REVISITING THE TRANSITIONAL ARRANGEMENTS OF THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT 28 OF 2002 AND THE CONSTITUTIONAL PROPERTY CLAUSE: AN ANALYSIS IN TWO PARTS

PART TWO: CONSTITUTIONALITY OF THE MINERALS AND PETROLEUM RESOURCES DEVELOPMENT ACT’S TRANSITIONAL PROVISIONS

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Introduction

This contribution is the second part of a discussion of the constitutionality of the transitional measures in the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRD Act) in as far as they influence the basis of mineral right holding and control in South Africa. Part one set out the categories of rights acknowledged by the transitional provisions, the nature and content of “old order” rights with regard to minerals as compared to rights of the new order, and the requirements for transition of “old order” rights to “new order” rights. A number of particularly problematic scenarios concluded that discussion.

As has been indicated in the first part of this contribution, the transitional measures of the MPRD Act need to be scrutinised on the basis of the constitutional property clause, because of the far-reaching effects the Act’s policies of economic empowerment and state custodianship of natural resources may have on existing entitlements with regard to minerals. Part two now focuses on the constitutionality of the transitional

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1 Rights regarding petroleum exploration and production will not be discussed.

2 Published in 2003(3) Stellenbosch Law Review, 377-400.
arrangements regarding "old order rights," arising from an analysis of their nature and content, in the light of the constitutional property clause.

1.1 Consequences of the transitional provisions

We have identified three basic sets of consequences for existing right holders brought about by the transitional provisions of the MPRD Act. The first set arises in the context of successful applications for conversion of "old order" rights by current holders of such rights. The question that needs to be asked in the context of constitutional property protection and regulation is whether the degree of imposition on existing rights by the conversion requirements in each separate case passes constitutional muster. Apart from the obvious question as to whether the conversions and concomitant restriction of the content of some of these rights amount to (justifiable) deprivations of property, it must also be determined at which point in the process such possible deprivations take place and must be assessed. In some individual cases, the conversions may amount to such severe deprivations that the issue of constructive expropriation may arise, in which case invalidation of the particular conversions, or payment of compensation in the alternative must be determined.

The second set of consequences arises where holders of "old order" rights are unsuccessful in their applications for conversion of their rights. Accordingly the holders would lose their rights altogether in terms of the MPRD Act. In this context, it must be determined whether impositions of this nature on existing property rights are permitted under the Constitution, and whether they qualify as expropriations. If this is the case, the question of payment of compensation arises. If they are not treated as expropriations, the issue to be determined is whether they amount to excessive regulation of private property.

The third possible category deals with situations where a current holder of an "old order" right chooses not to apply for conversion at all. In such event, the holder would also lose the "old order" right altogether, after a period of grace as provided by the transitional provisions. Thus the question of expropriation and compensation arises in this context as well. Further, the question as to the exact point at which a possible expropriation might occur, needs to be considered. It may also be asked whether the "lazy" holder of an "old order right," who does not apply for conversion, may at all be eligible to rely on expropriation in order to obtain redress for rights lost on account of a refusal to abide by the prescribed procedure for reapplication in the MPRD Act.

1.2 Course of the inquiry

Our inquiry in this second part of the contribution tests the transitional

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3 Rights regarding petroleum exploration and production will not be discussed.
4 See part one, par 4.
provisions of the MRPD Act, and specifically the consequences thereof as described above, against the requirements for deprivations and expropriations of property in terms of the constitutional property clause. Due to limited scope, the consequences of expropriation pertaining to the determination of compensation will not be considered.

The framework for interpretation of the property clause as formulated by the Constitutional Court\(^5\) will be broadly summarised first. In the course of the present discussion, particular attention will be afforded the problematic scenarios sketched towards the end of part one. It is, however, necessary to start out with an overview of the constitutional requirements applicable in the context of property regulation and protection. Thereafter the implications of the transitional arrangements of the MPRD Act may be assessed.

2 Relevant constitutional requirements

The constitutional property clause has a dual function as a protective measure against impermissible impositions on private property, and as a determinant of the scope of protection afforded to property rights. Section 25 read with section 36 of the 1996 Constitution sets out the possibilities for imposing upon private property relations within the limits set by the Constitution. It deals with the requirements for justifiable deprivations and expropriations of property. In assessing the impositions made on existing property rights by the introduction of a new mineral rights order, two basic considerations should be kept in mind. These are: (i) the scope of the property concept under the Constitution; and (ii) the range of permissible limitations on property in terms of the Constitution.

2.1 Basic elements of and procedure for invoking constitutional property protection

In the constitutional context, a two-stage\(^6\) procedure is envisaged, with which private property is protected and according to which the boundaries for regulation are set. The applicants in contesting the constitutionality of a specific imposition on property first bear the onus of proving that an infringement of a property right, which is protected by section 25, has taken place. As such the applicants would have to affirm: (i) that the interest under discussion qualifies for protection under section 25; and (ii) that an infringement of this interest has taken place. Once these issues have been established, the state (or the party relying on the validity of the relevant act) has the onus of proving that the infringement


is justified, in terms of both the constitutional property clause and the general limitations clause.\(^7\)

### 2.1.1 The scope of constitutional property protection

The Constitution protects property in a “negative” clause, by excluding deprivations of property in a manner not complying with the specifications of the Constitution, rather than by explicitly guaranteeing the right to property.\(^8\) The implications of the negative formulation of the property clause are still uncertain. Hence it may still be asked whether such a formulation could result in both individual property (or property in the “holding” sense) as well as the institution of property (or property as a “regime”) being protected. Contentions such as these sometimes even result in the argument that section 25 really protects something “less than property,”\(^9\) namely the right not to be deprived of property (in the case of section 25(1)) and the right not to be expropriated (in the case of section 25(2)) except as provided for in the property clause itself.

We have dealt with these opinions and stated our own considerations elsewhere,\(^10\) and hence do not propose to repeat them here, save to submit that convincing arguments exist to accept that the full content of property — and not something “less than property” — is protected by sections 25(1) and (2).\(^11\) Moreover, from the South African judiciary’s treatment of these provisions it is becoming increasingly clear that property “holdings” in the sense of individuals’ rights to acquire, hold and dispose of property in particular circumstances are protected,\(^12\) and even that the protection of property as a “regime” or an institution is implicitly endorsed.\(^13\)

Although it is still too early to identify hard and fast rules about the exact scope of constitutional property protection in South Africa,\(^14\) the judiciary seems inclined towards a broad scope of property protection

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7 Van der Walt Constitutional Property Clause 28 and Van der Walt 1997 SAPR/PL 277. Despite the fact that the two-stage approach may be questionable specifically as far as property protection and regulation are concerned (see Mostert “Liberty, Social Responsibility and Fairness in the Context of Constitutional Property Protection and Regulation” in Botha, AJ vd Walt & JMG van der Walt (eds) Rights and Democracy in a Transformative Constitution (2004) 140-141), this adjudicative approach is deeply ingrained in the fabric of South African constitutional law.

8 S 25(1) of the Constitution.

9 See the explanation of this argument in Van der Walt 1997 SAPR/PL 295-313.


11 See also the endorsement of this dictum by Ackerman J in the Constitutional Court decision of First National Bank v South African Revenue Service 2002 7 BCLR 702 (CC) per 59.

12 See the reasoning of Ackerman J in the Constitutional Court’s ruling of First National Bank of SA Ltd v Wesbank v Commissioner, South African Revenue Service 2002 7 BCLR 702 (CC) per 58.


14 See First National Bank of SA Ltd v Wesbank v Commissioner, South African Revenue Service 2002 7 BCLR 702 (CC) per 54.
under the Constitution. Most of the rights relating to the patrimony of individuals could be constitutionally protected by the property clause, for instance, against arbitrary enforcement of state authority and against an "unjust" balance of power between individuals *inter se*, which should be eradicated on the initiative of the state. In case of an imminent danger to the common good, or in times of social change, the constitutional provisions are capable of being used to correct the effect of private-law principles on the patrimonial interests of individuals. But even though certain kinds of property interests are protected or guaranteed by the property clause, not every single property entitlement will necessarily be protected or guaranteed in every possible circumstance. The Constitution therefore does not protect property in the sense of guaranteeing all existing property interests absolutely against any interference or invasion not authorised or consented to by the owner.15

In *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa*16 the idea of constitutional protection of mineral rights was erroneously, and rather simplistically, rejected.17 In our submission, the likelihood of protection of mineral, mining and similar rights in principle depends on the nature attributed to them in existing law. First, rights originating from private law of property (such as rights to movable or immovable corporeal things and real rights) would obviously qualify for protection as constitutional "property." Hence, many of the existing "old order right" types described already would qualify for protection in this primary and most obvious category of constitutionally protected rights.19 The fact that rights to land, which would include mineral rights, are understood as definitely falling within the wider ambit of the constitutional property clause is underscored by the explicit mention in section 25(4) of the Constitution that property should not be interpreted *only* to refer to land.

The judiciary has, in the second place, already acknowledged20 that use rights (as opposed to ownership) with regard to immovable property also qualify for protection, even though such rights are usually derived from contract or legislation, and therefore strictly are not protected in the

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15 Van der Walt *Constitutional Property Clause* 68.
16 2002 1 BCLR 23 (T) 28G-H, 31D-E.
17 The finding was based on a misunderstanding of the judgment in the so-called "Second Certification Case" of the Constitutional Court, namely *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 4 SA 744 (CC) 759, par 74. Mineral rights need not be explicitly mentioned in Bills of Rights because they receive ample protection as *property* under most constitutions. For a discussion of the *Lebowa Mineral Trust Beneficiaries case*, see Badenhorst & Vrancken "Do Mineral Rights Constitute 'Constitutional Property'" *Lebowa Mineral Trust Beneficiaries Forum v President of the RSA* 2001 Obiter 496.
18 Van der Walt *Property Clause* 63-66.
19 In *Attorney-General of Lesotho v Swibbourgh Diamond Mines (Pty) Ltd* 1997 8 BCLR 1122 (Lesotho CA) it was held that registered mining leases are "property" protected by the property guarantee, contained in s 9 of the Human Rights Act 24 of 1983 (Lesotho).
20 *Nkosi v Bührman* 2002 1 SA 372 (A) par 37.385. See also Van der Walt "Property Rights v Religious Rights: Bührmann v Nkosi" 2002 *Stell LR* 394-414.
traditional (private law) property context. Hence there should also be room for protection of rights in the mining context created by agreement. A third, less obvious category of protectable interests involves claims of property, traditionally based rather in administrative law than in property law, and which related to demands against the state not based on contract, but on permissions or concessions. These would include incorporeal participation rights (such as rights to receive pensions and social security) but also, and more importantly for present purposes, rights connected to land use permits or traditions. The judiciary is still cautious to formulate guidelines in this regard, and the contentiousness of this third category of possibly protectable interests should be kept in mind when assessing the impact of the constitutional property clause on the transitional arrangements of the new mineral rights order. For the moment, however, there seems to be adequate motivation in existing case law and scholarly work to avoid an outright rejection of the idea that mineral rights may qualify as property in terms of at least some categories of constitutional protection discussed above.

2.1.2 Permissible impositions on private property

The main purpose of the constitutional property guarantee is not to insulate the status quo and the existing position of the individual property holder against interference. Rather, section 25 of the Constitution aims to establish and maintain a balance between existing individual positions and the public interest with regard to private property. This often means that the individual’s interest has, without compensation, to be subject to controls, regulations, restrictions, levies and other measures that advance or protect the public interest. Within the constitutional framework, individual owners might be free to act with their property,

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21 Reich 1964 Yale LJ 733-787 calls these interests the “new property” based on “state largesse”.
22 These denote a variety of claims emanating from what is usually understood to be the field of public law. Licenses, permits and quotas are included in this category, as well as some rights pertaining to the social security and welfare of citizens. Licenses, permits and quotas issued by the state would probably be regarded as property and protected if they have vested in the claimant and if they are regarded as valuable assets. See Transkei Public Servants Association v Government of the Republic of South Africa 1995 9 BCLR 1235 (Tk).
23 See eg Richtersveld v Alexkor 2000 1 SA 337 (LCC) in which beneficial occupation of land was regarded as a protectable interest. In this particular case the constitutional objectives were embodied in s 2 of the Restitution of Land Rights Act 22 of 1994, which had to be interpreted by the court. The SCA in this case found that the protectable interest must be typified as a “customary law interest” based on the same legislative provisions. Richtersveld Community v Alexkor 2003 2 All SA 27 SCA.
24 This is illustrated by the decision in Transkei Public Servants Association v Government of the Republic of South Africa 1995 9 BCLR 1235 (Tk), which had to be decided in terms of s 28 of the Interim Constitution. The validity of various provisions of the Transkeian Public Service Staff Code relating to housing subsidies was at stake. The court refrained from an outright decision with regard to constitutional property protection of pension rights (1247A) but it did acknowledge in an obiter dictum that the meaning of “property” in s 28 of the Interim Constitution might well be sufficiently wide to encompass a housing subsidy benefit (1246J-1247A).
25 For more detail, see Mostert Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany (2002) 393-397.
26 Van der Walt Constitutional Property Clause 68.
but only within the limits set by the interests of the public,\textsuperscript{27} as determined in terms of the Constitution itself.

All the rights in the Bill of Rights are subject to the general limitations clause of section 36,\textsuperscript{28} which stipulates the constitutional authority for limiting fundamental rights and provides the controlling requirements for such a limitation.\textsuperscript{29} Section 7(3) of the Constitution supports the idea that section 25 and section 36 should be applied cumulatively.\textsuperscript{30} As for section 25 in particular, additional "internal modifying components" help define the content of property,\textsuperscript{31} whereas additional "specific limitations" within section 25 itself help determine the justifiability of limitations on constitutionally protected property rights as espoused by section 36.\textsuperscript{32} For the remainder of this discussion we will accept that section 25 and section 36 apply cumulatively to inquiries into constitutional property protection and regulation, and that expropriation is a subspecies of deprivation of property.

2.1.2.1 Requirements for impositions on property

Impositions on property will pass the constitutional scrutiny test, and qualify as justifiable deprivations of property, if they are achieved in terms of a law,\textsuperscript{33} which must be of general application,\textsuperscript{34} and which may not permit arbitrary limitation\textsuperscript{35} of the right to property. Impositions amounting to expropriation must additionally be for a public purpose or in the public interest.\textsuperscript{36} Expropriations are subject to the payment of compensation,\textsuperscript{37} the amount of which should be either agreed upon by the affected parties, or determined by a court, in which case it has to be just and equitable.\textsuperscript{38} In any event, all impositions on property must adhere to the requirement of proportionality.\textsuperscript{39}

\textsuperscript{27} Pieaar Nuwe Sakeregeliike Ontwikkelings op die Gebied van Grondhervorming (1997) 6-7.
\textsuperscript{28} s 7(3) of the 1996 Constitution.
\textsuperscript{29} Eg the first part of s 36(1) provides the constitutional reference for limitation by the legislature. The second part of s 36(1) provides for a judicial consideration of all relevant factors when limiting a fundamental right. Some of these factors are listed in s 36(1). Thus, two different aspects of the principle of proportionality are combined within section 36(1) of the Constitution, through the involvement of both the legislature and the courts. Blaauw-Wolf "The 'Balancing of Interests' with Reference to the Principle of Proportionality and the Doctrine of Güterabwägung – A Comparative Analysis" 1999 SAPR/PL 210-211.
\textsuperscript{30} For a more detailed argument, see Mostert Constitutional Protection and Regulation of Property 263-276.
\textsuperscript{31} Many divergent views exist not only as to the classification of the different "limiting elements" in s 25, but also as to whether and how s 25 should interact with s 36. Van der Walt 1997 SAPR/PL 293 ff provides an exposition of these approaches.
\textsuperscript{33} s 25(1) and (2) and s 36(1) of the 1996 Constitution.
\textsuperscript{34} S 25(1) and (2) and s 36(1) of the 1996 Constitution.
\textsuperscript{35} s 25(1) of the 1996 Constitution.
\textsuperscript{36} s 25(2)(a) of the 1996 Constitution.
\textsuperscript{37} s 25(2)(b) of the 1996 Constitution. See Van der Walt Constitutional Property Clause 115.
\textsuperscript{38} s 25(3) of the 1996 Constitution.
\textsuperscript{39} s 36(1) of the 1996 Constitution.
(a) Law of general application

The requirement that only a law of general application may limit property rights appears not only in section 36(1) of the Constitution, but also twice in the property clause itself.40 “Law” in this context includes statutes and accompanying legislative regulations, but not administrative regulations or decrees.41 The democratically elected legislature must authorise the limitation, being the organ of state endowed with legislative powers. Such authorisation must remain within the ambit of what has been authorised by the Constitution: a fundamental right must be left intact in so far as these requirements are not met.

Furthermore, the limitation must apply generally and not solely to an individual case. Varying interpretations of this requirement exist,42 but for present purposes we adhere to the idea that the phrase “generally applicable law” refers to the notion of fairness (in the sense of legality, certainty and trust) inherent in the principle of the rule of law.43 This entails a rejection of a purely formalistic approach, and accepts the presence of some degree of legal protection against arbitrary interference by public authorities. Such an approach presupposes that the particular legal measure (the “generally applicable law”) should be adequately accessible, and that it should be formulated with sufficient clarity to enable citizens to foresee the consequences of their conduct and to behave accordingly.44

Applied to the new mineral law order, the MPRD Act is, at face value, a “generally applicable law”. Upon closer scrutiny, however, it becomes clear that the broad discretionary powers of the Ministry of Mineral and Energy Affairs, particular as concerns the transitional arrangements, frequently results in uncertainty as to the consequences, in the constitutional context, of specific executive actions, and flies in the face of the notion of trust underlying the constitutionally endorsed principle of the rule of law.45

(b) Non-arbitrariness and proportionality

In terms of section 25(1), generally applicable laws imposing on private property rights may not be arbitrary.46 In terms of section 36(1), such laws must comply with the requirements of proportionality. Proportionality refers to the justifiability and rationality of a particular imposition

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40 In s 25(1) of the 1996 Constitution, where deprivations of property are regulated, as well as in s 25(2), where expropriation is regulated.
41 Blaauw-Wolf 1999 SAPRPL 178 ff.
42 For more detail, see Mostert Constitutional Protection and Regulation of Property 317-320.
44 Sunday Times v United Kingdom 1980 2 EHRR 245 par 49.
45 S 25(1) of the 1996 Constitution.
46 S 25(1) of the 1996 Constitution. In our submission, expropriation must be regarded as a special subcategory of deprivation. This means that expropriatory actions would also be subject to the requirement of non-arbitrariness.
on property.\textsuperscript{47} It also incorporates the idea of "strict" proportionality, which entails that competing interests need to be balanced on the basis of specific requirements listed in section 36(1)(a) to (e) of the Constitution,\textsuperscript{48} as a final measure of determining constitutionality of specific infringements. Arbitrariness in the context of impositions on property was initially taken to denote a lack of criteria governing the exercise of a deprivation on property; the absence of a rational connection between the interference with property and its purpose; and/or the absence of procedural safeguards.\textsuperscript{49} There seems to be a good measure of overlap between the two concepts of non-arbitrariness and proportionality, especially if it is taken into account that "justifiability" in the context of proportionality necessitates a "means-ends" analysis as to whether a limitation is suitable or appropriate to achieve a specific objective and "reasonableness" or "rationality" requires that a limitation may not be "arbitrary, unfair or based upon irrational considerations" and therefore constitutes a "rational connection" test.\textsuperscript{50} The same "means-ends" and "rational connection" analysis was applied with reference to non-arbitrariness in some of the early Constitutional Court decisions.\textsuperscript{51}

Since the non-arbitrariness requirement of section 25(1) is incorporated into the rationality review that forms part of the proportionality test as required by section 36(1), it might seem as if the arbitrariness of a particular law is tested only once the question of proportionality is reached. However, on this point the Constitutional Court in \textit{First National Bank v South African Revenue Service}\textsuperscript{52} adopted an interesting approach with regard to the cumulative application of sections 25 and 36. Ackerman J's point of departure was that the internal limitations of section 25(1) form a "filter" to the true second-stage limitation analysis. Accordingly, the non-arbitrariness inquiry is undertaken apart from any possible proportionality review,\textsuperscript{53} which means that the non-arbitrariness requirement here is regarded neither as a component of the formal requirement to be met before the proportionality inquiry commences, nor as an element of the "reasonableness" inquiry within the proportionality

\textsuperscript{47} S 36(1) requires that any particular limitation, introduced by a generally applicable law, must be reasonable and justifiable in an open and democratic society. The specific requirements in s 36(1)(a) to (e) act as aids in determining the strict proportionality of a specific infringement.

\textsuperscript{48} See the plea of Woolman 1997 \textit{SAJHR} 110-111 for the rearrangement of the factors in s 36(1)(a)-(e) in order to facilitate a proper limitation analysis.

\textsuperscript{49} For more detail, see Mostert \textit{Constitutional Protection and Regulation of Property} 321-329 and Budlender \textit{The Constitutional Protection of Property Rights} 34-35.

\textsuperscript{50} Blaauw-Wolf 1999 \textit{SAPR/PL} 178 ff.

\textsuperscript{51} In \textit{S v Lawrence; S v Negal; S v Solberg} 1997 4 SA 1176 (CC) and \textit{Prinsloo v Van der Linde} 1997 3 SA 1012 (CC) this requirement was explained as meaning that a rational connection must exist between means and ends (par 40) in the respective contexts of limitation on the right to engage in economic activity (s 26 of the Interim Constitution) and the right to equality (s 8 of the Interim Constitution). Non-compliance with this requirement, according to the court, would be arbitrary and "incompatible with a society [based on freedom and equality]."

\textsuperscript{52} \textit{First National Bank v South African Revenue Service} 2002 7 BCLR 702 (CC).

\textsuperscript{53} It is indicated at par 115 that this inquiry focused on the issue of whether a rational connection existed between the deprivation and the purpose for it, after it was indicated at par 105(g) that this type of inquiry is but one function of the requirement of non-arbitrariness.
Non-arbitrariness is referred to as a "wider concept" and a "broader controlling principle," which stretches beyond a mere rationality review, whilst, simultaneously, it also represents a "narrower and less intrusive concept than that of the proportionality evaluation required by . . . section 36" of the Constitution.

Although this statement might seem contradictory at first glance, it makes perfect sense in view of the fact that rationality review is but a single component of the over-all proportionality test. It is somewhat inconsistent of the court to refer to the proportionality test of section 36 whilst explicitly expecting the non-arbitrariness requirement (which is an internal limitation of section 25) to be met before one can proceed to the limitation analysis of section 36. With this approach, however, the court manages to straddle the gap between the two separate stages of the constitutional property inquiry, by introducing a particular type of "fairness" inquiry into the first stage, when the existence of an imposition on property has to be determined. The Constitutional Court thus acknowledges a flexible norm imposed by the arbitrariness requirement: the non-arbitrariness of limitations may be relevant and applicable at practically any point in the inquiry, depending on the specific context in which it is applied.

The transitional provisions of the MPRD Act, in as far as they cross the constitutional property clause, may accordingly be subjected either to strict rationality review, or to a broader test of rationality and justifiability, or to both at various stages of the constitutionality inquiry. In order to determine the arbitrariness or proportionality of the various transitional arrangements of the MPRD Act, the specific consequences thereof in each individual case need to be considered. This will necessitate a return (in paragraph 3 below) to the three sets of consequences of the transitional provisions as explained in part one of our contribution.

(c) Public purposes or public interest

Deprivations amounting to expropriation must be for a public purpose or in the public interest. No definition is provided in the Constitution of the terms public purpose or public interest, but section 25(4) of the 1996 Constitution determines that, for the purposes of the property clause, the public interest "includes the nation's commitment to land reform." Both terms have been subject to varying interpretations in South African property law, but they were never really carefully analysed.
Existing case law about the meaning of these terms is furthermore not adequate for application in the constitutional context. Expropriation for racially discriminatory and social restructuring purposes in South Africa has in the past simply been upheld – or not questioned – as constituting a public purpose or being in the public interest.\(^{59}\) The cases in which the courts did attempt to interpret these terms raise further problems in endeavours to discern how broad or narrow the scope of public interest or public purposes should be in the context of constitutional property.\(^{60}\)

Deciding whether a specific legislative measure is for a public purpose or in the public interest invariably involves policy choices. Since South African courts in the past have generally been somewhat cautious in making such choices, it could be argued that the term public interest in section 25(2)(a) of the Constitution emphasises the fact that the courts' powers to set aside expropriations on the grounds of their purpose are limited.\(^{61}\) It is questionable, however, whether a strict "hands off" approach in this context is necessarily always appropriate. The counter-argument, accordingly, may be that the inclusion of the public purposes or public interest standard in section 25(2) of the Constitution is aimed at curbing abuse of legislative and executive power. This would call for an increase in the sanctioning powers of the judiciary beyond a mere respect for the decisions of the legislature and executive. The provision in section 25(4) of the Constitution, that the public interest would include the nation's commitment to land reform and reform to ensure equitable access to natural resources, may then be understood as a pointer, to the judiciary, as to how the legislature and executive should exercise their powers with regard to determining policies affecting private property.

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\(^{59}\) Legislation aimed at giving effect to the segregation policy under apartheid also frequently made specific reference to "public purpose" (eg s 13(3) of the Development and Trust Land Act 18 of 1936). The courts also frequently upheld legislation permitting expropriation for purposes of social restructuring which were racially discriminatory for being in the public interest or for the public welfare (eg Minister of the Interior v Lockhat 1961 2 SA 587 (A), 602E-F). Alternatively, racially discriminatory actions by the state were not questioned by the courts on the basis of public purpose or public interest (see eg the submission of Mohamed, Chaskalson, Corbett, Van Heerden and Langa to the Truth and Reconciliation Commission, reproduced in Sunday Independent 1997-10-19 11).

\(^{60}\) The cases in which the courts did attempt to interpret the terms public purposes and public interest can, at best, provide only rather vague guidelines for interpretation of these terms in the new constitutional order. This is due to: (i) reservations concerning the question of whether these terms should be interpreted broadly or narrowly (see the exposition in Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society 1911 AD 271); (ii) uncertainty about whether precedent on the meaning of these terms outside the context of expropriation legislation would have an influence on its interpretation within the context of expropriation (compare Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society 1911 AD 271; Fourie v Minister van Lande 1970 4 SA 165 (C); White Rocks Farm (Pty) Ltd v Minister of Community Development 1984 3 SA 774 (WLD)); and (iii) uncertainty about the questions whether these terms in the context of expropriation requires actual use of the land by the expropriator and whether expropriation of one individual for the benefit of another would qualify as being in the public interest or for public purposes (see Administrator, Transvaal v J van Streepen (Kempton Park) (Pty) Ltd 1990 4 SA 644 (A)). For a more detailed discussion of these issues, see Mostert Constitutional Protection and Regulation of Property 333-340.

\(^{61}\) Chaskalson & Lewis in Chaskalson, Kirtzidge, Klaaren et al (eds) Constitutional Law of South Africa (1996) ch 31 22 describe the presence of this term in s 25(2) as a warning to the judiciary to respect the choices made by the legislature or the executive as to where the public interest lies.
This becomes particularly important if one considers the transitional provisions of the MPRD Act in conjunction with sections 3(1), 3(2)(a) and 110 of the same Act. As we have indicated in part one,\textsuperscript{62} section 3(1), which states that mineral resources are the common heritage of all the people of South Africa and that the state is the custodian thereof for the benefit of all South Africans, by itself probably has no noteworthy consequences for proprietary distribution in South Africa. It is not really significant whether ownership of unsevered minerals is vested in the state or the "people of South Africa." Rather, the important question is in whom specific rights to prospect or mine minerals are vested. It could probably be accepted, therefore, that the language of section 3(1) is merely an example of the social-democratic rhetoric frequenting a broad range of more recent legislative measures, without that the section actually conveys any rights to the state.\textsuperscript{63} Accordingly, section 3(1) most probably does not result independently in an outright, full-scale nationalisation of mineral resources. Section 110, however, repeals or amends all the "old order" rights, subject to the transitional provisions of Schedule II, to the extent set out in the third column of Schedule 1.

The public interest in endowing the state with custodianship of mineral resources should accordingly be viewed against the socio-democratic considerations enumerated in the Act’s objectives and the need for equitable distribution of land and related resources which lie at the heart of and are endorsed by our Constitution. In particular, economic empowerment objectives,\textsuperscript{64} along with the notion of growth and development and the idea of sustainable use of natural resources articulated by the section 2 of the MPRD Act, are significant to determine which impositions on property would be in the public interest, justifying expropriation. However, section 3(2) of the Act grants the minister – as agent of the state-as-custodian – broad discretionary powers of control and disposal of mineral rights. We submit that the effect of these sections can be assessed only upon a consideration of particular transitional arrangements operating in conjunction with sections 2 and 3(2) of the Act. In an inquiry into whether the public interest is served with a specific imposition, or whether a specific action undertaken in terms of the Act is for a public purpose, the consequences of that particular action or transitional arrangement should thus contribute to the assessment. We will accordingly return to this issue in paragraph 3 of this discussion, where some of the individual consequences of the transitional arrangements are reviewed.

\textsuperscript{62} Part one, par 1 2.

\textsuperscript{63} With the abrogation of the \textit{cuius est solum}, rule ownership of unsevered minerals has become possible.

\textsuperscript{64} If it can be argued that a new res or thing (despite difficulty with the characteristic of independence) has been created it could perhaps be classified as public things (\textit{res publicae}). See further in general, Badenhorst, Pienaar & Mostert \textit{Property} 34.

\textsuperscript{64} See Badenhorst "Saving the Pieces of the Mineral Law System: Keeping the Baby and the Bathwater" 2003 \textit{Obiter} 54 ff.
(d) Compensation

Expropriations are subject to the payment of compensation, the amount of which should be either agreed upon by the affected parties, or determined by a court, in which case it has to be just and equitable, and has to reflect a balance between the interests of the public and those affected by the expropriation. Contrary to the situation in most other legal systems, the South African property clause also provides some indications as to how the justness and equitability of the compensation amount should be determined. These include, but are not limited to: (i) the current use of the property; (ii) the history of the acquisition and use of the property; (iii) the market value of the property; (iv) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (v) the purpose of the expropriation.

Although many of the specific examples of imposition under the MPRD Act eventually raise the need to turn to a determination of the amount of compensation payable, the scope of our contribution does not allow detailed analyses in this regard. This issue needs to be reserved for a subsequent, separate inquiry. For the moment, a few general comments about the provision for compensation in the MPRD Act will have to suffice.

The MPRD Act now concedes that expropriation without sufficient compensation may take place upon implementation of the transitional measures. It accordingly provides for claims of compensation against the state in Schedule II. These provisions need to be read alongside the constitutional requirements for compensation in section 25(3). Item 12(3) of Schedule II requires that, apart from sections 25(2) and (3) of the Constitution, the following be taken into account in determining a just and equitable amount of compensation in the context of the MPRD Act. First, the state is obliged to redress the results of past racial discrimination in the allocation of and access to mineral resources. It must also, secondly, bring about reforms to promote equitable access to all South Africa’s natural resources. Thirdly, the provisions of section 25(8) of the Constitution, which enables the state to take legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination within the limits of the

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65 S 25(2)(b). See van der Walt _Constitutional Property Clause 115._
66 S 25(3).
67 For detailed comments on the meaning of each of these requirements, see Mostert _Constitutional Property Protection and Regulation 345-349; Van der Walt Constitutional Property Clause: A Comparative Analysis 346-347._
68 Item 12(1) of Schedule II to the MPRD Act.
69 See item 12. Payment of compensation is, however, not stated as an objective of the transitional measures (see item 2), and apparently is a power apart from that of the minister to expropriate property for the purpose of prospecting or mining in s 55.
70 Item 12(3)(a) of Schedule II to the MPRD Act.
71 Item 12(3)(b) of Schedule II to the MPRD Act.
general limitations clause must be heeded. Finally, it must also be determined whether the person concerned will continue to benefit from the use of the property in question.

A claim in terms of item 12 of Schedule II has to be lodged in the prescribed manner with the Director-General of the Department of Minerals and Energy. The successful claimant of compensation in terms of the MPRD Act will have (i) proved the extent and nature of actual loss and damage suffered; (ii) indicated the current use of the property; (iii) proved his or her ownership of the property involved; (iv) provided an account of the history of acquisition of the property in question and the price paid for it; (v) provided detail of the nature of such property; (vi) proved the market value of the property and the manner in which such value was determined; and (vii) indicated the extent of any state assistance and benefits received in respect of such property.

The last-minute additions and alterations to item 12 of Schedule II to the MPRD Act, along with bad draughtsmanship, render these provisions problematic. The compensation provisions are apparently not connected in any way to the only other reference to expropriation in the Act, namely section 55. The phrasing and structure of these provisions render it difficult, moreover, to link them with the other transitional provisions, since no cross-referencing to the compensation provisions exist, and in fact no other commitment as to the possibly expropriatory effects of the transitional provisions are made.

The prescribed procedure for claiming compensation in terms of items 12(2) and (4) apparently applies to any expropriation of property, and not only to the possible expropriations in terms of the transitional provisions, even though the provision appears in the schedule of transitional arrangements. This provision indicates, nevertheless (albeit on a very basic level), that an expropriatory intention underlies some or all of the provisions of the MPRD Act. It nevertheless leaves lawyers, judges, and indeed the relevant executive authorities in the dark as to exactly which arrangements amount to expropriation. This in turn gives rise to the question as to whether some of the provisions were intended only as deprivations, which might then possibly "go too far."

The most obvious explanation of the incorporation of these provisions must be that they represent an attempt by the legislature to avoid the Constitutional Court striking down any expropriatory measures on the basis that the scrutiny test of section 25(2) and (3) has not been passed. All in all, however, the terms and applicative scope of item 12 remain so

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72 Item 12(3)(c) of Schedule II to the MPRD Act.
73 Item 12(2)(d) of Schedule II to the MPRD Act.
74 Item 12(4) of Schedule II to the MPRD Act.
75 Item 12(2) of Schedule II to the MPRD Act.
76 See n 69 above.
77 Item 12(1) of Schedule II to the MPRD Act.
78 See Steinberg v South Peninsula Municipality 2001 4 SA 1243 (SCA) par 8; First National Bank v South African Revenue Service 2002 7 BCLR 702 (CC) par 114.
vague that they raise concerns as to whether these provisions comply with
the constitutional principle of the rule of law,\textsuperscript{79} which requires certainty
about and predictability of state action.\textsuperscript{80}

2122 Deprivations, expropriations and constructive expropriations

As concerns the constitutionality of the MRPD Act's transitional
provisions, one of the frequently raised issues relates to the \textit{nature} of a
particular destruction or conversion of existing rights under the Act, in
view of the constitutional provisions of deprivations and expropriations.

In order to assess the implications of the constitutional requirements for
property protection and regulations for the new mineral rights order, it is
necessary to focus on the distinction between deprivations and
expropriations.

\textbf{(a) Deprivations of property}

In a certain sense, any imposition on the use, enjoyment or exploitation
of private property involves some kind of deprivation for the title or right
holders of the property concerned.\textsuperscript{81} The term \textit{"deprivation"} of property
results from the wording of section 25(1). It denotes all impositions on
property, also expropriations. The transitional provisions of the MRPD
Act may be regarded as regulations of existing property rights, where
their effect is to impose on such existing rights. The transitional
provisions either impose additional duties on existing right holders to
ensure continuation of their rights, or they result in a substitution of "old
order" rights with "new order" rights that are not as extensive in content
as the "old order" rights which preceded them. Only in two instances, as
has been indicated in part one of our inquiry,\textsuperscript{82} the conversion of "old
order" rights into "new order" rights actually result in a broadening of
the content of such entitlements.

In essence, an imposition on property amounts to an unconstitutional
depredation if it infringes section 25(1) and cannot be justified under the
general limitations clause (section 36 of the Constitution).\textsuperscript{83} According to
the two-stage approach, the holder of an existing "old order" right may
want to challenge the transitional arrangements if it can be indicated that
these result either in a reduction or in a destruction of their rights. The
state will then have to prove that such a deprivation is justified. The
requirements to be met in order for a deprivation of property to pass

\textsuperscript{79} S 1(c) of the Constitution.
\textsuperscript{80} See in general Mostert \textit{Constitutional Protection and Regulation of Property} 126, 134 and Rautenbach
\textsuperscript{81} \textit{First National Bank of South Africa Ltd t/a Witsbank v Commissioner for South African Revenue
Services} 2002 7 BCLR 702 (CC) par 57.
\textsuperscript{82} Part one, par 4.
\textsuperscript{83} See \textit{First National Bank v South African Revenue Services} 2002 7 BCLR 702 (CC) par 58-59; Chaskalson
14.
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constitutional scrutiny entail that the imposition must be effected by a law of general application,\(^{84}\) which is not arbitrary,\(^{85}\) and that the imposition must be reasonable and justifiable in an open and democratic society based on freedom and equality.\(^{86}\)

(b) Expropriations of property

Even if the imposition on property qualifies as a justifiable deprivation of property, because it meets the constitutional requirements of section 25(1) and section 36 as listed above, it remains to be determined whether the particular imposition on property was intended to be an expropriation. In the latter case, the additional requirements under section 25(2) and (3) of the Constitution must be met.\(^{87}\) In particular, compensation is payable to the property right holder affected by the expropriation, if it is to be permissible under the Constitution. The expropriation furthermore must be in the public interest or for a public purpose. An additional requirement might be posed by existing case law\(^{88}\) and practice\(^{89}\) – that the expropriation must result in the appropriation by another party or the state of the specific rights taken away from one party.\(^{90}\) No justification exists for this viewpoint in the constitutional context,\(^{91}\) but the view seems to be firmly ingrained in the structure of South African expropriation law.\(^{92}\) The implications of importing such a requirement in the context of the transitional provisions of the MPRD Act will be considered below with reference to specific scenarios. For the moment, it remains to be indicated that the Constitution also does not require expropriation to be permanent in nature.\(^{93}\) Expropriations, being subspecies of deprivations of property\(^{94}\) under the Constitution need, however, to comply with all requirements set for deprivations in section 25(1) read with section 36 of the Constitution.

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\(^{84}\) S 25(1) and 36(1) of the 1996 Constitution.

\(^{85}\) S 25(1) of the 1996 Constitution.

\(^{86}\) S 36(1) of the 1996 Constitution.

\(^{87}\) See n 83 above.

\(^{88}\) See Beekenstrater v Sand River Irrigation Board 1964 4 SA 510 (T) 515A-C and also Harksen v Lane NO and Others 1998 1 SA 300 (CC) 316A-C.


\(^{90}\) Badenhorst "Property and the Bill of Rights" in Butterworths' Bill of Rights Compendium (issue 3) 3FB-29; Badenhorst "Die Vereistes vir 'n Geldige Onteieningskennisgewing" 1989 THRHR 130, 137-138. Gildenhuys Onteieningsreg 8. Justification for this stance is sought in the decision of Harksen v Lane NO and Others 1998 1 SA 300 (CC) 315G-H. However, the latter decision is criticised on this point in particular. See Van der Walt & Botha "Coming to Grips with the New Constitutional Order: Critical Comments on Harksen v Lane NO" 1998 SAPR/PL 17-41.

\(^{91}\) For details, see Mostert Constitutional Protection and Regulation of Property 350-351.

\(^{92}\) Badenhorst 1989 THRHR 130 ff; Gildenhuys Onteieningsreg 117-123.

\(^{93}\) For details, see Mostert Constitutional Protection and Regulation of Property 351-352.

\(^{94}\) Van der Walt "Moving towards Recognition of Constructive Expropriation? Steinberg v South Peninsula Municipality" 2002 THRHR 469.
(c) The third category: constructive expropriations

The manner in which the requirements for impositions on property are dealt with under the Constitution could leave room for the import of a further, implicit category of impositions, namely "constructive expropriations," "regulatory takings" or "inverse condemnations." A legislative or administrative measure which has the effect of removing or destroying all the rights from a particular property holder (whether or not a corresponding advantage is granted to the expropriator or another party), without the payment of compensation being envisaged, can be described as a constructive expropriation.\(^9\) The important point to keep in mind in this context is that, even if nothing in the particular legislative or administrative measure is meant to be an expropriation (or even obviously resembles an expropriation), the effect of the measure may still result factually in expropriation.

The relation between the first and second subsections of the property clause influences the assessment of the difference between deprivations and expropriations, as well as the question as to whether South African law is open to either a "doctrine of constructive expropriation" or at least some argument to the same effect. The most important consideration in this regard is that the requirements set in section 25(1) seem to overlap to some extent, but not completely, with those set for expropriations in terms of section 25(2). The two subsections converge as far as the requirements for impositions on property to be undertaken by laws of general application are concerned. They diverge on the matters of non-arbitrariness (which appears in section 25(1)), and public interest and compensation (which appears in section 25(2)). As has been indicated, both subsections must be read along with the requirements for justifiability and rationality in section 36 of the Constitution.

Constructive expropriation would typically be raised where the state does not directly, explicitly or formally expropriate the property, but rather imposes such severe regulations on particular property rights that payment of compensation would be the natural and fair consequence thereof, in lieu of an invalidation of the particular (set of) imposition(s) on property.\(^9\) The exact extent to which a doctrine of inverse condemnation or constructive expropriation will be imported into South African law is not yet clear.

Even though this contribution does not allow much scope to develop ideas about the applicability of constructive expropriation in the South African context, it needs to be indicated that until recently, basically two strands of ideas influenced the import of such a doctrine into our law.


\(^{96}\) Van der Walt 1995 SAPR/PL 310; Van der Walt 1999 SAPR/PL 273-331; Van der Walt 2002 THRHR 459-470.
In *Harksen v Lane*, an approach to deprivation and expropriation of property which views these as separate, non-related and non-continuous categories of imposition was supported. Scholars opine that, through this categorical stance, the question as to the introduction of constructive expropriation into South African law was negated implicitly. One would actually expect that a categorical distinction between deprivation and expropriation would render necessary an admission of the need for that "grey area" in which regulations that have gone too far could fall. Nevertheless, the Harksen court's approach renders it impossible to claim compensation on the basis of excessive regulation. It is equally impossible upon the approach in Harksen to request the striking of a specific legislative measure because it creates an imposition that should have complied with other requirements than those set for deprivations. The matter is complicated further by the Harksen court's reliance on the common-law quality attributed to expropriations, concerning the requirement of appropriation by or transfer to the expropriator.

In *Steinberg v South Peninsula Municipality*, the Supreme Court of Appeal seems to favour the idea that deprivations and expropriations are different points on a single continuum, expropriation being a particular species of deprivation. Along with this view, the court acknowledges, albeit in non-binding terms, the incorporation of some measure of inverse

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97 *Harksen v Lane NO and Another* 1997 11 BCLR 1489 (CC).
98 The decision has been thoroughly analysed at various occasions. See eg Van der Walt, *Constitutional Property Clauses -- A Comparative Analysis* (1999) 338 ff; Van der Walt & Botha 1998 SAPR/PL 17-41. It had to be decided whether a statutory provision (s 21(1) of the Insolvency Act 24 of 1936) resulting in (solvent) spouses of persons ensnared in insolvent proceedings temporarily losing their property to the Master of the Court, was in conflict with, *inter alia*, the (interim) constitutional property guarantee. The Constitutional Court's decision did not support the argument that this provision was in conflict with the property clause, because it constituted an *expropriation* of the solvent spouse's property without providing for compensation. The court chose to base the distinction between deprivation and expropriation on the question of whether ownership is *transferred to a public authority for a public purpose* (par [32]-[34]). The court's choice of expropriation, rather than deprivation, as point of departure is open to criticism. The purpose of the particular statutory provision resembles the logic of forfeiture or confiscation of property more closely than it resembles the logic of expropriation. Ironically, the reasoning of the *Harksen* court supports, without explicitly acknowledging, the idea that the relevant provision has a regulatory, rather than an expropriatory character, in that it is aimed at ensuring protection of creditors of an insolvent estate by avoiding the unlawful or fraudulent transfer of property belonging to the insolvent to the separate estate of the solvent spouse.
99 See the discussion in n 98 above.
100 The question as to the introduction of the doctrine of constructive expropriation into South African law was left open in *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 SCA par 8, although the judgment seemed to indicate a positive disposition towards the incorporation of some of the elements of the doctrine.
101 This case involved an application for an order directing the municipality to complete the process of expropriation foreseen for property belonging to the appellant. Under South African law, approval of a road scheme does not bind the relevant state authority to implement such a scheme at any point (1245F-H). The contention before the court was that the uncertainty surrounding the implementation of the road scheme rendered the appellant unable to develop or improve the property, and immobilised any alienation of the land, thereby depriving her of the economic value of her land. The court distinguished between deprivation and expropriation on the basis of the required payment of compensation, and the need to regulate private property for the public good without incurring liability for compensation (1246 B-C).
condemnation into our law.\textsuperscript{103} It is argued\textsuperscript{104} that the continuum approach permits a reliance on the doctrine of constructive expropriation. This is apparently in line with the general structure and tenor of the Constitution, and with the situation in many other jurisdictions, where the focus is placed on questions about the constitutional reasonableness and justifiability of limitations on the protected property right, rather than the exact definition and scope of the right itself. The continuum approach anticipates the existence of a “grey area” between deprivations and expropriations. In this “grey area” deprivations that have “gone too far” attract the more stringent requirements set for a valid expropriation, in particular the requirement of compensation. One would expect that the need for a doctrine of constructive expropriation would not arise if expropriation were regarded as a subspecies of deprivation, because the continuum would simply catch up with any regulation that is “going too far”, and treat it as an expropriation, requiring adherence to the additional prerequisites. This, however, would lose sight of the consideration that expropriations need to be intended as such to be treated as such. There is very little constitutional justification for judicial creativity in treating impositions resembling the logic of deprivations under section 25(2) and expecting payment of compensation where the legislature considered it unnecessary to provide for such on the basis of the general impeding effect of a specific imposition on a class of property holders.

It seems, therefore, as if both the categorical and the continuum approaches may expose the judiciary to dilemmas, albeit of different natures, should either of them form the basis of a possible doctrine of constructive expropriation.

The ground-breaking decision of the Constitutional Court in \textit{FNB v SARS}\textsuperscript{105} creates a new range of possibilities for the doctrine of constructive expropriation. The existence thereof would depend on the standard of non-arbitrariness where this is employed to determine the circumstances under which a regulation would have “gone too far” or would have “cast the net too wide.”\textsuperscript{106} Arbitrariness is linked to the lack

\textsuperscript{103} The court acknowledged that there may be room to develop a narrow doctrine of constructive expropriation for the South African context, in cases where a public body utilises its power to regulate private property so excessively that it may be characterised as a deprivation which has the effect of \textit{indirectly transferring those rights} to the public body (1246G-247H). Admitting that development of a doctrine of constructive expropriation may induce confusion in the law and may hamper the constitutional imperative of land reform (1288A-B), the court eventually left open the question as to the need to develop a doctrine of constructive expropriation in South Africa. It found, instead, that approval of the road scheme amounted to nothing more than an “advance notification of a possible intention to construct a road, which if implemented in the form approved, would result in a taking” (1249E-F).

\textsuperscript{104} Van der Walt \textit{Constitutional Property Clauses – Comparative Analysis} 358.

\textsuperscript{105} \textit{First National Bank v South African Revenue Service} 2002 7 BCLR 702 (CC).

\textsuperscript{106} See par 114 of the decision.
of sufficient reason in a law for an imposition on property,\textsuperscript{107} or to procedural unfairness. The court explicitly indicates that where land or corporeal moveable property is at stake, the purpose for deprivation will have to be more compelling than where the property does not qualify as land or corporeal movables or where the property rights are less extensive. Likewise, where the deprivation is all-embracing, a more compelling purpose will have to be established than in the case where only some incidents of the property are affected, or where they are only partially affected. As has been indicated above already, the court supports the idea that the meaning of non-arbitrariness fluctuates,\textsuperscript{108} as a result of which \textit{sufficient reason} will sometimes be established by “no more than a mere rational relationship between means and ends,” whilst in other circumstances it will call for a full-blown proportionality review in terms of section 36(1) of the Constitution. Although the issue of constructive expropriation is never raised explicitly, the manner in which the court uses the arbitrariness requirement to determine the constitutionality of the specific imposition on property leaves no doubt that an inquiry as to possible remuneration for excessive regulation would be unnecessary. The implication thereof is that an argument of constructive expropriation would be relevant in instances where the constitutionality of a specific legislative regulation of property is under scrutiny, and not where an individual affected by a state imposition on his/her property requires compensation outside the confines of section 25(2). This is, in any event, the result that may be reached if a deprivation of property is contested for being excessive.

As must be apparent from the preceding discussion, the question as to the import of some kind of “doctrine” of constructive expropriation is by no means resolved yet. Due to the uncertainty still existing in this regard, it is for present purposes necessary to keep in mind the possibilities offered by the acknowledgement of this potential third category of impositions on property. We shall assume that any possible South African model of constructive expropriation will at least acknowledge the fact that in spite of a lack of formal expropriation, a specific imposition on property by the state is prone to be constitutionally contested because of its excessive effect or unfair impact on an individual property holder. Accordingly the issue of constructive expropriation would arise where actions are seemingly nothing more than deprivations, but nevertheless effectively destroy the economical viability of the property or a core element of the property right, whilst (additionally) affording no direct benefit to the authority effecting the imposition on property.\textsuperscript{109} Hence, although no expropriation was intended, the effect of the specific imposition on the rights of the property holder is so extensive that the

\textsuperscript{107} See par 105 of the decision.
\textsuperscript{108} See par 105(g) of the decision.
\textsuperscript{109} Van der Walt 1995 \textit{SAPR/PL} 310.
property may just as well have been expropriated. Contesting such an imposition on property may result in the enforcement of the provisions in section 25(2) regarding payment of compensation. Alternatively, it may invalidate the excessive regulatory imposition on property.  

In the final section of this contribution we concentrate on specific examples of conversion or destruction of rights in terms of the transitional provisions of the MPRD Act, specifically to determine how the provisions on deprivation and expropriations under the Constitution operate in the context of the Act.

3 Constitutional property review in specific instances under the MPRD Act

The three identified sets of consequences resulting from the transitional provisions of the MPRD Act have the effect either of converting existing “old order” rights into “new order” rights (in the case of successful applications for conversion); or of destroying existing rights altogether (in the event of unsuccessful applications for conversion, or where no application for conversion is submitted). In effect, the transitional provisions aim at destroying all existing “old order” rights, and reissuing similar rights upon successful applications for conversion. Whilst aware of the fact that we deal in the broad sense with two instances of destruction of rights in our discussion below, we attempt to import some measure of distinction by labelling the first set “destructions proper,” referring to those cases where rights are destroyed altogether and not substituted at all; and the second set “conversions”, referring to those cases where rights are destroyed, but replaced by new order rights due to successful applications for conversion or new rights.

3.1 “Proper” destruction of rights

As concerns the destruction of old order rights without substitution by any type of new order right, impositions on private property rights may occur on various different levels:

3.1.1 Unsuccessful applications for conversion

First, mineral (or similar) rights held by third parties may be destroyed altogether in terms of the transitional provisions if the existing holders of such rights are unsuccessful in applications for conversion. This raises the issue of whether such destruction of rights qualifies as expropriation in terms of the Constitution, or if it does not, whether compensation should in any event be payable on the basis of the severe effect the unsuccessful application has on the individual right holder.

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110 Van der Walt 2002 THRHR 459-470.
111 See part one, par 4.
Item 12(1) to Schedule II of the Act provides that “any person who can prove that his or her property has been expropriated in terms of any provision of the Act may claim compensation from the State.” Hence parties affected by circumstances as described above will first have to indicate that the destruction “proper” of their rights amount to an expropriation. In view of the two-stage approach followed in the constitutional context, this means that the aggrieved parties will have to indicate not only that their claims to minerals under the “old order” constitute rights protectable in terms of section 25, but also that the transitional provisions of the MPRD Act, along with the exercise of the ministerial discretion, amount to an imposition which must be tested against section 25(1) and section 25(2). For purposes of proving the existence of a protectable right as well as an infringement upon this right, the existing requirements under the Expropriation Act may serve to give more specific content to the constitutional expropriation requirements in as far as this Act is compatible with the Constitution.

As soon as the aggrieved parties have indicated that acknowledged and protectable rights in terms of the Constitution have been infringed, it will be up to the state to indicate that such infringements are justifiable under the Constitution. In this context, it must be the exercise of ministerial consent in terms of the transitional measures read with section 5, which requires scrutiny. The requirements of “generally applicable law” effecting the deprivation, as well as the requirement of “non-arbitrariness” and “proportionality” may be problematic here. As we have indicated above it may be doubted whether the broad discretion afforded to the minister under the MPRD Act provides affected parties with sufficient certainty as to the consequences of this Act. Furthermore, as has been indicated elsewhere, it may be doubted whether the approach of the legislature here results in a proper balance between means and ends of legislative reform. The result is misgivings as to the rational connection between the grave impositions brought about by the transitional provisions (especially in the context of “destruction “proper”), and the broader goals of economic empowerment, economic growth and sustainable development.

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112 There are two separate instances in the MPRD Act of provisions introducing ministerial discretion: item 8 read with s 17 or 23 respectively afford holders of unused old order rights the exclusive right to apply for prospecting or mining rights respectively. Conversion of old order prospecting rights and old order mining rights take place under the ministerial discretion envisaged by item 6(3) in the case of prospecting rights, and item 7(3) in the case of mining rights.

113 63 of 1975.

114 See n 112 above.

115 See par 2 1 2 1(a) above.

116 Badenhorst 2003 Obiter 46-64.
312 Non-compliance with the application requirements (the case of the “lazy” holder)

The destruction of rights as a result of non-compliance with the application for conversion requirement also raises the question of whether “lazy” right holders are entitled to claim any compensation for expropriation where no application was made under the new Act. In considering the latter issue, it must be kept in mind that a landowner traditionally is not obliged to perform any acts with or upon his/her land. Likewise, mineral right holders traditionally were not obliged to exercise these rights. The requirement that existing “old order” right holders now are forced to reapply for conversion of their rights may, in the context of unexercised “old order” rights, result in an additional burden placed upon such right holders. If such holders do not re-apply in terms of the MPRD Act, their rights will expire after the respective periods of grace envisaged for different types of “old order” rights in the transitional provisions. In such cases, the transitional provisions also result in destruction “proper” of existing rights, and the same considerations should be applicable in the context of constitutional property protection and regulation, as those discussed in paragraph 311 above.

The only distinction, to our minds, between the situation sketched in 311 above and the situation where holders of “old order” rights choose not to comply with the re-application requirements, may be found in the application of item 12(1) to the respective case scenarios. Where an application for conversion was unsuccessful, the unfortunate applicant will have to be informed of the minister’s decision and the reasons for it. Hence it would be relatively easy to indicate the occurrence of an expropriation in the context of the administrative exercise of the state’s powers. If no application for conversion was made, the minister is under no obligation to inform the “old order” right holder of the cessation of his/her rights after expiry of the periods of grace. In fact, it may be argued that the cessation of rights occurred through no action of the administrative authorities responsible, but indeed as a result of the inertia of the right holders themselves. Hence, even though the rights will be extinguished, it may be more difficult to link such destruction with the actions of the relevant state authorities.

Upon a means-ends analysis it may perhaps be argued that the requirement of re-application may be reasonably expected from the affected parties in this instance. The more vexing issue in this particular set-up, however, is whether the annihilation of the rights subsequent to the expiry of the period of grace, where no application for conversion has been brought, constitutes only a justifiable deprivation, or rather an expropriation. Seeing that the effect of the provisions here is the ultimate cessation of existing rights, one would tend to construe the action in such

117 See part one, par 3.
instance rather as an expropriation. However, the affected parties need not receive any notice of such expropriation, and the rights terminate automatically after expiry of the various periods of grace. Accordingly, nothing in the situation itself indicates an expropriatory intention. This leads to the question of whether constructive expropriation may be at stake. In turn, it will then have to be determined whether application of either a "doctrine" or simply an argument of constructive expropriation doctrine here will result only in the striking of an excessive regulation of property, or whether the affected parties will be able to claim compensation.

At this point, as we have indicated above, it is not easy to provide a quick answer to these questions, since the matter of the application of a doctrine of constructive expropriation has not been finalised by the South African judiciary. Following the implicit reasoning of the Constitutional Court in *FNB v SARS*, that constructive expropriation would be relevant as an argument warranting a finding of constitutionality, rather than payment of compensation, the following result may be anticipated: since the possibility of a notice of expropriation is excluded where old order rights have expired after the grace period and there had been no application for conversion, the result of the transitional provisions in this instance is a deprivation that "goes too far". It divests the "old order right" holder of the right itself, as well as the protection afforded to such a holder in the event of subsequent administrative action. For all practical purposes, there is no need to engage in an expropriatory process, since the rights simply vanish after the grace period. The argument that the "old order right" holder is reasonably expected, by way of legislative regulation, to undertake steps to ensure the continued existence of the right, or of similar rights, may nevertheless counter the idea of constructive expropriation.

### 3.1.3 Loss of prospecting moneys and royalties

A third issue concerns the loss of prospecting moneys and royalties upon termination of mineral rights as "old order rights". The provisions in the MPRD Act concerning royalties payable by mineral lease right holders to landowners/mineral right holders remain really vague. Since the basis of the obligation to pay royalties (the mineral lease) is destroyed by the MPRD Act in general, the obligation itself must naturally also cease to operate, save where exceptions have been made explicitly. In this

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118 See par 2.1.2.2 above.

119 The duty of the prospector or miner to pay prospecting moneys or royalties is terminated upon termination of the "old order" right, that is upon conversion into new order rights, or termination of the period of grace, or subsequent to an unsuccessful application. See item 11, read with items 7(7) and (8). Item 11 contains an exception to the general rule, in that communities already receiving consideration or royalties may continue to receive such (subsection (1)) and individuals receiving consideration or royalties will not lose their rights to receive these if the loss will result in undue hardship, or if these are used for social upliftment.
context, therefore, it seems as if an expropriation of a property right is at stake.

In order to qualify for payment of compensation in terms of item 12 of the transitional provisions, however, the landowner who has lost the rights to payment of royalties or other consideration will have to prove that an expropriation has taken place. The MPRD Act itself does not stipulate the arguments to be advanced in order to prove the occurrence of expropriation. It remains unclear, therefore, whether an aggrieved mineral right holder will have to rely on the constitutional provisions of sections 25(1) and 25(2) only, or whether additional elements of expropriation, inherited from pre-constitutional expropriation law and practice (such as appropriation by a state organ and permanence of expropriation), will also have to be fed into the equation. In terms of section 3(1) read with section 3(2)(b) of the MPRD Act and according to the envisaged provisions in independent royalty legislation, royalties, fees and consideration payable in the context of minerals will in future be payable by the miner to the state. Hence it would be relatively easy to indicate that appropriation of the right at the cost of the mineral right holder has been effected. The most problematic aspect in this context, therefore, is that the aggrieved party will have to prove that the relevant rights qualified as "property" for purposes of constitutional protection, and (of course) that an expropriation (that is a complete taking of existing rights) has occurred.

Based upon the categorisation of rights according to the likelihood of their being protected under the constitutional property clause as discussed above, it is submitted that the right to receive royalties will be protected under the Constitution. In essence such rights are personal in nature, referring to the ability to claim payment from the miner as per agreement. The withdrawal of these rights from the private sphere, and the assignment thereof to the state surely represents a deprivation of property in the constitutional sense. Since expropriation is probably not intended here, the matter of constructive expropriation must arise if this deprivation is to be struck down for going too far.

3.2 Conversion of rights

Impositions on property rights may be less obvious in the event of conversion of "old order" rights into new order rights. Nevertheless, we have shown already that at least to some extent and in most instances of conversion attenuation takes place, due to the increased role of ministerial consent in the acquisition and retention of new order rights,

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120 Item 13(1) of Schedule II to the MPRD Act.
121 S 3(1) of the MPRD Act renders the state custodian of all the mineral resources in South Africa, whilst s 3(2)(b) empowers the state to levy royalties or fees in connection with the mining of such minerals.
122 See the current provisions of the Draft Mineral and Petroleum Royalty Bill.
123 See par 2.1.1 above.
and due also to the limited duration of most of the new order rights. Nothing in the transitional provisions obliges the minister to convert existing rights into rights having exactly the same content. On the contrary, item 7(4) provides: "No terms and conditions applicable to the old order mining right remain in force if they are contrary to any provision of the Constitution or this Act."

In broad terms, the results of conversion in terms of the transitional provisions, read with section 3 of the MPRD Act, may be summarised as follows in the light of the doctrine of private law rights: Upon introduction of the MPRD Act, the (unsevered) mineral resources of the country are vested in the people of South Africa (or the state). Landowners can, accordingly, no longer deal with such unsevered mineral rights as they please, but have to acknowledge the custodianship of the state in this regard. Where landownership was held subject to mineral rights (that is where severance had already occurred), it will in future be subject to new prospecting and mining rights, because the right to prospect and mine minerals implicitly vests in the state. Holders of mineral rights, prospecting rights or mining rights are deprived of the entitlements of prospecting and mining as a result of section 3(2)(a) of the MPRD Act. The state’s right to prospect and mine is subject to the transitional measures, which grant certain statutory (personal) rights: Holders of "old order" rights may (i) apply for the granting of (or conversion to) new order rights; or (ii) claim compensation upon "expropriation of property". Upon granting (and registration) of new rights, similar rights are obtained with a possible restriction of some entitlements. The new right may have the entitlement to prospect or mine as its content. Upon possible subsequent termination of a "converted" right by the minister due to non-compliance with the Act, the holder is deprived of the new right. A personal right to claim compensation exists.

The question in this context is whether the impositions as listed above amount to justifiable deprivations in terms of section 25(1) of the 1996 Constitution.

The instances of impositions on existing property rights in this category are too numerous to justify detailed explanation of each. Hence we will resort to a discussion of the scenarios which concluded part one of our contribution. For one, the successful conversion of "unused old order" mineral rights to "new order" prospecting/mining rights results in the award of a more restricted right, due to the requirement of ministerial consent as concerns entitlements such as alienation and encumbrance. Such a right will, moreover, no longer be perpetual in nature, but will depend on compliance with of the MPRD Act for continued existence.

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124 S 3(1) of the MPRD Act.
125 S 3(2)(a) of the MPRD Act.
126 The holder of an "unused old order" right may apply for new prospecting/mining rights; holders of "old order" prospecting rights or "old order" mining rights may apply for conversion of their respective rights.
Secondly, in the case of successful conversion of rights in terms of a mineral lease or prospecting contract, similar rights (mining rights or prospecting rights) are awarded. Again, the converted rights are more restricted in content, especially as concerns entitlements such as alienation and encumbrance, because of the requirement of ministerial consent. Furthermore, the duration of the new prospecting and mining rights are now statutorily regulated. The financial benefits to be derived from former mineral rights are also affected (by the Act’s exclusion of the mineral rights holder from eligibility to continue receiving prospecting moneys from the prospector or royalties from the miner). In conversions of this kind, the holder of the underlying mineral right loses not only the mineral right but also the right to claim payment of further royalties.

The situation above should be distinguished from that addressed in our third example that refers to the conversion of rights in terms of statutory mining leases, where royalties are in any event not an issue. Such conversions result in the acquisition of more or less equal rights, save that duration of such right may be under stricter control, and requirements for compliance with some of the statutory duties may be stricter.

Our fourth example of successful conversion involves the switch from “old order” mining authorisations into new order mining rights. In this instance, a licence is replaced with limited real rights. Underlying common law or statutory rights are not mentioned in this category. Assuming that the fasces approach applies in this instance, it would result in other rights accompanying the pre-conversion licence (for instance mineral rights) terminating along with the mining authorisation, whilst the new mining rights need to be registered in the mining titles office. In such instances, the post-conversion rights seem to be stronger than their pre-conversion counterparts.

As is apparent from particularly the first three examples, the rights of particular holders of “old order” rights may be directly and individually affected where ancillary rights granted on successful applications for conversions of mining or prospecting rights, are more restricted in content than the original “old order” rights from which they were derived. This would represent an obvious instance of an imposition on property rights to the extent that the conversion to “new order” rights results in a renewed limitation of existing rights. It must hence be determined whether these circumstances give rise to a claim for payment of compensation in terms of item 12 of Schedule II.

The result here depends to a very large extent on the facts of each individual case. If the right to mine or prospect essentially is retained

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127 As we have indicated (part one, par 4), depending on the content of pre-conversion mining and prospecting rights, the terms of such “old order” rights could be stronger than the post-conversion rights under the new act.

128 s 3(2)(b) determines that the state will become entitled to royalties.

129 Save, of course, in case of either of the exceptions provided for in the act (see n 119 above).
after conversion the loss of parts of other or secondary entitlements might be minimal; and the imposition would then not raise eyebrows upon rationality review or a proportionality inquiry. However, if the converted right is later terminated by non-compliance with the Act, the holder loses all the former entitlements, and effectively the newly converted right as well. In such circumstances it would indeed be more difficult to prove that the means employed by legislature and the relevant administrative bodies to achieve the goals of the Act and to ensure compliance with the Act’s provisions justifies the complete loss of property.

3.3 Destinations, conversions and constructive expropriation

The direct consequence of “old order” rights’ destructions (in the broad sense incorporating both destructions “proper” and conversions of old order rights) under the transitional provisions is that the way is cleared for the minister to grant new statutory rights either to the original right holder, or to a new holder. Only when that right is granted by the minister in terms of the transitional measures, do the rights mentioned in section 5 of the Act come into existence. The landowner’s rights to the minerals in the land are obviously expropriated by the minister in favour of the prospector, miner or permit holder\textsuperscript{130} if the minister exercises his/her powers in terms of the transitional measures. The holders of prospecting rights or mining rights are enabled by section 5(3)(b) to prospect or mine for their own accounts and to dispose of the fruits of their mining activities. Accordingly, the rights to the minerals pass from the landowner to the new holder through the exercise of the ministerial discretion.\textsuperscript{131}

If appropriation by the state or another party is regarded as a prerequisite for expropriation, then the transitional provisions cannot amount to expropriation unless an immediate vesting of a similar right in a new party or the state occurs. Furthermore, the action with the expropriatory effect is invariably one taken by an executive organ (the minister, in terms of the transitional measures) rather than an outright statutory action. If the action then does not amount to an expropriation, it may still qualify as a mere deprivation of property, which still has to pass constitutional scrutiny. The question that remains then is whether the effect of the deprivation is excessive.

In each isolated instance where the minister exercises his/her power to grant a statutory mining right or prospecting right, the exercise of this power may result in an expropriation or regulation of the existing “old order” right. If the view is taken that expropriation requires an

\textsuperscript{130} We have already pointed out that the permit holder is not expressly granted the right to mine and dispose of minerals, but for purposes hereof we assume that to be the case.

\textsuperscript{131} The landowner nevertheless remains entitled to the use and control of the surface of the land, subject to the regulatory measures incorporated in s 50 of the Act.
appropriation of similar rights either by the state or by another party, the cessation of the "old order" right along with the exercise of the minister's discretion in favour of a party other than the "old order" right holder may be seen as a single act amounting to expropriation of such an "old order" right. Before appropriation takes place, on this view, the cessation of the "old order" right may at best be regarded as an excessive regulation of the property rights of the "old order" right, for which compensation may be payable if a wide doctrine of constructive expropriation is applied.

If appropriation is not regarded as a requirement for expropriation, the cessation of the "old order" right may be regarded as expropriation even before the minister exercises his/her discretion and rewards a similar or new right to a party other than the "old order" right holder.

Furthermore, one must consider the effects of the conversion of "old order" rights in the hands of the existing holder thereof. The conversion of old order rights or the granting of prospecting rights or mining rights in terms of the transitional arrangements could be seen as partial compensation in cases where the nature and content of the new order right amounts to a diminution of existing rights. In such events, which obviously do not amount to expropriations, no compensation needs to be paid according to the provisions of the constitutional property clause. Deprivations of property such as these nevertheless still need to be effected in terms of a law of general application, which is not arbitrary, and which complies with the proportionality test. The payment of (partial) compensation cannot replace the requirements set by the Constitution for deprivations. If the legislature's arrangement in this regard is regarded as factual compliance with the idea of constructive expropriation, it still does not pass muster, since no indication is provided as to whether the provisions for determining compensation in section 25(3) of the Constitution have been met.

4 Conclusionary remarks

If one accepts that the constitutional property clause protects not only individual property holdings (on a case by case basis), but also the idea or regime of private property, it is submitted that Schedule II must amount to an excessive regulation of existing property rights. In this context, therefore, the question of constructive expropriation arises once again. Here, however, the purpose of relying on a "doctrine" or an argument of constructive expropriation would not be to secure compensation in an individual case, but rather to achieve the striking of the relevant provisions on the basis of their excessiveness.

In any event, convincing reasons would have to be advanced on the basis of section 25(1) or section 36 or both, if a steep imposition on

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132 See our view as set out in Badenhorst, Pienaar & Mostert Property 8-9.
property (such as the destruction of the legal concept of property through the transitional provisions) is to qualify as a justifiable deprivation of property. It must be doubted whether, on the basis of rationality and justifiability, as components of the South African proportionality test, and indeed eventually on the basis of strict proportionality (in the sense of balancing of competing interests as a final stage of the proportionality inquiry), such reasons exist. If this is indeed the case, and the transitional provisions of the MPRD Act are unconstitutional as a whole, the constitutionality of the Act in its entirety is in issue, since most of the new order arrangements depend on the effectiveness with which the transition from the old order to the new order can be achieved. Hence, although we have argued that section 3(1) does not bring about a full-scale nationalisation of mineral resources in South Africa, the effect of the transitional provisions as a whole, along with section 3(2)(a), is to destroy the legal institutions of mineral rights, prospecting rights and mining rights as they are known in South Africa.

OPSOMMING

Wysigings aan die onlangs uitgevaardigde Wet op Ontwikkeling van Minerale en Petroleum Hulpbronne noodsak 'n herbescouing van die oorgangsbepalings van die Wet. Hierdie bydrae het ten doel om die aard en inhoud van die regte wat deur die oorgangsbepalings geraak word te analiseer, en die effek van die oorgangsbepalings op sodanige regte teen die grondwetlike eiendomsklousule te toets. Die analise is gestruktueer in twee aparte afdelings. Deel een het 'n vergelyking van "ou orde" regte en die nuwe regte in terme van die Wet behels. Megaanlig deel twee fokus op grondwetlikbeidskwessies. Dit verskaf 'n oorsig oor die relevante bepalings van die grondwetlike eiendomsklousule. Die strekwydte van die klousule, samehang tussen die eiendomsklousule en die algemene beperkingsklousule, sowel as die verskillende kategorieë inbreuke op eiendom in terme van die Grondwet, word bespreek. Hierna word die algemene beginsels rakende grondwetlike eiendomsbeskerming en -regulering toegepas op die verskillende probleemsituasies wat reeds in deel een van hierdie bydrae geïdentifiseer is.