENTS IN CONSTITUTIONAL PROPERTY JURISPRUDENCE

*FNB* illustrated that the justification for valid infringement pivots on the relationship between "the sacrifice the individual is asked to make and the public purpose this is intended to serve" (para 98). This latter point is underscored by the spirit of the South African Constitution, and has gained further importance in subsequent case law.

The South African constitution's commitment to the core value of social justice in its preamble attests to the influence of, among others, the idea of social responsibility on our law (further details in H Mostert, *Constitutional Protection and Regulation of Property*, (2002) Springer 148ff). As regards property in particular, the dual character of

section 25 as a means to protect rights and to promote social justice, further confirms that under the Constitution, property does not have the same kind of inviolable conceptual integrity as one often encounters in conventional, private-law thinking (see AJ van der Walt, *Constitutional Property Clause*, (1997, Juta) 55ff; confirmed in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 15; *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) / 2002 (7) BCLR 702 (CC) paras 50-52.) Instead, the whole make-up of the property guarantee pivots on the recognition that private property is limited by the exercise of state powers for the public good. The constitutional paradigm thus already incorporates an acknowledgement that private rights are subject to societal considerations or, conversely, that there rests a responsibility upon private owners to exercise their rights in a way that is conducive to the general public weal (H Mostert “Liberty, Social Responsibility and Fairness in the Context of Constitutional Property Protection and Regulation,” in H Botha et al, *Rights and Democracy in a Transformative Constitution* (2003) Sun Press 159). What remains, is to establish the scope of such an individual responsibility for promoting the public interest.

The FNB court’s remark that reasons for infringement would have to be more compelling in some cases than in others (see above) raises the idea that the social relevance of a particular property interest contributes to the level of protection it deserves, and the degree of sacrifice expected from the individual holder. As case law proliferates, considerations such as these are becoming cemented into the structure of the constitutional property law inquiry. This may be demonstrated by a closer look at three further decisions from the South African Constitutional Court. They are *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) / 2004 12 BCLR 1268 (CC), (the “PE Municipality case”); *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bissett and Others v Buffalo City Municipality*; *Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 1 SA 530 (CC), (the “Mkontwana case”); and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2005 (5) SA 3 (CC) / 2005 (8) BCLR 786 (CC), (the “Modderklip case”).

The PE Municipality case dealt with eviction. At stake was the fate of a small group of about 68 unlawful occupiers, of which about a third were children. They were settled in shacks on unused, private, vacant land within the jurisdiction of the municipality who applied for eviction, at the instance of the landowners, and who denied that it was legally obliged to find suitable alternative accommodation. The essential issue was the manner in which the constitutional right to property can be restricted by the applicability of other fundamental rights, such as the right to housing.

The Mkontwana case was decided just a few days after PE Municipality. It dealt with the question whether interference with individual owners’ ability to alienate their land was permissible, to promote the state’s ability to collect outstanding debts. The owners who were party to the matter were affected by section 118 of the Local Government: Municipal Systems Act 32/2000 or sections 49 and 50(1)(a) of the Gauteng Local Government Ordinance 17/1939. These laws have different application, but more or less the same effect in that they put the responsibility for ensuring payment of consumption charges squarely on the shoulders of private property owners, by placing an embargo on sale of the land where charges for consumption of water and electricity are outstanding. In this way, the laws established a security interest in favour of the municipalities involved. In all the matters that were joined for hearing, the owners themselves did not incur the debts, because there were either tenants or unlawful occupants on the property. In some instances, the owners were not even aware that the debts were escalating, due to the poor administrative practices of the municipalities involved (Mkontwana, para 18). The Constitutional Court essentially had to establish whether the relevant legislation resulted in arbitrary deprivations of property (Mkontwana, para 31, 33 ff).

The Modderklip case was decided about half a year later. It arose from the inability of the state to assist landowners in exercising a legitimate eviction order, obtained from a lower court, to control the massive, incessant influx of unlawful occupiers onto their land. A vast informal settlement had established itself by the time the matter came before the Constitutional Court.<sup>iii</sup> It had to decide upon the kind of relief, if any, that the state was obliged to provide to the landowners (Modderklip, para 42).

The constitutional property guarantee formed part of the resolution to each of the disputes, albeit in very distinct ways. For Mkontwana, an FNB-style analysis and application of section 25 was central to the problem. PE Municipality and Modderklip did not contain an outright analysis of section 25. They nevertheless are important for an understanding of the interference parameter of private property, because of the manner in which they deal with the relation between property and other fundamental rights, such as housing.

The problems posed by each of the cases had serious implications for the public order. The housing need, landlessness and queue-jumping were issues that arose in both PE Municipality and Modderklip. The effectiveness of the sanctions available to the state were at stake in both Modderklip and Mkontwana. They also reflected problems with social transformation where the state is incapable of providing basic means to enforce rights.

In all three of these cases, the Constitutional Court’s decisions were informed by an engagement with the duties and responsibilities of both the state and the various private

stakeholders involved. It is noticeable that the court in each of these three decisions adheres to a notion of individual duty towards the achievement of state goals. The term used in *Mkontwana*, “civic responsibility” (para 38, 52), summarises the idea quite well. There are explanations, in each of the respective decisions that support this notion, even though it is not expressly named in all instances.

In the *Mkontwana* case, the court (through Yacoob J) found that a government purpose which is legitimate and compelling would constitute “sufficient reason”, if it would not be unreasonable to expect an individual to carry the burden thereof in a particular case. The court decided that the owners *could* reasonably be expected to bear the risk of unpaid consumption charges (para 51). It relied heavily on the idea that private owners must contribute proactively to discharging the state’s duties, referring to this as the “civic responsibility” (para 38, 59). Because the benefit of municipal services is an integral, value-enhancing aspect of the property, it was found that landowners should remain responsible for consumption charges (paras 40-42, 53, 61), even where the service was delivered to non-owners (para 47); and even if municipalities’ debt collection structures were patently deficient (para 19-23). The bottom line is that owners must protect their property themselves and ensure that its entitlements can be exercised (para 59). In *Mkontwana*, the court thus developed the idea that individual landowners are expected to shoulder the responsibility for the achievement of state goals or the exercise of state duties, because they are connected to it through the benefits that directly or indirectly befall their property (para 53).

At around the same time, the *PE Municipality* decision developed a similar idea. Sachs J’s decision in *PE Municipality* acknowledged that the judiciary must manage the counterposition of the conventional rights of ownership against the new, equally relevant right not to be capriciously deprived of a home, without creating hierarchies of privilege (para 23). In this sense, the court views itself as the guardian of the public interest (para 29), and the manager of the constitutional attempt to create what the court called a “caring society based on good neighbourliness and shared concern” (para 37). The court clearly herewith recognized the idea of civic responsibility, and underscored it with references to the communitarian philosophy of *ubuntu* and the “need for human interdependence, respect and concern” (para 37). The court required of all those involved in issues of property protection and housing to avoid self-victimisation; and to be adaptable and resourceful in finding ways out of whatever their predicament is. They should look beyond the stereotypes of social nuisance to recognize the dire needs created by poverty and homelessness and do something about it. This understanding of civic responsibility means that in matters of eviction, sacrifice and proactiveness are required both from landowners and occupants (para 20).

Whereas the idea of “civic responsibility” as espoused by these cases certainly promises transformation-friendly solutions to property problems, the outcome of *Mkontwana* anticipates that civic responsibility can also place patently unreasonable burdens on individuals. This is illustrated even better by the state’s argument in the *Modderklip* case. The state raised an argument *a la Mkontwana*: the owners of Modderklip brought their woes upon themselves by not taking effective steps to protect their property at a point when the problem could still have been manageable (para 27). This was a low blow to the Modderklip owners, given all that they had done to try to resolve their problem themselves, and given the state’s irresponsiveness to their attempts (paras 8, 9, 13, 41ff, 48). Yet even this abuse of the idea that ownership entails obligations does not eliminate the possibilities offered by reliance on civic responsibility in defining casuistically the exact parameter of property interference. It merely shows that civic responsibility as a factor influencing the interference parameter needs to be counterposed.

The idea of state duty in the realization of fundamental rights presents itself as a suitable counter-mechanism. This concept is being developed in respect of fundamental rights theory in general, as an alternative to the complexities of the debate surrounding the horizontal application of fundamental rights (see eg A J van der Walt, “Transformative constitutionalism and the development of South African property law” (2005) TSAR 655-89 and (2006) TSAR 1-31). As regards issues of property and housing in particular, *PE Municipality* engaged seriously with the duties of the state in resolving the problem. Sachs J saw the state’s obligation as one of mitigating, rather than intensifying, the marginalization of the poor and the homeless (para 18), to meet the demands of the Constitution. So, while civic responsibility was endorsed unequivocally, even more was demanded from the state, especially in view of the duty to provide access to housing. The court in *PE Municipality* refused to endorse the granting of an eviction, because the municipality did not do enough to find a mediated solution, and did not attend to the genuine needs of the occupiers (para 59).

The importance of state involvement is even more obvious in the context of *Modderklip*. There the court acknowledged the duty of private owners to protect their own property, but found the state’s argument along the lines of civic responsibility unconvincing in view of the landowners’ proactive and ongoing, yet futile, attempts to resolve the problem (para 44). The court regarded the state’s conduct as unreasonable, because it forced private owners to shoulder the burden of providing alternative housing for the unlawful occupants (para 49 ff). The court stressed that the state’s actions cannot be seen to condone queue-jumping as regards access to land and housing (par 34), but it also cannot aggravate the victimization of the landowners affected by rampant, massive unlawful occupation (para 44).

In *Modderklip*, the state's dilemma was that if it carried out the eviction order, it would cause major social upheaval and misery (paras 46-47); and if it failed to enforce the eviction, it would seriously disrupt the public order. Either way, the rule of law would be compromised. Even so, the court held that the state cannot simply "stand by and do nothing" (para 48), just because they want to discourage queue-jumping for housing (para 49). The state has the constitutional duty to ensure progressive realization of the right to access to housing and land, even if its task is immensely difficult, resources scarce and competition intense among people living in the bleakest of conditions (para 49). Under the circumstances, the court found, a more serious attempt could have been made to expropriate the occupied land. That would have alleviated the *Modderklip* owners from bearing a burden patently befalling the state. The court ordered that the occupiers be allowed to stay on the land, against payment of compensation by the state to the landowners (para 68). It seems as if the court had in mind some form of equalisation payment (A J van der Walt, 2005 SAJHR 144-61; *Constitutional Property Law*, 2005, 333), although it does not elaborate on the nature of the proposed compensation. It simply indicated that the amount could be set off against any future amount payable in terms of an expropriation (para 64).

It is noticeable, therefore, that considerations of state duty and civic responsibility influenced the outcome of all these cases. In *Mkontwana*, considerations of civic responsibility were strong enough for the court to turn a blind eye to the possible inefficiencies of the state in fulfilling some of its functions. In *Modderklip*, part of what made the judgment against the state so convincing was the fact that the landowners in that case acted in a "civilly responsible" manner. In both *Modderklip* and *PE Municipality*, however, the state's conduct was also considered more critically than was the case in *Mkontwana*. In both these decisions, the perceived passivity of the state in resolving matters of housing and landlessness tilted the scales against it.

## ASSESSMENT

The interplay between civic responsibility and state duty will have to be thrashed out doctrinally elsewhere, because the scope of this discussion does not allow much more than a few observations. First, as regards the nature of the purposes that would justify infringement upon private property, the *FNB* structure and particularly its application in the *Mkontwana* case demonstrates the need for "compelling and legitimate" state purposes. Though fiscal efficiency was held to be such a state purpose in *Mkontwana*, the decision was criticized severely for the dubious manner in which it elevated deficiencies in the state's debt management system to a public purpose, to be remedied by depriving individuals of property (A J 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) SALJ 84). The relation between *FNB* and *Mkontwana* also show that *even for a single state purpose* – that of the state's fiscal efficiency – the application of the "sufficient reason" test may have very different consequences.

By contrast, the purposes at stake in *Modderklip* and *PE Municipality* were the need to eradicate homelessness alongside the duty to give effect to the fundamental right to housing. *Modderklip* confirmed that limitation of landowners' rights of exclusion for this reason can be regarded as compelling and legitimate, and be a valid deprivation of property. The court expects the landowners to *tolerate* this infringement, but not to *carry the risk* of achievement thereof, as was the case in *Mkontwana*. *PE Municipality* also confirmed that the imposition placed upon landownership by anti-eviction measures is legitimate and compelling, even where their effect is rather extreme. The court here even went as far as indicating that tolerance of such impositions is a proverbial two-way street between the private stakeholders involved. In cases where there are contesting private stakeholders, the state's involvement must be facilitative.

Second, *Mkontwana* (like *FNB*) turned upon the question of "how far" the relevant infringement went: a question that depended on how the interests of the owners and the nature of the property affected are weighed against the public interest. The politics on which such an assessment is based – the importance of a "pro-government" decision – were not revealed. By contrast, both *Modderklip* and *PE Municipality* expressly recognised pressing social realities such as poverty and "intense competition for scarce resources" in finding that passivity on the part of the state cannot be tolerated in matters of housing. These examples render it all the more strange that state passivity can be overlooked and private individuals be expected to carry the risk when (as in *Mkontwana*) the purpose of fiscal efficiency is at stake.

Third, on a structural level, reliance on civic responsibility and state duty may open up possibilities that were eliminated by what had been dubbed the "arbitrariness vortex" created by *FNB*. Essentially, according to this argument, the *FNB*-type inquiry based on section 25 is unnecessarily complicated, since it favours findings upon the basis of rationality, proportionality and justifiability of infringements. It brushes over issues that may be regarded as "technical", ie questions such as (i) whether a property interest is at stake; and (ii) whether a given action amounts to an infringement at all. A potential mechanism with which to "filter out" some matters at an early stage of the inquiry is thus reduced or even eliminated (T Roux "Property," in Stuart Woolman et al (eds) *Constitutional Law of South Africa* (2003), 2<sup>nd</sup> ed, Butterworths LexisNexis). An interactive application of the notions of civic responsibility and state duty could leave room for the question *whether rights had actually been curtailed* to take a more prominent place in the constitutional property inquiry. As such, it responds to the difficulties of

a structure which requires essentially that findings be based upon rationality or proportionality of interference. Though it of course may inform these aspects of an inquiry too, reliance on civic responsibility and state duty could also pave the way for a doctrine in terms of which the social function of property assumes that some types of interference with property does not warrant very intensive levels of scrutiny.

Fourth, much more clarity on the results of particular inroads on property is needed, especially if we take into account the *FNB* legacy. *FNB* left very little room for an argument that the violation of property rights under the deprivations clause may give rise to compensation (for further details, see H Mostert, “The Distinction between Deprivations and Expropriations and the Future of the ‘Doctrine’ of Constructive Expropriation in South Africa,” 2003 (4) SAJHR 567-92). To some extent, *Modderklip* – in adhering to the goals of *PE Municipality*’s social-contextual approach, addresses this problem. It anticipated the payment of an unidentified type of compensation for violation of the rights guaranteed by the deprivations clause. It thus contextualizes the homelessness problem in relation to the state’s constitutional duty to do what is possible, within its resource capacity, to eradicate the problem.

## CONCLUSION

A viable model for determining the interference parameter of property needs to be cognizant of the politics behind particular state goals. In addition, considerations summarized by the term “civic responsibility” must be acknowledged as having a central role in shaping the structure of constitutional property protection in South Africa. It can have a very real impact on the technical aspects of the law. If property law is to develop in a manner sensitive to the constitutional goals of transformation, it is vital to acknowledge that, first, property does not denote only rights of ownership in the narrow conventional private-law sense, but also a broader range of entitlements and interests. Second, this notion of property needs to develop not so much along rights-based lines, but instead towards a more serious engagement with the responsibilities underlying property. The South African constitution endorses that owners must be tolerant of inroads upon their rights, for the sake of the broader public weal. In fact, even more is required. Owners must be both proactive and resourceful in finding solutions to property problems with significant socio-political dimensions. Adherence to the civic responsibility inherent in ownership, however, by no means implies that the state may abdicate its own duties in creating a society based on the values of democracy, freedom, social justice and the rule of law. A heightened awareness of the duties inherent in private ownership brings with it an increased demand on the state to be involved, facilitative, meditative, in fact instrumental, in resolving the tensions between the public interest and private rights.

From an individualistic perspective, the South African case law illustrates that the line between what can be regarded as tolerable sacrifice for the public good and what not, is sometimes very fine. In one instance it may be simply sufficient to hold (as in the *FNB decision*) that the legislature has “cast the net far too wide.” In other instances, as *PE Municipality* illustrates, a cocktail of social and political considerations – such as “neighbourliness and shared concern”, resourcefulness against the odds and state involvement – is required to define the interference parameter of private property.

It would have been easier to make generalisations about how far civic responsibility could be stretched, and to what extent state duty counterposes individual involvement in the resolution of property measures, if there had at least been more clarity on the kinds of state purposes that would justify severe inroads on private rights. The examples available in the South African context deal at present only with the solution of the homelessness problem and with the state’s fiscal efficiency. As concerns homelessness, the South African Constitutional Court requires strong intervention from the state, even if a good measure of civic responsibility is demanded – both from landowners and unlawful occupants – to make solutions work. As regards the state’s ability to manage debt effectively, there seems to be less of a trend.

What definitely is noticeable is the Constitutional Court’s impatience with any form of passivity, be it on the part of the state or the interested property holder. In *Modderklip*, *PE Municipality* and *Mkontwana* – despite their vastly different subject matter and outcomes – the Constitutional Court is pronouncedly against attitudes smacking of an unwillingness on the part of interested parties to get involved and to be resourceful in tackling problems related to property. This gives at least some idea about the outcome of future decisions about the interference parameter of private property. 

### Hanri Mostert

*Professor of Law, Stellenbosch University, South Africa. (hmos@sun.ac.za)*

This article summarises ideas from various papers presented by the author during 2007, at the Institute of Advanced Legal Studies, the meeting of Alexander von Humboldt Fellows at the University of Munich and the colloquium of the United Kingdom National Committee on Comparative Law at the 2007 Society of Law Scholars’ Conference in Durham. A more detailed engagement with the issues raised here is to be published elsewhere. The financial support of the Alexander von Humboldt Foundation and the National Research Foundation has made the research from which this contribution stems possible, and is gratefully acknowledged. The support of Professor Friedrich Schoch, Professor David Carey Miller and Dr Rainer Nowak is recognised with gratitude. Responsibility for opinions expressed and errors remaining lies with the author and should not be attributed to any of institutions or people mentioned.

## NOTES

i There is no scope here to provide a comprehensive list of publications dealing with the interpretation of the South African constitutional property clause or its comparative influences. The following sources may be cited as being representative: **Work dealing with the genesis of the property clause and the interim constitutional period:** Carol Lewis, “The Right to Private Property in a New Political Dispensation in South Africa” (1992) *South African Journal on Human Rights* 389-430; John Murphy, “The Ambiguous Nature of Property Rights” (1993) *Journal of Juridical Science* 35-66; Theunis Roux, “Balancing Competing Property Interests” (1993) *South African Journal on Human Rights* 539-48; André J van der Walt, “Comparative Notes on the Constitutional Protection of Property Rights” (1993) *Recht & Kritiek* 263-97; Andrew Caiger, “The Protection of Property in South Africa” in Mervyn Bennun & Malyn D Newitt (eds) *Negotiating Justice – A New Constitution for South Africa* (1995) University of Exeter Press. **Comparative analyses of interpretative problems in the period before the decision of the Constitutional Court in *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC) / 2002 (7) BCLR 702 (CC)*:** Duard Kleyn, “The Constitutional Protection of Property: A Comparison between the German and the South African Approach” (1996) *SA Publikereg/Public Law* 402-45; Andra Eisenberg, “‘Public Purpose’ and Expropriation: Some Comparative Insights and the South African Bill of Rights” (1995) *South African Journal on Human Rights* 207-21; André J van der Walt, *The Constitutional Property Clause – A Comparative Analysis of Section 25 of the South African Constitution of 1996* (1997) Juta; André J van der Walt, “‘Double’ Property Guarantees: A Structural and Comparative Analysis” (1998) *South African Journal on Human Rights* 560-86; André J van der Walt, *Constitutional Property Clauses – A Comparative Analysis*, (1999) Juta; André J van der Walt, “Compensation for Excessive or Unfair Regulation: A Comparative Overview of Constitutional Practice relating to Regulatory Takings” (1999) *SA Publikereg/Public Law* 273-331; André J van der Walt, “Police Power Regulation of Intangible Property and the Constitutional Property Clause: A Comparative Analysis of Case Law” in Paul Jackson & David C Wilde (eds) *Property Law: Current Issues and Debates* (1999) Ashgate 208-80. **For analyses after and comments upon the FNB decision:** André J van der Walt, “Negating Grotius - The Constitutional Validity of Statutory Security Rights in Favour of the State: *First National Bank of SA t/a Wesbank v Commissioner for the South African Revenue Service 2001 (7) BCLR 715 (C)*” (2002) *South African Journal on Human Rights* 86-113; Theunis Roux, “Property” in Stuart Woolman et al (eds) *Constitutional Law of South Africa* (2003) 2nd ed, Butterworths LexisNexis); André J van der Walt, “Overview of Developments since the Introduction of the Constitutional Property Clause” (2004) *SA Publikereg/Public Law* 46-89; André J van der Walt, “Striving for the Better Interpretation – A Critical Reflection on the Constitutional Court’s Harksen and FNB Decisions on the Property Clause” (2004) *South African Law Journal* 854-78; André J 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) *South African Law Journal* 75-89. André J van der Walt, *Constitutional Property Law* (2005) Juta). **For analyses dealing with the interaction between constitutional property protection and other fundamental rights issues:** André J van der Walt, “The State’s Duty to Protect Property Owners vs the State’s Duty to Provide Housing: Thoughts on the *Modderklip Case*” (2005) *South African Journal on Human Rights* 144-61; André J van der Walt, “Ownership and Eviction: Constitutional Rights in Private Law” (2005) *Edinburg Law Review* 32-64; André J van der Walt, “The state’s duty to pay ‘just and equitable’ compensation for

expropriation: reflections on the *Du Toit case*” (2005) *South African Law Journal* 765-778; André J van der Walt, *Constitutional Property Law* (2005,) Juta; André J van der Walt, “Transformative constitutionalism and the development of South African property law” (2005) *Tydskrif vir die Suid-Afrikaanse Reg* 655-689 and (2006) *Tydskrif vir die Suid-Afrikaanse Reg* 1-31; Warren Freedman, “The constitutional right not to be deprived of property: the Constitutional Court keeps its options open” (2006) *Tydskrif vir die Suid-Afrikaanse Reg* 83-100; André J van der Walt, “Reconciling the state’s duties to promote land reform and to pay ‘just and equitable’ compensation for expropriation” (2006) *South African Law Journal* 23-40.

ii The first extensive consideration of s 25 by the Constitutional Court was in 2002, in *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC) / 2002 (7) BCLR 702 (CC)*, which is discussed here. Various provincial and local divisions of the High Court and the Supreme Court of Appeal have also considered s 25 in a number of cases, which include: *Prior v Battle* 1999 2 SA 850 (TkD); *Joubert v Van Rensburg* 2001 1 SA 753 (W) – eventually heard by the Constitutional Court in *Mkangeli v Joubert* 2001 1 SA 1191 (CC); *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA); *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 1 BCLR 23 (T). More recently, sec 25 of the 1996 Constitution also enjoyed attention in *Khumalo and Others v Potgieter and others* 2000 2 All SA 456 (LCC); *Ex Parte Former Highland Residents, In Re: Ash and others v Department of Land Affairs* 2000 2 All 26 (LCC); *In Re Kranspoort Community* 2000 2 SA 124(LCC); *Transvaal Agricultural Union v Minister of Agriculture & Land Affairs & others* 2003 4 SA 411(LCC); *Ex parte: Optimal Property Solution CC* 2003 2 SA 136 (C); *City of Cape Town v Rudolph and Others* 2003 11 BCLR 1236 (C); *Abrams v Allie NO and Others* 2004 9 BCLR 914 (SCA); *Offit Enterprises (Pty) Ltd & Another v Premier, Eastern Cape Government & Others* [2006] JOL 16700 (SE); *Prophet v National Director of Public Prosecutions* 2006 (1) SA 38 (SCA); *Minister of Transport v Du Toit* 2005 (1) SA 16 (SCA); *Transnet Ltd v Nyawuza and Others* 2006 (5) SA 100 (D); *Petro Props (Pty) Ltd v Barlow and Another* 2006 (5) SA 160 (W); *Minister of Education and Another v Syfrets Trust Ltd No and Another* 2006 (4) SA 205 (C); *Minister of Education and Another v Syfrets Trust Ltd No and Another* 2006 (4) SA 205 (C); *National Director of Public Prosecutions v Gerber and Another* 2007 (1) SA 512 (W); *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA). The most recent Constitutional Court decisions which involved an interpretation of sec 25 is *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 1 SA 530 (CC), discussed here; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2005 (5) SA 3 (CC) / 2005 (8) BCLR 786 (CC), discussed here; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) / 2004 12 BCLR 1268 (CC), discussed here; *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC); *Monhuram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amici Curiae)* 2007 4 SA 222 (CC); and *Prophet v National Director of Public Prosecutions* 2006 (2) SACR 525 (CC). The lists are not exhaustive.

iii In the year that passed while the application for eviction was being heard, the informal settlement of unlawful occupiers grew from an initial 400 people in 50 makeshift structures to almost 40,000 people in 6,000 structures. The numbers kept growing, even after the eviction order was granted. *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 v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) paras 2, 9.