The notion of constitutional property in South Africa: an analysis of the Constitutional Court's approach in the Shoprite Checkers (Pty) Ltd v MEC for Economic Development Eastern Cape 2015 6 SA 125 (CC)

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1 Introduction: The protection of property under a constitutional order

In South Africa, the right to “property” is a constitutionally guaranteed or fundamental right in terms of section 25 (“the property clause”) of the Constitution of the Republic of South Africa, 1996 (“Constitution”).¹ The property clause in the Constitution is a two-pronged mechanism: it is designed to protect property against unconstitutional interference, and it guides the constitutionally-mandated redistribution and reform process with the transformational goal of addressing centuries of racial and economic discrimination.²

In terms of section 25(1) of the Constitution, property is protected against arbitrary deprivations by law of general application. Expropriation of property, as subspecies of a deprivation,³ can only take place in terms of a law of general application, for a public purpose or in the public interest, and subject to the payment of compensation.⁴ Compensation must be “just and equitable” reflecting an equitable balance between the public interest and the

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¹ The authors gratefully acknowledge the suggestions and insights obtained from the anonymous referees.
⁴ First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 4 SA 768 (CC) para 57.
⁵ S 25(2)-(3) of the Constitution.
interests of the expropriated owner. In determining whether deprivation or expropriation has taken place, it is important to determine whether the subject of the deprivation or expropriation qualifies as constitutional property, and is thus worthy of constitutional protection.

Property that is deemed worthy of constitutional protection is not necessarily limited to the characterisation of property in terms of private law. The Constitutional Court has provided a number of factors to assist in the determination of what should be constitutionally protected in terms of section 25. However, until the decision in Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape (“Shoprite decision”), the courts had, for the most part, not yet fully engaged with the meaning of constitutional property that went beyond the private-law understanding of property. In this case, the court was called upon to adjudicate a query as to whether a commercial trading licence, which permitted the selling of wine in a grocery store, fell within the ambit of the meaning of “property” in the Constitution. This case by no means provides an expansive and complete definition of what constitutes constitutional property, but, it widens the ambit of constitutional property considerably.

The notion of constitutional property and its features, and the court’s approach to the determination of what constitutes constitutional property, will be examined in this article in respect of the three judgments handed down in the Shoprite decision. This article sets out the normative approach adopted by Froneman J, as compared to the private-law approach adopted by Madlanga J. It also canvasses the approach adopted by Moseneke DCJ, who argued that whether licences constituted constitutional property need not be examined, and instead put forward that a rationality enquiry should be undertaken.

This article argues that the focus of the investigation should be on the rights that are lost when determining whether a right should be treated as constitutional property. The various approaches adopted by the three judgments referred to above, are evaluated in this light. Thereafter, this article attempts to distil the key features used by the court that may be useful for the determination of whether a right falls within the notion of constitutional property.

2 Evolution of the concept of “constitutional property” in South African jurisprudence

Section 25(1) seeks to protect private property rights against governmental interference. Consequently, it embodies a negative protection of property. 5

5 S 25(3). See further section 25(3) as to the factors that need to be taken into account in the balancing of the respective interests.
6 2015 6 SA 125 (CC).
7 Para 40.
8 A discussion on the protection of property against deprivations or expropriations falls beyond the scope of this discussion.
9 Phoebus Apollo Aviation CC v Minister of Safety and Security 2003 2 SA 34 (CC) para 4.
10 First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 4 SA 768 (CC) para 48.

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However, the right to property is not an absolute right in the constitutional order and may be subject to governmental interference to facilitate the achievement of social purposes. Where property rights are limited or deprived, it must first be established whether the property in question enjoys the status of constitutional property and thus the protection that the Constitution affords such property.

Save for the fact that property is not limited to land, section 25(1) of the Constitution does not define the notion of “property”.

The first major decision concerning the property clause was First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service (“FNB decision”). In its judgment, the Constitutional Court declined to define property for purposes of section 25 comprehensively. The Court reasoned that it would be “practically impossible” and “judicially unwise” to furnish a comprehensive definition of property for purposes of section 25, given the early stage of development of the South African constitutional jurisprudence.

Despite the Constitutional Court’s initial reluctance to circumscribe the meaning of property, subsequent judgments have provided more clarity and insight into the content of the right. However, it has been accepted that a definition of constitutional property should not be too wide, thus rendering statutory regulation impracticable, nor should such definition be too narrow, rendering protection of property worthless.

Since the FNB decision, the Constitutional Court has recognised different forms of constitutional property. Both corporeal and incorporeal property enjoy protection.

Real rights (property rights), such as ownership of movable or immovable (corporeal) property, mineral rights, usufructs and the right to use land temporarily to remove gravel, have been recognised

11 Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng 2005 1 SA 530 (CC) para 82; Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government 2009 6 SA 391 (CC) para 33.
13 National Credit Regulator v Opperman 2013 2 SA 1 (CC) para 60.
14 2002 4 SA 768 (CC).
15 Para 51; H Mostert & PJ Badenhorst “Property and the Bill of Rights” in T Naidu (ed) Bill of Rights Compendium 18 ed (RS 29 2006) 36.1.4. The absence of a definition was again confirmed in Law Society of South Africa v Minister for Transport 2011 1 SA 400 (CC) para 83.
16 Law Society of South Africa v Minister for Transport 2011 1 SA 400 (CC) para 83.
17 Para 83.
18 First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 4 SA 768 (CC) paras 51, 54, 56. The Constitutional Court based its classification of ownership of a motor vehicle as constitutional property on the nature and object of ownership (para 51). The absence of, or limited use of the vehicles by First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 4 SA 768 (CC) as credit provider, in whose favour ownership of the vehicles was reserved (para 54), its subjective interest as owner and the economic value its ownership (para 56) was rejected as criteria to determine the characteristic of the right.
19 Para 51; Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng 2005 1 SA 530 (CC) para 33; Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government 2009 6 SA 391 (CC) para 33.
20 Agri South Africa v Minister of Minerals and Energy 2013 4 SA 1 (CC) para 50.
21 See National Credit Regulator v Opperman 2013 2 SA 1 (CC) para 61.
22 Du Toit v Minister of Transport 2006 1 SA 297 (CC) para 54.
as types of constitutional property.\textsuperscript{23} Other private-law rights (incorporeal property), such as intellectual property rights (a registered trademark),\textsuperscript{24} and a right to the goodwill of a business\textsuperscript{25} have also been recognised as constitutional property. Some personal rights, such as a personal right arising from unjustified enrichment,\textsuperscript{26} and a claim for loss of earning capacity\textsuperscript{27} or the personal right to money deposited into a bank account\textsuperscript{28} have also been recognised as constitutional property.\textsuperscript{29} Public-law rights, such as state welfare payments and subsidies,\textsuperscript{30} are generally not regarded as constitutional property.

Despite the above private-law style examples of constitutional property, the concept of constitutional property is fundamentally different from property as a private-law right. This is also true of the range of interests that qualify, and are protected, as private-law rights.\textsuperscript{31} As a point of departure, an interest or right should be regarded as constitutional property if it constitutes a concrete asset and has “vested in or been acquired by the holder according to normal law”.\textsuperscript{32} As will be indicated in our discussion below, the consideration of what constitutes constitutional property goes beyond this formulation of property.

3 Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape

Shoprite Checkers is a well-known supermarket chain in South Africa. In terms of a pre-existing legislative framework (the Liquor Act 27 of 1989 (“Liquor Act”)), it was licenced to sell wine with food in all of its grocery stores in the Eastern Cape. In terms of the new Eastern Cape Liquor Act 10 of 2003 (“Eastern Cape Liquor Act”), the holder of a grocer’s wine licence is (a) allowed to continue to sell wine with food at the same premises for a period of ten years; and (b) entitled, after five years, to apply for a liquor licence to sell

\textsuperscript{23} According to Van der Walt, all limited real rights, including servitudes, real security rights and registered long term leases and mineral rights should be recognised as constitutional property. Van der Walt Constitutional Property Law 140.
\textsuperscript{24} Laugh It Off Promotions CC v SAB International (Finance) BV \textit{via} Sabmark International (Freedom of Expression Institute as Amicus Curiae) 2006 1 SA 144 (CC) para 17. See further Van der Walt Constitutional Property Law 143, 148-150.
\textsuperscript{25} Phumelela Gaming and Leisure Ltd \textit{v} Grundlingh 2007 6 SA 350 (CC). See also Van der Walt Constitutional Property Law 151.
\textsuperscript{26} National Credit Regulator \textit{v} Opperman 2013 2 SA 1 (CC) para 61. Van der Westhuizen J reasoned that such recognition is in line with the recognition of personal rights as constitutional property in other jurisdictions (para 63). Van der Westhuizen J also referred to the view of the court \textit{a quo} that an enrichment claim counted as an asset in one’s estate or patrimony, has monetary value and could be disposed of and transferred to another person.
\textsuperscript{27} It was only assumed to be the case in \textit{Law Society of South Africa \textit{v} Minister for Transport} 2011 1 SA 400 (CC) para 84.
\textsuperscript{28} Chevron SA (Pty) Ltd \textit{v} Wilson \textit{via} Wilson’s Transport 2015 10 BCLR 1158 (CC) para 16. See also Van der Walt Constitutional Property Law 151.
\textsuperscript{29} See further Van der Walt Constitutional Property Law 141-143, 153.
\textsuperscript{30} See 162. In \textit{Transkei Public Servants Association \textit{v} Government of the Republic of South Africa} 1995 9 BCLR 1235 (Tk) it was noted that constitutional property for purposes of section 28 of the Constitution of the Republic of South Africa, Act 200 of 1993 (“Interim Constitution”) was probably wide enough to include a state subsidy. See further Van der Walt Constitutional Property Law 167-168.
\textsuperscript{31} Van der Walt Constitutional Property Law 101-102, 107.
\textsuperscript{32} 184.
all kinds of liquor at separate premises. Shoprite elected not to apply for the conversion of its grocer’s wine licences, resulting in the lapsing of the licences and the closure of the table-wine sections in its affected stores.

Shoprite contended that the change of the regulatory regime amounted to arbitrary deprivation of property in terms of section 25(1) of the Constitution. This argument was accepted by the court a quo. When the High Court’s finding of unconstitutionality was referred to the Constitutional Court for confirmation, Shoprite argued that the licences constituted constitutional property because they had monetary value, could be disposed of and transferred, and constituted an asset in the holder’s estate. The respondents contended that the liquor licences became converted rights and neither licence nor right was property for purposes of section 25. Whether a deprivation took place, and if so, whether it was arbitrary, was contested by the parties.

A primary consideration that the court had to address was thus whether the commercial trading licence fell within the scope of the term “property” as set out by the Constitution. Froneman J formulated the three constitutional issues as follows:

(a) “Does the entitlement to commercial trade under state licence or regulation amount to property under s 25?
(b) If it does, do the impugned provisions of the Eastern Cape Act deprive holders of their property?
(c) If yes, is that deprivation arbitrary?”

Three judgments were handed down by Froneman J (Cameron J, Jappie JA and Nkabinde J concurring), Madlanga J (Tshiqi AJ concurring) and Moseke DCJ (Mogoeng CJ, Khampepe J, Molemela AJ and Theron AJ concurring). The majority of the Constitutional Court, in the judgments of Froneman J and Madlanga J, held that a grocer’s wine licence is property under section 25 of the Constitution and that Shoprite was deprived of this property in terms of the provisions of the Eastern Cape Liquor Act. Moseke DCJ, in his minority judgment, disagreed with the finding that the grocer’s wine licences constituted constitutional property. Froneman J and Moseke DCJ (majority with this issue) held that the deprivation was not arbitrary, whilst Madlanga J dissented on the matter of arbitrariness. The overall effect of the judgments was that the High Court’s declaration of unconstitutionality could
not be confirmed: there was no arbitrary deprivation of property, and lapsing of the right was consistent with the Constitution.  

3 1 The majority judgments in the Shoprite decision

Below, the judgments of Froneman J and Madlanga J are set out in more detail.

3 1 1 Froneman J

Froneman J, in his majority judgment, set the scene for the conflicting judgments on the notion of property:

“The question of property is fiercely contested in South African society. There is, as yet, little common ground on how we conceive of property under s 25 of the Constitution, why we should do so, and what purpose the protection of property should serve. This exposes a potential fault line that may threaten our constitutional project.”  

In grappling with the conception of constitutional property against this backdrop, the court stated that the “evolving conversation” about the notion of property should continue “within the framework of values and individual rights in the Constitution”.  

This sentiment is key to Froneman J’s judgment, which adopts an explicitly normative approach towards the interpretation of the property clause. The court set out the reasons for the contested nature of the protection of property, explaining them with reference to the history of apartheid, where exclusive individual entitlements were the focus of the pre-constitutional notion of property. Secondly, apartheid laws and policies ensured the “dispossession of what indigenous people held, and its transfer to the colonisers in the form of land and other property, protected by an economic system that ensured the continued deprivation of those benefits on racial and class lines”.  

As a consequence of this history, the effects of which are still experienced, the realisation of the constitutional values of a society based on “human dignity, the achievement of equality and the advancement of human rights and freedoms” is hindered. This hindrance can be attributed to the dichotomy that exists between the previously advantaged, who fear losing what they have, and the previously disadvantaged, who fear that equitable redistribution will not be realised. The property clause is thus treated with suspicion, exacerbated and informed by different perspectives and opposite ideological extremes.

According to Froneman J, the contrasting conceptions can only be addressed by seeking “our own constitutional conception of property within

45 See paras 24, 88, 91.
46 Para 4.
47 Para 4.
48 Para 34.
49 S 1(a) of the Constitution.
50 Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape 2015 6 SA 125 (CC) para 34.
51 Para 35.
the normative framework of the fundamental values and individual rights in the Constitution.” He also stated that the extent of constitutional protection that property should enjoy would be dependent on not only the nature of the constitutional property interest, but also the “core purpose” of the interest in question.

Froneman J was of the view that it had become necessary to pursue the investigation into what constituted constitutional property beyond the FNB decision. He argued that, following this decision, the query into the existence of constitutional property was context-dependent and thus variable. To ensure consistency between these assessments, Froneman J identified the underlying reasons or the normative basis for the determination of constitutional property. In the process, he set out some of the guidelines for the proper conceptualisation of constitutional property, in addition to those earlier identified in the FNB decision. The building blocks mentioned by Froneman J can be extracted and summarised as follows:

(a) a conception and determination of constitutional property has to be derived from the Constitution and accord with the objective normative values and founding values of the Constitution;
(b) during the extension of the boundaries of property, the fundamental values of dignity, equality and freedom play a central role;
(c) each individual case must be adjudged within the constitutional framework, and the enquiry must be objective;
(d) it would be retrogressive to rely on pre-constitutional notions of vesting to determine the ambit of property that needs to be protected;
(e) section 25 contains other potential constitutional resources that are worthy of protection;
(f) determination of constitutional property should be pushed and extended beyond the private-law boundaries or notions of property to extend the boundaries of constitutional protection;
(g) the entitlement to commercial trade under a state licence or regulation does not fit comfortably within the private-law notions of property, which only recognises rights once they are vested rights.

Para 36; see also para 46.
Para 36.
Para 39.
Para 48, namely:
“(i) the protection of property as an individual right is not absolute but subject to societal considerations;
(ii) that property should also serve the public good is an idea by no means foreign to pre-constitutional property concepts; and (iii) neither the subjective interest of the owner in the thing owned, nor the economic value of the right of ownership, can determine the characterisation of the right.”
(per Froneman J).
Paras 39 and 44.
Para 46.
Para 39.
Para 64.
Para 59.
For examples of these resources, see paras 42-43.
See paras 40 and 46.
See paras 41-59.
(h) private-law notions of property should still be constitutionally scrutinised;\(^{64}\)

(i) a conception of property is necessitated which allows individual self-fulfilment in the holding of property as well the social obligation not to harm the public good;\(^{65}\)

(j) protection of property need not to be premised on an economic theory, which holds that the most important purpose of property has to be wealth or individual satisfaction; and\(^{66}\)

(k) when confronted with legal transition, “the entitlements of the past do not necessarily warrant protection in perpetuity, provided that appropriate and reasonable transitional provisions are made”.\(^{67}\)

Froneman J thus concluded that constitutional property must be expanded beyond the private-law notions of property, finding that the holding of a grocer’s wine licence constitutes property for purposes of section 25(1) of the Constitution.\(^{68}\) Froneman J reasoned that the public-law nature of state grants, such as social and welfare grants, should not be used as an argument to deny them protection as property.\(^{69}\) The public-law origin of a licence was also recognised by virtue of it being a state grant.\(^{70}\)

To arrive at this outcome, namely that a liquor licence can be considered as constitutional property, Froneman J made a number of observations. He defined a liquor licence as “an entitlement to do business that would otherwise have been unlawful”.\(^{71}\) In terms of private-law theory, an entitlement denotes the content of the right. Froneman J identifies the encompassing right itself as a “personal legal claim”\(^{72}\) or “an enforceable personal incorporeal right”.\(^{73}\) However, as argued below, this does not sufficiently distinguish between the remedy and the right.\(^{74}\)

Notwithstanding the fact that the origin of the right in question was public, a distinction should still be drawn between (a) the right itself, which is by nature incorporeal,\(^{75}\) (b) the entitlements as the content of a right, and (c) a remedy (claim) by virtue of a right. A personal right is at hand if the legal object of the right is the rendering of a performance.\(^{76}\) A grocer’s wine licence (personal right) has as its content the entitlement to carry on the business of selling wine and other groceries on the same premises. Performance by the state involves allowing the licensee to carry on such business.

\(^{64}\) See para 46.

\(^{65}\) Para 61.

\(^{66}\) See paras 52-55.

\(^{67}\) Para 51.

\(^{68}\) Para 70.

\(^{69}\) Para 58.

\(^{70}\) Para 58.

\(^{71}\) Para 58.

\(^{72}\) Para 67.

\(^{73}\) Para 68.

\(^{74}\) See the text to n 153 below.

\(^{75}\) In short, a corporeal right as opposite of an incorporeal right is nonsensical.

The following features of these personal rights, which are statutorily created and protected, are listed by the court, namely that the rights are:

(a) “clearly definable and identifiable by persons other than the holder”;
(b) recognised not only upon vesting;
(c) transferable, subject to approval by the licensing authority;
(d) “sufficiently permanent, in the sense that the holder is, in terms of administrative law, protected against arbitrary revocation by the issuing authority”;
(e) valuable;
(f) only capable of being withdrawn under prescribed conditions; and
(g) enforceable, either (i) indefinitely (under the Liquor Act) or (ii) for a determined period (under the Eastern Cape Act).

Froneman J conceded that his approach, namely to look at the nature of the right, its content and features, is “close to recognition on conventional private-law grounds”.

However, the majority of the focus in Froneman J’s judgment was to link the concept of constitutional property with other values and rights in the Constitution. He set out the reasons why constitutional property should not be confined to “private-law notions of property” as this could both exclude constitutional entitlements worthy of protection as property, and shield traditional concepts of property from constitutional scrutiny. Instead, the notion of constitutional property must accord with the founding values of the Constitution, which includes the values of dignity, freedom and equality. As the court pointed out, a natural person would find it easier to persuade the court that a “grocer’s wine licence granted by the state enabled [them] to conduct a business vocation of [their] choice that was essential to [their] living a life of dignity”. However, the enquiry that the court must undertake is not a subjective one, taking into account that the holder of the right is not a natural person. Instead, the enquiry is objective: the legislation complained of may impact other holders of rights where the link between the rights and dignity are clearer, such as in the case of a natural person. Further, Froneman J argued, there is nothing in the legislation preventing a “licence of this kind” from being held by a “person who needs it to live a life of individual self-fulfilment and reciprocal dignity to others.” In the main, therefore, Froneman J’s approach was to link the state-granted licence to the concept of dignity, and more concretely, the right to choose one’s own vocation. Having

77 Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape 2015 6 SA 125 (CC) para 68.
78 See para 59. It seems as if recognition should be extended to instances where the applicant had a legitimate expectation in the outcome of the decision.
79 Para 68. Commercial value is, however, not required (para 69).
80 Para 67.
81 Para 68.
82 Para 46.
83 Para 64.
84 Para 61.
85 Para 66.
done so for all persons who could be affected by the legislation, both natural and legal, he concluded that licences are worthy of constitutional protection.

3.1.2 Madlanga J

Standing in stark contrast to the predominantly normative approach adopted by Froneman J, Madlanga J adopted an approach anchored more heavily in private law. Madlanga J also outlined the historical disadvantage of black people in South Africa, particularly the dispossession of land, and the ongoing detrimental effects that are yet to be addressed, highlighting that our society was, and continues to be, “painfully unequal”. As required by section 25 of the Constitution, a balance must be struck between the protection of existing property interests and the promotion of the public interests pursuant to the objectives of transforming our society, including the current property regime. Though the protection of property interests cannot derail the transformative vision of the Constitution, Madlanga J stated that if an interest qualifies as constitutional property, one “should not shy away [from] declaring it to be so”.86

Madlanga J undertook an analysis of the features or rights to determine whether property is constitutional property through the lens of private law. He reiterated that ownership and incorporeal property enjoy constitutional protection.87 Madlanga J also acknowledged that what constitutes property beyond these easily identifiable private-law types is a “vexed question”.88 Moreover, in seeking a definition of property, the courts should guard against a definition that is “too wide to make legislative regulation impracticable”, whilst ensuring that said definition is similarly “not too narrow to render the protection of property of little worth”.89

Going beyond the recognised forms of private-law rights in attempting to answer the problem at hand, Madlanga J compared a grocer’s wine licence with an enrichment claim, which was recognised as a form of constitutional property in National Credit Regulator v Opperman (“Opperman decision”).90 In drawing a comparison between the two rights, Madlanga J stated that an enrichment claim is a personal right that is only enforceable against a specific party, is tenuous in nature, and devoid of value, unless proven in court.91 A grocer’s wine licence was perceived as a right (“something in hand”), which entitles its holder to sell wine under specified circumstances, may endure indefinitely, may only be suspended or cancelled in accordance with the requirements of just administrative action, has objective commercial

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86 Para 138.
87 See paras 140-142.
88 Para 141.
89 Para 141.
90 2013 2 SA 1 (CC). For commentary on this decision, see EJ Marais “The Constitutionality of Section 89(5)(e) of the National Credit Act under the Property Clause: National Credit Regulator v Opperman & Others” (2014) 131 SJLJ 215-233.
91 Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape 2015 6 SA 125 (CC) para 142.
value under prescribed circumstances, is transferable against valuable consideration, subject to sanction by the authorities, constitutes an asset in an estate and enhances the value of its holder. Madlanga J viewed the enrichment action as “somewhat tenuous” and even further removed from a “readily acceptable property” right. Given that an enrichment action was recognised as constitutional property, a grocer’s wine licence should also be capable of recognition as property for purposes of section 25(1) of the Constitution.

Commenting on the approach adopted by Froneman J, Madlanga J stressed that the right to property is a stand-alone right, which need not ride on the coat-tails of other fundamental rights such as human dignity, freedom of trade, occupation and profession. According to Madlanga J, the judgment of Froneman J “waters down the potency of the right to property” by relying too heavily on the aforementioned rights. He reasoned further that the licence had all the hallmarks of property; consequently, its existence as a licence was not a bar to its characterisation as constitutional property. This statement is not necessarily determinative or precedent-setting for all licences, however, as Madlanga J stated obiter that some licences may lack some of the necessary features of constitutional property.

Madlanga J also criticised Froneman J’s finding that the deprivation of property was minor, and further, that it did not amount to an arbitrary deprivation. Responding to the concerns outlined by Moseneke DCJ, Madlanga J indicated that the termination of licences would not necessarily amount to expropriation of property due to the difficulty of proving an expropriation after the Constitutional Court’s decision in Agri South Africa v Minister of Minerals and Energy ("Agri decision"). Thus, future determinations regarding licences, and whether they constitute constitutional

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92 Which was distinguished from subjective commercial value (held to be of insignificant value in the concurring judgment of Moseneke DCJ (para 143). Madlanga J shows, with reference to First National Bank of SA Ltd v Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd v Minister of Finance 2002 4 SA 768 (CC); Agri South Africa v Minister of Minerals and Energy 2013 4 SA 1 (CC) and Law Society of South Africa v Minister for Transport 2011 1 SA 400 (CC) decisions of the Constitutional Court, that objective economic value may at times be determinative of whether an interest constitutes constitutional property (paras 145-146).

93 Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape 2015 6 SA 125 (CC) para 149.

94 Para 142.
95 Para 143.
96 Para 139.
97 Para 139.
98 Para 150.
99 Para 147.
100 Para 131.
102 Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape 2015 6 SA 125 (CC) para 149.
property in terms of section 25(1), should be reviewed on a case-by-case basis.  

3.2 The minority view in the *Shoprite* decision

Moseaneke DCJ argued that it was unnecessary to characterise the licence as constitutional property because the same outcome could be achieved if the challenged provisions were tested for rationality. Rationality is determined by asking “whether the provisions pursue a legitimate government purpose, and if so, whether the statutory means resorted to are arbitrary or reveal naked preference or another illogical or irrational trait.” Moseaneke DCJ was of the opinion that such a rationality enquiry would, in process and substance, be the same as the arbitrariness enquiry required by section 25(1) of the Constitution.

This notwithstanding, Moseaneke DCJ, upon evaluating the “difficult and fluid question” as to whether the licence constitutes property in the hands of its holder, argued that the licences do not fall within the ambit of constitutional property. Agreeing with the respondents in the matter, Moseaneke DCJ distinguished between state grants, generally, and liquor licences, in particular, “given the special nature of the subject of regulation, namely liquor.” The focus of his enquiry was thus only on state grants in the form of liquor licences.

In his assessment, Moseaneke DCJ required section 25 of the Constitution to be considered against the backdrop of the history of South Africa in relation to the notions of property in the property clause. A further consideration is the absence of a comprehensive definition of property in the Constitution, and the fact that various real rights (under the common law and customary law), and some personal rights, have been recognised by the courts as property. Furthermore, additional considerations to be taken into account are that the inherent nature of a right must contain characteristics of property and the importance of determining whether vesting of a right has taken place. Moseaneke DCJ pointed out the difficulty of conflicting international jurisprudence as to whether the so-called new forms of property (such as

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103 Para 150.
104 Para 94.
105 Para 94. This simple rationality-test approach is rejected by Madlanga J as being contrary to the sliding scale set out in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 133-136.
106 *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 6 SA 125 (CC) paras 94, 129.
107 Para 94.
108 Para 95.
109 Para 117.
110 Para 103.
111 Para 104.
112 See paras 104-105, 107.
113 See para 106.
114 Para 113.
115 Para 122.
government largesse) should be recognised as property.\textsuperscript{116} The constitutional scheme is also a relevant consideration\textsuperscript{117} as well as the fact that not every conceivable interest, with or without commercial value, needs to be converted into protectable property.\textsuperscript{118} In the context of commercial value, Moseneke DCJ stated that it was not necessary to adopt a wide approach to the property clause such that all interests are recognised as protectable property, as a broad range of socio-economic rights are protected by our Constitution. Furthermore, laws and governmental conduct are open to judicial scrutiny as well as protection in terms of administrative justice.\textsuperscript{119}

In his assessment, Moseneke DCJ offered two possibilities as to the object of the deprivation.\textsuperscript{120} In the first instance, the object of loss could be characterised as the “entitlement and business opportunity to sell table wine in its supermarkets alongside other groceries”\textsuperscript{121} or “a preferred business opportunity or model”.\textsuperscript{122} Alternatively, Moseneke DCJ argued that the liquor licence as a right (excluding other state grants),\textsuperscript{123} namely an incorporeal right, could be the object of deprivation.

Upon consideration, Moseneke DCJ held that the object of loss is as first described, namely, “a preferred business opportunity or model”. In this instance, Shoprite had not lost the ability to sell liquor altogether; upon application for a liquor licence, it would be entitled to sell liquor again, but at a separate premises and not alongside groceries.\textsuperscript{124} What it had lost was a “business strategy and model that it prefers and cherishes”.\textsuperscript{125} In respect of this finding, he concluded that “a mere preference of a business model is not “property” that requires protection against arbitrary deprivation as foreseen in section 25(1) of the Constitution”.\textsuperscript{126}

A licence is described as “a bare permission to do something that would otherwise be unlawful”.\textsuperscript{127} Liquor licences have a number of attributes: they are normally issued to overcome a statutory prohibition,\textsuperscript{128} they remain in force for an indefinite duration\textsuperscript{129} or may be time bound\textsuperscript{130} once they are granted, they are never absolute and often subject to conditions,\textsuperscript{131} they may be suspended or withdrawn administratively by the licencing authority under specified and limited circumstances,\textsuperscript{132} they are transferable

\textsuperscript{116} See paras 108-114.
\textsuperscript{117} Para 115.
\textsuperscript{118} Para 115.
\textsuperscript{119} See para 115.
\textsuperscript{120} Para 96.
\textsuperscript{121} Para 102.
\textsuperscript{122} Para 102.
\textsuperscript{123} Para 117.
\textsuperscript{124} Para 102.
\textsuperscript{125} Para 102.
\textsuperscript{126} Para 130.
\textsuperscript{127} Para 122.
\textsuperscript{128} Para 122.
\textsuperscript{129} Para 97.
\textsuperscript{130} Para 122.
\textsuperscript{131} See paras 119 and 122.
\textsuperscript{132} Paras 97 and 122.
subject to approval being obtained, and they could lapse upon specified circumstances. These are typical features of a right (as object) and not of an entitlement or opportunity (as object).

Moseneke DCJ reasoned that the entitlement to commercial trade under a state licence does not fit comfortably with the constitutional notion of property. Furthermore, and contrary to the judgment of Froneman J, Moseneke DCJ required vesting of a right prior to its recognition as constitutional property. A liquor licence, he argued, does not vest in its holder under the statutory scheme. In addition, a liquor licence is derived from an act of regulation and open to legitimate regulation. Finally, Moseneke DCJ stated that the enquiry about arbitrary deprivation is, in substance, not different from the enquiry into the rationality of the impugned statute.

Moseneke DCJ also directly disagreed with Froneman J’s primary approach, which was to evaluate whether the right fell within the ambit of constitutional property by looking at the impact of the licences on other rights, such as dignity. Finding that the “core nature of a liquor licence is permission”, he stated that “subjective interests like economic and commercial value, let alone human dignity and vocation of choice and liberty, are of little assistance in themselves.”

Moseneke DCJ placed less emphasis on the threshold question of “property”, namely whether the property can be classified as constitutional property, and instead elevated the scrutiny to the level of an arbitrary deprivation analysis. Aside from his reasoning that the same outcome could be achieved by testing the rationality of the impugned statute, Moseneke DCJ argued that, unlike other jurisdictions, the remedies in South African administrative law were sufficiently wide that the constitutional property clause did not have to be overburdened as a judicial mechanism in these circumstances. To support this approach, Moseneke DCJ argued that a construction of constitutional property that included licences would be too wide and make regulation difficult due to the increase in possible deprivations and expropriations. Moseneke DCJ was wary of creating the untenable situation where any regulatory regime that affects licences would result in a constitutional challenge under section 25, thus “impermissibly limit[ing]” legislative competence.

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133 Paras 98 and 122.
134 See para 98.
135 See para 122. This is based upon the abovementioned features of a liquor licence.
136 Para 123.
137 Para 123.
138 Para 123.
139 Para 129.
140 Para 127.
141 See para 129.
142 Para 128.
143 See paras 124 and 125.
144 Para 125.
4 Commentary

The word “property” is generally used in the sense of a legal object, such as land, a right or a legal relationship.\textsuperscript{145} Whilst it is, for instance, relatively easy to identify property as an object (for example, the common-law notion of a thing as identified with reference to its features),\textsuperscript{146} the identification of property as a right is more difficult. If one adheres to the doctrine of rights, which defines rights with reference to objects, it is also relatively easy to do so. As such, any property analysis in private law is actually a rights analysis. As a starting point, the same submission is put forward in respect of the analysis and identification of constitutional property. The first stage of the enquiry into what constitutes constitutional property is thus the determination of the rights in question. In the \textit{Shoprite} decision, these are the statutory rights afforded by the holding of the licence. The content of the right was the entitlement to carry on the business of selling wine and other groceries on the same premises.

Per the court’s approach in the \textit{Shoprite} decision, the second stage of the enquiry is as follows: contextualise and evaluate the undefined notion of constitutional property within the normative framework of the fundamental values and individual rights in the Constitution, with an awareness of the South African history of dispossession of property prior to the constitutional era.\textsuperscript{147} This is clear from the majority and minority judgments in the \textit{Shoprite} decision.\textsuperscript{148}

In the post-constitutional order, and since the \textit{FNB} decision, the private-law notions of property and interests may serve as a point of departure in the determination of what constitutes constitutional property. However, the concept of, and range of interests qualifying as constitutional property, and the reasons for constitutional protection, are fundamentally different from the recognition of property as a private-law right. As indicated by Froneman J,\textsuperscript{149} possible forms of constitutional property do not always align comfortably with private-law notions of property. This has given rise to the need to expand the concept of constitutional property beyond the private-law boundaries and constraints that ordinarily dominate the discourse on property.\textsuperscript{150}

Alternatively, in terms of Moseneke DCJ’s approach, the grant of statutory licences should rather be treated as an administrative act\textsuperscript{151} protected by the right to administrative justice, rather than the constitutional property clause.

The characterisation of this exercise of determining what is constitutional property as being focused on the property itself is misleading. Instead, the focus of the investigation should be on the rights that are lost. Deprivation or expropriation is about the regulation of the exercise of rights or the taking of...
those rights. This does not mean that the all-important social and historical context must not be taken into account. However, if the object of the search is correctly identified as a right, it no longer becomes necessary to work with private-law notions of property or to extend the boundaries of private-law notions. The source of the right may be found in public or private law. The notion of a right is well developed in private law and, to some extent, in public law as well.

An understanding of the notion of a right during the determination of constitutional property is important, whether one views the issue from a private or public law perspective. As indicated before, a distinction must be drawn between rights, entitlements as the content of a right, and remedies. It is submitted that neither Froneman J nor Moseneke DCJ focused sufficiently on the right, as the object of deprivation. As indicated before, Froneman J does not clearly distinguish between a remedy, a personal legal claim, and a right (an enforceable personal incorporeal right). For purposes of determining whether a deprivation of property occurred, the ability to sell table wine was characterised by Moseneke DCJ as the object of deprivation and not the right to do so. Moseneke DCJ, whilst attempting to focus on the object of deprivation, hovered between a conception of the object as a (i) “business opportunity or model”, which was the incorrect object as it does not amount to a right in private or public law, and (ii) a statutory right or licence, which was the correct object of deprivation. Moseneke DCJ also reasoned that a grocer’s wine licence is derived from the fact of regulation. It is true that a licence is granted by statute, but it remains a personal right in nature, which is enforceable against the state. Similarly, Madlanga J, referred to the Opperman decision regarding an enrichment claim, which is by its nature a remedy, as a personal right. However, a personal right is, strictly speaking, acquired by virtue of the fact that undue enrichment took place, which provides the remedy, namely a specific enrichment action. A civil-law obligation arises by contract, delict or unjustified enrichment. The personal right by virtue of unjustified enrichment (and not the remedy) exhibits the features identified by Madlanga J.

If a right is focused upon during the enquiry, the features of a right may then be examined as the logical next step - a step that was undertaken by the court. Both the majority and minority decisions focused on the different features of a right to determine whether the object or interest qualifies as property. The presence or absence of certain features, which are set out below, can be taken into account during the determination of whether such rights are constitutional property. Although the list is not definitive, the presence of most of the features point towards the recognition of the right as constitutional

153 See the text to n 75 above.
155 Para 102.
156 Para 142.
157 Which is to be distinguished from the English common-law obligation (in the sense of a duty).
property. Each of the judgments in the Shoprite case investigated a different array of the features set out below, coming to different conclusions as to their existence and the extent to which they influenced the recognition of the right as constitutional property.

The first feature that may indicate the recognition of a right as constitutional property considers the acquisition and vesting of rights, the relevance of which is well-known in private law. However, the court in the Shoprite decision took markedly different approaches to this feature. Froneman J indicated that constitutional property might exist even in circumstances where vesting has not yet taken place. Madlanga J seems to have accepted that vesting of the licence did take place, and such vesting supported his view that the licence was constitutional property. Moseneke DCJ required vesting of the right and used the absence of such vesting, in his opinion, to justify his finding about the absence of constitutional property.

With reference to the feature of vesting, it is conceded that the moment of vesting of a right is difficult to determine at times. The reason for this difficulty stems from the fact that the nature of the right is usually not first determined. For instance, it was unclear when the vesting of a (statutory) prospecting right occurred in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (“MPRDA”). In Meepo v Kotze, it was held that the grant of a prospecting right takes place by contract, once the terms and conditions had been determined and communicated by the Deputy Director-General: Mineral Development to an applicant for his acceptance. In Minister of Mineral Resources v Mawetse (SA) Mining Corporation (Pty) Ltd (“Mawetse decision”), the Supreme Court of Appeal decided that the grant of a prospecting right by the Deputy Director-General: Mineral Development takes place by an authoritative unilateral administrative act upon the date that the grantor approves the Regional Manager’s recommendation to grant a prospecting right.

Both these decisions may be correct and are reconcilable: a public-law right is vested at the times indicated in the Mawetse decision whilst, the private-law right, namely a personal right, is vested upon conclusion of the contract. Upon registration of the prospecting right, as required by the MPRDA in the Mineral and Petroleum Titles Registration Office, another private-law right is acquired, namely a real right. The three rights identified have vested at three distinct moments in time. To know whether vesting has taken place, the right, and its nature, needs to be clarified first.

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158 See for instance the distinction between dies cedit (vesting of right to claim inheritance) and dies venit (enforceability of right against executor of the estate) in the law of succession. Prior to dies cedit the beneficiary under a will has merely a spes or hope (and not a right) to inherit one day.
159 Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape 2015 6 SA 125 (CC) para 59.
160 Para 143.
161 Para 123.
162 2008 1 SA 104 (NC) 125D-F/G.
163 Meepo v Kotze 2008 1 SA 104 (NC) 125D-F/G para 463.
164 2016 1 SA 306 (SCA).
165 Paras 19, 24, 26 and 27.
166 S 5(1) read with s 19(2)(a) of the MPRDA (specifically in respect of a prospecting right).
The second feature that can be observed is the identifiability and definability of the right. A right that cannot be identified, or is incapable of definition, cannot be property. This feature is in line with the South African property law requirement that an object has to constitute an independent entity in law to qualify as a thing.\footnote{167} Froneman J specifically stated that the “right to sell liquor is thus clearly definable and identifiable by persons other than the holder”\footnote{168}.

The nature of the right is the third feature that may inform the enquiry into whether a right is constitutional property. Whether the right is by nature private or public is relevant, as private-law rights have more readily been recognised as constitutional property by the courts, as expressly stated by the court in the \textit{Shoprite} decision.\footnote{169} Madlanga J used a private-law right (namely, the personal right by virtue of unjustified enrichment) as a yardstick to justify his finding that a grocer’s wine licence constitutes property.\footnote{170} Froneman J even reasoned that the nature of a grocer’s licence - a public-law right - should not be used to deny finding that a grocer’s licence constitutes constitutional property.\footnote{171} By contrast, the public-law nature of the licence played a significant role in Moseneke DCJ’s finding that the licence did not constitute property.\footnote{172}

The content of the right is the fourth feature identified, as a right has as its content certain entitlements. The more extensive these entitlements are, the more likely it would amount to the vesting of an interest in the holder of the right. The corollary is that the more a right is restricted, the less entitlements there are likely to be. As a result, the inherent or imposed limitations on the exercise of the right must also be taken into account. All three judges focused on the content of the right of the grocer to sell wine. As stated above,\footnote{173} in the context of the \textit{Shoprite} decision, it is contended that the correct conception of what constituted the content of the right was the entitlement to carry on the business of selling wine and other groceries on the same premises.

The fifth feature that can be evaluated is the objective value of the right, which is also relevant when identifying a thing or property\footnote{174} and a patrimonial right in private law. Froneman J, in discussing the right, lists “value” as one of the features of the liquor licence.\footnote{175} However, as set out by the court, not only in the \textit{Shoprite} decision, but also in \textit{Agri} and \textit{FNB}, the commercial value of the right is not determinative of whether it constitutes constitutional property.\footnote{176} Instead, the enquiry should focus on the value of the purpose (“object”) of the

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\begin{itemize}
\item \textsuperscript{167} See Van der Merwe \textit{Sakereg 2}; Badenhorst et al \textit{The Law of Property} 20.
\item \textsuperscript{168} \textit{Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape 2015 6 SA 125 (CC)} para 68.
\item \textsuperscript{169} Paras 40–41.
\item \textsuperscript{170} Para 142.
\item \textsuperscript{171} Paras 58–59.
\item \textsuperscript{172} Para 122.
\item \textsuperscript{173} See the text to n 68 above.
\item \textsuperscript{174} See Van der Merwe \textit{Sakereg 7}; Badenhorst et al \textit{The Law of Property} 21.
\item \textsuperscript{175} \textit{Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape 2015 6 SA 125 (CC)} para 68.
\item \textsuperscript{176} Para 69.
\end{itemize}
right and not its commercial value.\textsuperscript{177} It is submitted that one could work with the objective value of a right as one of various factors. This point was also made by Madlanga J, who stated that “[o]bjective commercial value definitely does come into the equation when determining whether the right in issue is property”.\textsuperscript{178}

The enforceability of a right is also a relevant feature: if a right is unenforceable against others, it would not qualify as a right or constitutional property. Enforceability of a right against others (society), or the so-called \textit{in rem} operation, is a universal feature of a property right.\textsuperscript{179} Stated differently, the ability of the right holder to exclude others from interfering with the exercise of the right is an important feature of property.\textsuperscript{180} It is submitted that the feature of excludability afforded by a right should also be emphasised more in the South African context\textsuperscript{181} as it fits well with the subject-third parties’ relationship of a subjective right. In this case, the right was characterised as enforceable by Froneman J.\textsuperscript{182}

Two other relevant features include the ability of the right to be transferred, as well as the suspension or termination of the right under specified circumstances.\textsuperscript{183} The transferability of a right may lead to a very wide definition of property, given that many rights, including those not necessarily falling within the traditional concept of “property” may also be transferable. These other transferable rights, namely, personal rights and intellectual property rights, however, also qualify as constitutional property. In respect of these features, Moseneke DCJ also reasoned that they contribute towards a finding that the licence is not constitutional property: he stated that “licenses are subject to administrative withdrawal and change … they are also not freely transferable”.\textsuperscript{184} Madlanga J, by contrast, reasoned, “though [the licence] may be suspended or cancelled, that may not be done at whim”, and further, that the licence is transferable, though only with approval from the authorities.\textsuperscript{185}

The final feature discussed is the ability of a right to form an asset in the estate of the holder of the right. In support of their argument that the licence was constitutional property, Shoprite submitted that the right constituted an “asset in the holder’s estate”.\textsuperscript{186} The court did not directly engage with

\textsuperscript{177} Para 69. For further discussion, see also \textit{Agri South Africa v Minister of Minerals and Energy} 2013 4 SA 1 (CC) para 42.
\textsuperscript{178} \textit{Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape} 2015 6 SA 125 (CC) para 144.
\textsuperscript{179} Van der Merwe \textit{Sakereg 12; XZS Industries v AF Dreyer (Pty) Ltd} 2004 4 SA 186 (W) para 196F-G; See also R Chambers \textit{An Introduction to Property law in Australia} 3 ed (2013) 5, 8.
\textsuperscript{182} \textit{Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape} 2015 6 SA 125 (CC) para 68.
\textsuperscript{183} Para 68. Froneman J lists transferability as one of the features of the right.
\textsuperscript{184} Para 122.
\textsuperscript{185} Para 143.
\textsuperscript{186} Para 18.
this point, although Madlanga J made reference to “asset[s] of value” in his discussion of the objective commercial value of the licence.\(^{187}\)

## 5 Conclusion

Since the provisional steps taken by the court in the \textit{FNB} decision, different rights have been recognised as constitutional property. The notion has been widened to include public-law rights, such as a grocer’s licence to sell liquor. The court has appropriately acknowledged that the evolving conversation surrounding what constitutes constitutional property should continue. The discovery and declaration of new forms of constitutional property is inevitable.

When rights are scrutinised to determine whether they qualify as constitutional property, and are thus worthy of constitutional protection, the normative standards set out by the Constitution must be met. In this determination of what constitutes constitutional property, the historical context of ownership and land distribution as a consequence of apartheid must be borne in mind, as well as the transformative visions and values of the Constitution. This necessarily requires an approach that is both backward and forward-looking: the building blocks of properly conceptualised property, and the milieu of legal reality of the past and the present, provide assistance for this analysis. The presence or absence of established features of a right, namely a claim of a subject to an object with reference to others, should be applied to classify the new forms of constitutional property. Upon examining new forms of constitutional property, one may still rely on the private-law theory of rights.

It is submitted that the various approaches of identifying property, be they old, new, popular, or fancy, must focus on the right in question. A right either exists or not, has certain features, and the exercise thereof can be regulated or limited, such as deprivation, or taken away altogether, such as expropriation. Property analysis has always been, and will always be, a rights-analysis. Even within the broad notion of property in the English common law, where rights, interests and title are used indiscriminately as synonyms and rights-analyses are limited, Blackstone started his famous definition of property with the words:

\[ \text{“[T]he right of property [is the] sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe”} \] \(^{188}\) [our emphasis].

Despite the fact that the \textit{Shoprite} decision required the court to look at constitutional property in the context of public rights, the Constitutional Court necessarily undertook a rights-analysis.

Though all three judgments undertook a rights-analysis, their respective approaches were markedly different. As a result, the \textit{Shoprite} decision provides

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\(^{187}\) Para 146.

little certainty regarding the approach to be adopted when determining the scope and ambit of the constitutional concept of property, given the contrasting approaches adopted by Froneman J and Madlanga J in this respect. Froneman J approached the enquiry by taking normative considerations into account, anchoring the notion of constitutional property to other constitutional rights and values, such as dignity. By contrast, Madlanga J focused on private-law considerations to inform his decision, arguing that the constitutional property clause was a stand-alone right. Neither of these approaches attracted the support of a majority of the court, and accordingly, either may be adopted in future enquiries as to whether a right constitutes constitutional property. In addition, the features that the court considered to reach its conclusion, as outlined in part 4 above, are by no means exhaustive, complete or binding, but rather contribute to future enquiries into the “evolving conversation” about the notion of constitutional property.

SUMMARY

This article discusses the court’s approach to the determination of what constitutes property in terms of section 25 of the Constitution of the Republic of South Africa, 1996 (“Constitution”). Property that is deemed worthy of constitutional protection is not necessarily limited to the characterisation of property in terms of private law.

The Constitutional Court has provided a number of factors to assist in the determination of what should be constitutionally protected in terms of section 25. However, until the decision in Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape (“Shoprite decision”), the courts had, for the most part, not yet fully engaged with the meaning of constitutional property that went beyond the private-law understanding of property. In this case, the court was called upon to adjudicate a query as to whether a commercial trading licence, which permitted the selling of wine in a grocery store, fell within the ambit of the meaning of “property” in the Constitution. This case by no means provides an expansive and complete definition of what constitutes constitutional property, but, it widens the ambit of constitutional property considerably.

This article argues that the focus of the investigation should be on the rights that are lost when determining whether a right should be treated as constitutional property. This article attempts to distil the key features used by the court that may be useful for the determination of whether a right falls within the notion of constitutional property.