

Section 25 vortices (part 1)

AJ VAN DER WALT*

1 Introduction

Roux introduced the notion of the “arbitrariness vortex”¹ to illustrate his observation that the constitutional court’s *FNB* decision² could “telescope many of the issues that might have been addressed (and in comparative constitutional law are addressed) at other stages of the property clause inquiry into [the arbitrariness] stage” or, as he describes it elsewhere, of “sucking the [whole property] inquiry into the arbitrariness test”.³ Crucial to the idea of a vortex is that what is perceived as the crux of a section 25 dispute, namely the balancing of individual property interests and the public interest, is “sucked into” just one stage or part of a section 25 challenge,⁴ instead of taking place in or being spread over several discrete stages or parts of the inquiry.

According to Roux, the six stages at which constitutional property disputes could be decided⁵ respectively involve the questions whether (1) the right or interest involved is constitutional property;⁶ (2) the impugned law authorises deprivation of that property; (3) the authorised deprivation of property is arbitrary; (4) the law

* Professor, Stellenbosch University and South African Research Chair in Property Law (SARCPL). The SARCPL is funded by the South African Department of Science and Technology (DST), administered by the National Research Foundation (NRF) and hosted by Stellenbosch University. The views expressed in this article are those of the author and should not be attributed to any of these institutions. Thanks to Frank Michelman and Bradley Slade for comments and discussion. Remaining shortcomings are my own.

¹ English dictionaries define a vortex (specialist) as a mass of air, water, etc that spins around very fast and pulls other objects into its (empty) centre; see eg the *Oxford Advanced Learner’s Dictionary* at <http://www.oxforddictionaries.com/definition/learner/vortex>; *Cambridge Advanced Learner’s Dictionary & Thesaurus* at <http://dictionary.cambridge.org/dictionary/english/vortex> (3-12-2015).

² *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Services*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC).

³ Roux “Property” in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2003) 46-2, 46-20.

⁴ Describing the *FNB* questions (see n 5 below) as “stages” is potentially confusing, since it evokes the related but distinct “telescoping” effect that the arbitrariness test allegedly also has on the two main stages of a constitutional challenge, a context in which the notion of “stages” of a constitutional challenge goes beyond s 25, property and the *FNB* case. In a property dispute, these two stages involve proof of a non-compliant deprivation or expropriation in terms of s 25 and the possibility of justifying it in terms of s 36 respectively; see the discussion below. To avoid confusion I generally avoid the term “stages” and refer to the “*FNB* questions” or “inquiries”.

⁵ Roux (n 3) 46-2, 46-20. Roux bases his analysis on the seven questions set out in the *FNB* case (n 2) par 46. The *FNB* list is longer because the s 36 justification question features twice, at (4) for arbitrary deprivation and again at (7) for non-compliant expropriation. A question that neither Roux nor the *FNB* case lists specifically but that both he and the *FNB* case consider separately (as an application issue and a preliminary issue respectively; see Roux (n 3) 46-6; the *FNB* case (n 2) par 41-45) is that of beneficiaries. As appears from the discussion below, the beneficiaries issue could be seen as a discrete issue that might also be sucked into the arbitrariness vortex, with much the same implications.

⁶ The point is discussed again below, but it bears mentioning early on that the issue in s 25 cases is not “property” in its relatively restricted, private-law sense (*saaklike regte*) but particularly *constitutional* property, which is a wider concept that extends beyond private-law property interests and includes at least some personal and public-law rights. See par 2.4, 3.3 below for references.

in question provides for expropriation of property; (5) the amount, time and manner of payment of compensation for expropriation comply with the requirements in section 25(2)-(3); and (6) any deviation from the property clause standard (for either deprivation or expropriation) could be justified under section 36(1).⁷ In effect, Roux argues, the *FNB* decision might have the effect of sucking all the other stages of a constitutional property inquiry into the arbitrariness stage, which would then effectively become the only or the principal locus for deciding constitutional property disputes, at least in so far as they turn on finding the required balance between the protection of individual property and the public interest. Without using the term “vortex”, Roux explains this effect most clearly in the following passage:

“[B]ecause it applies to all deprivations, including expropriations, the [arbitrariness] test will be the focus of almost any property clause inquiry. It will be in the application of this test that courts will seek to strike the required balance between the individual right to property and the public purpose sought to be pursued in, or the public purpose underlying, the law in question.”⁸

Accordingly, the vortex effect would effectively render all other stages or factors in the section 25 inquiry redundant, except to the extent that three of the *FNB* questions might play a reduced role in some cases.⁹

The notion of “telescoping” aspects of the constitutional property challenge into one dominant stage – also coined by Roux – is used in a slightly different but related sense to indicate that the structure of section 25 (as it was interpreted in the *FNB* case) reduces the usual two-stage constitutional inquiry to a single, substantive analysis (whether a constitutionally entrenched right has been infringed) that effectively renders the second, section 36(1) justification inquiry redundant.¹⁰ This overlaps with Roux’s general vortex thesis to the extent that the substantive limitation analysis (which, according to Roux, would turn on the arbitrariness issue) pre-empts the justificatory stage of the property inquiry. I return to this particular aspect of the vortex argument below.

In this article I address three questions. Paragraph 2 considers whether an arbitrariness vortex effect can in fact, with hindsight, be ascribed to the *FNB* decision. Paragraph 3 reviews subsequent case law – particularly from the constitutional court – to see whether it provides further examples of the vortex effect that Roux identified. Finally, paragraph 4 briefly reviews the negative features of a vortex effect in developing section 25 jurisprudence and suggests an interpretation of the case law to date that would distinguish true vortex approaches from a contextual approach to section 25 that does not display these negative features.

2 *The FNB decision: an arbitrariness vortex?*

2.1 Introduction

It is not entirely clear whether Roux intended to claim that the *FNB* decision itself reflects the arbitrariness vortex, or that it might inspire (or allow) courts to decide subsequent property challenges in a way that would have a vortex effect – quite possibly his argument included elements of both. It is probably fair to say that

⁷ Cf Roux and Davis “Property” in Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2005) 20-9, where the list is simplified to just four questions; Currie and De Waal *The Bill of Rights Handbook* (2013) 534 (the full *FNB* list).

⁸ Roux (n 3) 46-23.

⁹ Roux (n 3) 46-23. I return to these exceptions in the sections on property and expropriation below.

¹⁰ See Roux and Davis (n 7) 20-8, citing De Waal, Currie and Erasmus (n 7) 557.

Roux's argument turns on three interlocked points: (1) the *FNB* decision turns the arbitrariness inquiry into a dominant issue that has a vortex effect on the other section 25 questions in the *FNB* case;¹¹ and (2) while the court reserves for itself a wide discretion in future cases to vary the level of scrutiny according to the circumstances,¹² (3) the *FNB* case will allow future decisions to be decided in a way that will have the vortex effect, thereby increasingly sidelining other factors and focusing on the arbitrariness test.¹³

It might be useful, some 14 years after the *FNB* case, to reflect on Roux's vortex thesis, taking into account the substantial body of case law that has emerged since Roux's analysis of the decision. For this purpose, the starting point is the core of the vortex thesis, namely that courts "will seek to strike the required balance between the individual right to property and the public purpose sought to be pursued in, or the public purpose underlying, the law in question" by focusing on just one of the questions on which that balance might have been struck,¹⁴ thereby either rendering the other questions redundant or at least relegating them to a lesser role. The question should be, therefore, whether either the *FNB* case or subsequent case law provides evidence to support the claim that the courts (particularly the constitutional court) routinely strike the required balance between individual property rights and the public interest by focusing on just one of the questions identified in the *FNB* case, while ignoring the others or reducing them to a lesser role. A secondary question, if either the *FNB* decision or subsequent case law indeed supports such a vortex analysis, is whether the preferred inquiry in which the balance is usually struck is indeed the arbitrariness test, as Roux predicted. This section focuses on the *FNB* decision; subsequent case law is considered in paragraph 3 below.

The main issue to be reviewed is the court's treatment of the set of questions that it identifies in the *FNB* case as being raised by section 25. The question is whether it can be said, from the court's analysis and discussion of each question (or lack thereof) that it in fact strikes the required balance mainly on the basis of arbitrariness, sucking the other questions that might also be relevant to that balance into the arbitrariness discussion or underplaying them, instead of striking the balance in any one (or a combination) of them. The more specific question is whether the property, deprivation, expropriation and justification questions are effectively sucked into the arbitrariness analysis. As a point of departure, it is assumed that avoiding a firm decision, or reaching an answer fairly simply or quickly, on any one of these questions does not necessarily confirm the vortex thesis – the latter implies that the court specifically strikes the balance between protecting individual property and the public interest in the arbitrariness inquiry instead of doing so with reference to any of the other questions, in a situation where it could just as well (or preferably) have struck the balance on any of them. If it is unnecessary or very easy to reach a firm decision on one of these points, for example because the parties

¹¹ See *eg* Roux (n 3) 46-2: "[T]he Constitutional Court's analysis in *this case* telescoped many of the issues that might have been addressed (and in comparative constitutional law are addressed) at other stages of the property clause inquiry into this [arbitrariness] stage" (my emphasis).

¹² in so doing retaining the ability of subtly shifting the balance of the factors considered. Roux (n 3) 46-23 – 46-24 describes this flexibility in judicial discretion as one of the two keys to unlocking the arbitrariness test (the first being the fact that the arbitrariness test will be the focus of almost all s 25 inquiries as a result of the vortex effect).

¹³ See *eg* Roux (n 3) 46-2: "After *FNB*, it is apparent that the property clause inquiry will focus on stage (3) – the test for arbitrariness."

¹⁴ Roux (n 3) 46-23.

reached agreement on it or it has been decided in an earlier case, that should not be treated as proof either for or against the arbitrariness vortex thesis.

2.2 The constitutional and interpretive context

A first indication in the *FNB* decision that the required balance between the protection of individual rights and the public interest is not struck in the analysis of just one question is that the court in the *FNB* case contextualised the constitutional property inquiry in a sweeping historical, constitutional and social framework that informs the interpretation of section 25 as a whole. Having identified the seven questions that arise in a section 25 dispute,¹⁵ the constitutional court¹⁶ emphasised that (1) section 25 must be interpreted as a whole, in its historical context and in the context of the whole constitution; (2) section 25 must always be construed with the need for redressing the legacy of past racial discrimination and unequal distribution of land in mind, since the constitutional protection of property as an individual right is not absolute but subject to societal considerations; (3) one of the purposes of the constitution is to establish a society based on democratic values, fundamental human rights and social justice; (4) the bill of rights places positive obligations on the state in regard to various social and economic rights, and in every individual case section 25 must be analysed, interpreted and applied with the resulting tension between individual rights and social responsibilities as a guiding principle; and (5) section 25 both protects existing private property rights and serves the public interest, mainly in the sphere of land reform but not limited thereto, and strikes a proportionate balance between these two functions. This contextualisation of section 25 directly informs the proportionality inquiry that characterises the arbitrariness stage, but it goes beyond the confines of the arbitrariness inquiry in so far as it also informs the analysis and construction of section 25 as a whole. Furthermore, crucial external contextualisation factors such as democratic and social justice values, the protection of non-property fundamental rights and the constitutional mandate for land reform that feature prominently in this contextualisation exercise, play no direct role in the arbitrariness test but are relevant to section 25 taken as a whole. By contextualising the interpretation of section 25 in this way the constitutional court rendered a vortex-promoting interpretation of any part of section 25 undesirable.

2.3 The beneficiaries issue

A second consideration that points in the same direction but that is somewhat obscured by the organisation of the *FNB* judgment is the court's fairly extensive analysis of the beneficiaries issue, which is treated as a preliminary question that precedes the identification of the seven questions raised by section 25.¹⁷ The question, simply put, was whether FNB, a juristic person, was entitled to the property rights protected by section 25. With reference to section 8(4) of the constitution¹⁸

¹⁵ the *FNB* case (n 2) par 46; for the list of questions see text following n 5 above. For further analysis of the decision see Van der Walt "Striving for the better interpretation: a critical reflection on the constitutional court's *Harksen* and *FNB* decisions on the property clause" 2004 *SALJ* 854-878.

¹⁶ the *FNB* case (n 2) par 47-50.

¹⁷ the *FNB* case (n 2) par 41-45. See further Rautenbach "Overview of constitutional court decisions on the bill of rights – 2002" 2003 *TSAR* 166 182.

¹⁸ S 8(4) reads: "A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person."

and its *First Certification*¹⁹ and *Hyundai*²⁰ judgments, the court concluded that a corporate juristic person, more specifically a public company like FNB, should enjoy the protection of section 25 because (1) in the vast majority of cases, the holders of shares in public companies are natural persons, who are entitled to section 25 protection; (2) natural persons form companies and purchase shares in companies for a variety of legitimate purposes and the use of companies has come to be regarded as indispensable for the conducting of business; consequently, (3) denying companies section 25 protection of their property rights would lead to grave disruptions and would undermine the democratic state; and (4) “[t]he property rights of natural persons can only be fully and properly realised if such rights are afforded to companies as well as to natural persons”.²¹

Far from playing a minor role in an analysis dominated by arbitrariness, this passage highlights the court’s effort to strike the required balance between protection of individual property and the public interest with reference to considerations and factors that extend well beyond arbitrariness, namely the beneficiaries provision in section 8(4) of the constitution; the broader context within which rights are protected in the constitution; the nature of property holding by juristic persons and its function in society; and the constitutional purpose and function of section 25. The court described its beneficiaries analysis as a preliminary matter and dealt with it in the form of a threshold consideration, but it can hardly be said that its decision on this issue was overshadowed by or sucked into the vortex of non-arbitrariness. Instead, the court reached its decision on the beneficiaries of section 8(4) in a contextual analysis that takes into account the whole of section 25; other provisions in the bill of rights; the constitutional and normative framework within which section 25 and the constitution must be interpreted; and the social and economic context within which the constitution and section 25 function.

2.4 The property question – (*FNB* question 1)

As far as the property issue is concerned, the constitutional court stated quite early in its *FNB* analysis:

“At this stage of our constitutional jurisprudence it is, for the reasons given above, practically impossible to furnish – and judicially unwise to attempt – a comprehensive definition of property for purposes of section 25. Such difficulties do not, however, arise in the present case. Here it is sufficient to hold that ownership of a corporeal movable must – as must ownership of land – lie at the heart of our constitutional concept of property, both as regards the nature of the right involved as well as the object of the right and must therefore, in principle, enjoy the protection of section 25.”²²

This statement can, but does not have to be read as an evasive tactic that shifts the crucial part of the decision – striking the balance between individual property and the public interest – to the arbitrariness question. Instead, it arguably simply frames the specific point for decision in the *FNB* case, namely whether ownership of corporeal movables is property for purposes of section 25. The court considered

¹⁹ *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) par 57.

²⁰ *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd* 2001 1 SA 545 (CC) par 18.

²¹ the *FNB* case (n 2) par 43, 44, 45.

²² the *FNB* case (n 2) par 51. See Rautenbach (n 17) 166 182.

it obvious that ownership of corporeal movables (and of land)²³ must “lie at the heart” of whatever is considered property for purposes of section 25, purely because of the centrality of these objects and the right of ownership in them to private-law property. Consequently, the property question is arguably not a suitable place in this particular case to strike the balance, because the legal tradition and socio-economic custom that dominate the property issue in private law would not leave much room for judicial manoeuvring in a transformation-oriented constitutional context. According to a widely accepted guideline of constitutional property law, objects and rights that are traditionally regarded and protected as property in private law are included in the category of constitutional property as a point of departure.²⁴ Courts developing constitutional property law may deviate from private-law doctrine, but the point of doing so would be to extend its protection beyond the traditional private-law categories and not to restrict constitutional recognition of those categories as property.²⁵ In effect, the *FNB* decision simply follows the well-established constitutional property principle that it is not suitable to strike the required section 25 balance in the property inquiry when the dispute involves objects and rights, such as ownership of land or corporeal movables, that are clearly and without exception treated and protected as property in private law. In those cases, the property question is still asked,²⁶ but it assumes the form and function of a simple threshold, whereafter the inquiry proceeds to substantive questions that concern the justification of regulatory restrictions imposed on that property. The reason for recognising as constitutional property, as a point of departure, objects and rights that are traditionally recognised and protected as property in private law is significant. I return to the point in the concluding paragraph 4 below.

There is an interesting twist to the property analysis in the *FNB* decision. In addition to the general observations referred to already, the court rejected an argument to the effect that the proper balance between the protection of property and the public interest should be struck on the property question in this particular case because the property interest in issue (ownership of movables for security purposes) was a contractual device devoid of any actual use interest. This kind of ownership interest, the respondents argued, does not deserve the protection of section 25. On this point, it might appear as if the court shifted the process of balancing the protection of the particular property interest and the public interest to the arbitrariness question of the inquiry, thereby confirming the vortex thesis:

“The fact that an owner of a corporeal movable makes no, or limited use of the object in question, is irrelevant to the categorisation of the object as constitutional property. It may be relevant to deciding whether a deprivation thereof is arbitrary and, if it is, whether such deprivation is justified under section 36 of the Constitution. We are here dealing only with corporeal movables and it is unnecessary to go any wider.”²⁷

²³ As far as land is concerned, the question has always been not whether land is constitutional property, but whether and how far constitutional property extends beyond land. Hence the provision in s 25(4)(b) that “[f]or purposes of this section, property is not limited to land”.

²⁴ Van der Walt *Constitutional Property Law* (2011) 187 summarises the argument; compare Roux (n 3) 46-10 – 46-11.

²⁵ This principle is identifiable in any jurisdiction with an established body of constitutional property law, but see *eg* Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 152-153 on the case law of the German federal constitutional court.

²⁶ Even when the property question is more or less uncontested in a particular case, that does not mean that it is ignored or that just any interest is accepted as property: see *eg* Van der Walt (n 24) 119 (German law); 123 (US law).

²⁷ the *FNB* case (n 2) par 54.

However, in fact the court decided even this part of the property issue on its own merit and did not allow it to be sucked into the arbitrariness question. The security-interest argument, the court concluded, misconstrues the nature and function of ownership as a security right:

“The argument moreover incorrectly conflates the legal right and the commercial interest that FNB has in the vehicles in question. At the time when FNB concluded the relevant contracts it was the owner of all the vehicles. The ‘reservation of ownership’ is not what the inquiry should focus on. This is no more than the description of the effect of a contractual term in the agreement. The fact that the agreements contemplate a stage when FNB might cease to be owner cannot affect the characterisation of its right of ownership for as long as it remains owner. Instead, it is FNB’s ownership of the vehicle, and nothing else, that entitles it to treat the vehicle as an execution object in the event of its debtor defaulting under the agreement in question, or affords it a special advantage in insolvency. This is the essence of why a lease of moveables is viable; there is no need for further security since the ownership of the asset leased provides adequate security.”²⁸

“Neither the subjective interest of the owner in the thing owned, nor the economic value of the right of ownership, having regard to the other terms of the agreement, can determine the characterisation of the right. It does not matter that the owner would rather have the purchase price than the vehicle, nor that the economic value of the right of ownership might be small when the contract term draws to an end. A speculator has no less a right of ownership in goods purchased exclusively for resale merely because she has no subjective interest in them but sees them only as objects that will produce money on resale. I accordingly conclude that the right of ownership that FNB has in the vehicles in question constitutes property for purposes of section 25.”²⁹

The court went further than simply endorsing private-law doctrine, though; it emphasised that the constitutional protection of ownership of land and corporeal movables – property objects and rights that have been identified as the core of constitutional property on the strength of their status and function in private law – must be understood in its proper constitutional context. Recognising these objects and rights as constitutional property does not insulate them against regulatory interference, since property also serves the public good in the constitutional context.³⁰ In other words, the court identified and recognised the property objects and interests that are relevant to this case – specifically ownership of corporeal movables – as property for purposes of section 25 on the strength of their status and function in private law (in other words, not on the basis of arbitrariness), and added (again without reference to arbitrariness) that recognition of those property objects and rights as constitutional property does not insulate them against public-interest regulatory deprivation or expropriation. That defines both aspects of the recognition of ownership of corporeal movables as constitutional property – its protection and its susceptibility to social, public-interest limitation – on the strength of factors and considerations that are germane to the property question as such (the private law status and function of ownership of land and corporeal movables) and to the broader section 25 and constitutional context (constitutional property is not insulated against public-interest regulation), and not on the basis of arbitrariness logic. Since the constitution- and section 25-driven combination of these two aspects of constitutional recognition as property established, in the property inquiry, the required balance between the protection of individual property and the public

²⁸ the *FNB* case (n 2) par 55.

²⁹ the *FNB* case (n 2) par 56.

³⁰ the *FNB* case (n 2) par 52.

interest, one must conclude that this section of the court's decision in the *FNB* case does not present an example of the arbitrariness vortex at work.

Roux recognised that the property question might feature in section 25 challenges, despite the arbitrariness vortex, in a reduced role: the “threshold question concerning the meaning of property may serve to eliminate claims based purely on the impact of the law on the claimant's wealth, rather than on any particular right in property or legally recognised incident of ownership”.³¹ In other words, in some cases it might be established in the property inquiry, as a threshold issue, that the property interest involved is not “any particular right in property or legally recognised incident of ownership” but the claimant's wealth as such, and in those cases the property inquiry might be used to strike the required balance between the protection of individual property and the public interest by eliminating claims that should not reach the arbitrariness inquiry.

Two points are relevant to this observation. Firstly, this reduced-role non-vortex function of the property inquiry does not apply to discrete property interests that are clearly established in private law, such as ownership of land or corporeal movables – in that regard, Roux echoes the *FNB* decision on the security-interest argument discussed above. Secondly, it is a well-established principle of comparative constitutional property law that constitutional property clauses do not protect a property holder's general wealth but discrete property interests that have been acquired according to normal law.³² In that regard, Roux merely confirms widely shared constitutional property doctrine.³³ In one sense, reaching a decision on this point does not require balancing of individual interests and the public interest in the property inquiry – deciding that general wealth or general financial status is not recognised as property for purposes of the property clause should be just as easy, on the basis of established doctrine, as deciding that discrete property interests that are recognised and protected as property in private law should be recognised. Put differently, both the exclusion of general wealth and the inclusion of established property interests result from threshold-type inquiries and not necessarily from a principled balancing of individual interests and the public interest. From that perspective these two points are not strong indications of exceptions to the vortex thesis but rather indications that the property question will sometimes assume the form and function of a simple threshold question that leaves the balancing of individual property interests and the public interest to substantive analysis dealing with the justification of imposing regulatory restrictions on property rights. In the concluding paragraph 4 below I argue that these threshold decisions to either preclude altogether or to leave a substantive decision on the protection of a particular interest for a later part of the inquiry neither confirm nor create exceptions to the arbitrariness vortex thesis.

³¹ Roux (n 3) 46-23.

³² See *eg* Van der Walt (n 24) 119 text accompanying n 120 (German law), 123 text accompanying n 134 (US law).

³³ The point was raised but not decided in *Law Society of South Africa v Minister for Transport* 2011 1 SA 400 (CC) par 82 84. The minister argued that the fact of incurred expenditure (in other words, effects of regulatory action on one's general wealth) is not property for purposes of s 25; the court found it unnecessary to decide the property issue.

2.5 Deprivation (*FNB* question 2) and expropriation (*FNB* questions 5 and 6)

Two features of the *FNB* decision are its wide definition of deprivation as “any interference with the use, enjoyment or exploitation of private property”³⁴ and the fact that deprivation is presented as an overarching genus that includes expropriation as a species.³⁵ Primarily because of the second feature, the court declared that the starting point for all section 25 challenges is section 25(1): the analysis will only reach the point where a limitation is considered as an expropriation in terms of the requirements in section 25(2)-(3) once it had either passed scrutiny under (did not infringe) section 25(1) or if the infringement is justifiable in terms of section 36.³⁶

Compared to the property inquiry, the lack of contextual, constitutional or social analysis in the *FNB* case’s deprivation inquiry is striking. The court presented its wide definition of deprivation more or less as a matter of simple logic, focusing on the conceptual distinction between deprivation and expropriation and relying on nothing more than a handful of academic references. The definitional distinction between deprivation and expropriation that the court proposed, and particularly its implications for the analytical rhythm of section 25 challenges that the court presented, is perhaps the strongest indication of the arbitrariness vortex effect that Roux identified. According to the analytical structure or methodology that the court set out so emphatically, the starting point for all constitutional challenges under section 25 is always the deprivation issue in section 25(1) – in other words, the first question is always whether a deprivation of property is arbitrary. If the deprivation infringes section 25(1) (in other words, if it is arbitrary) and cannot be justified under section 36 that is the end of the matter – the law that authorises the deprivation is unconstitutional. If that law happens to deal with expropriation, and if it happens not to comply with the expropriation requirements in section 25(2)-(3), it is highly probable that those shortcomings would already render the law unconstitutional in terms of the section 25(1) arbitrariness inquiry. If it does comply with the formal section 25(2)-(3) expropriation requirements, it is unlikely to offend either the section 25(1) non-arbitrariness or the section 25(2)-(3) validity requirements, and it will therefore probably never be the source of a section 25 challenge. Effectively, constitutional analysis of the validity of an expropriation in terms of the requirements in section 25(2)-(3) is therefore always sucked into the section 25(1) arbitrariness inquiry, unless the deprivation that it causes can be justified under section 36. However, as appears below, it is unlikely that an arbitrary deprivation can in fact be justified in terms of section 36. To this extent, Roux’s arbitrariness vortex thesis seems to be confirmed by the *FNB* decision.

If the courts were to decide a case dealing with the section 25(2)-(3) expropriation requirements strictly according to the guidelines set out in the *FNB* case, the result would be an example of Roux’s arbitrariness vortex effect: a constitutional challenge against a law that authorises expropriation would be decided in terms of the section 25(2)-(3) expropriation requirements only if the deprivation that the expropriation inevitably also causes (in terms of the genus-species definition in the *FNB* case) is either not arbitrary (which will be the case only if the expropriation complies with the section 25(2)-(3) requirements) or if it is arbitrary but justifiable under section 36 (which is highly unlikely). Effectively, if the approach set out in the *FNB* case is followed strictly, all section 25 challenges against expropriation laws would be

³⁴ the *FNB* case (n 2) par 57. See Rautenbach (n 17) 166 182.

³⁵ the *FNB* case (n 2) par 58.

³⁶ the *FNB* case (n 2) par 58-60.

decisively dealt with in (sucked into) the section 25(1) arbitrariness inquiry. In other words, the required balance between the protection of individual property and the public interest in expropriation would in principle never be struck in a section 25(2)-(3) expropriation inquiry, even when the case at hand is in fact an expropriation case. If the analytical rhythm that the *FNB* decision proposed as if it were logically inevitable were indeed followed strictly, that would confirm Roux's arbitrariness vortex observation, at least as far as the effect on expropriation analysis is concerned.

However, Roux qualified his vortex thesis with the observation that courts may find it necessary or desirable in some cases to go to expropriation issues (either *FNB* question 5 or question 6) directly, instead of via the non-arbitrariness and justification route. The first possibility will arise when a court finds it necessary to consider more closely "the distinction between deprivation and expropriation (to determine whether the additional duty to pay just and equitable compensation arises [...])"; the second when a court finds it useful to inquire "into the adequacy of compensation (where this stage provides a more nuanced method for balancing private and public interests in property)".³⁷ In other words, Roux foresaw the possibility that a court might bypass the seemingly strict rhythm described in the *FNB* case in some instances and, instead of first establishing whether a particular regulatory limitation of property amounts to an arbitrary deprivation, go directly to the question whether the deprivation amounts to expropriation, with the result that compensation is required in terms of section 25(2); or whether the compensation that is provided for is just and equitable according to the requirements in section 25(3). Both would establish significant exceptions to the arbitrariness vortex. Taken together, they establish such an important qualification of what Roux perceived as the rule that he concluded that the *FNB* case's analytical rhythm or methodology "is not a true algorithm" since at least one step in it can be bypassed.³⁸

Since expropriation was not at stake in the *FNB* case, it is difficult to establish whether the court intended to establish a "true algorithm" that would inexorably follow the analytical rhythm at the heart of the vortex thesis. Judging from the summary statements in the *FNB* case where the court described the relationship between deprivation and expropriation that indeed seems to have been the intention, but it is difficult to rely on a decision with such a limited factual scope for strong conclusions on this point. As appears from the discussion of subsequent case law in section 3 below, the court does not consider itself bound to such a strong algorithmic interpretation of its decision in the *FNB* case and it is indeed willing to bypass the arbitrariness inquiry altogether and decide certain cases on the basis of *FNB* question 5 or 6 expropriation issues. In either event, it makes little difference whether one regards these expropriation examples as exceptional cases where the court abandons its own strict algorithm by skipping one stage to go directly to another, or as counter-examples on which the vortex thesis falls down because they demonstrate instances where the court prefers to strike the required balance between protection of individual property and the public interest outside of the arbitrariness inquiry – in either form these examples suggest that the *FNB* decision does not prescribe the logic of the arbitrariness vortex strictly. When it is fairly obvious that the challenged limitation of property is or may be expropriatory in nature, the court may prefer to strike the balance on *FNB* question 5 (by holding that there has been an expropriation that requires just and equitable compensation) or *FNB* question 6

³⁷ Roux (n 3) 46-24.

³⁸ Roux (n 3) 46-4.

(by deciding whether the compensation on offer is just and equitable as required by section 25(2)-(3)). By way of conclusion, it is probably fair to say that while the *FNB* decision seems to create a conceptual framework, in its genus-species description of the relationship between deprivation and expropriation, to support the arbitrariness vortex thesis, it does not provide any strong proof of the working of that vortex, because the case does not involve expropriation. Any judgment on this point must therefore be informed by analysis of later case law.

2.6 Arbitrariness

In view of Roux's arbitrariness vortex thesis it stands to reason that, at the very least, the arbitrariness stage would be an important locus for striking the desired balance between the protection of individual property and the public interest. Given the nature of the non-arbitrariness requirement in section 25(1),³⁹ it is to be expected that the arbitrariness test would always involve consideration of the balance that is struck between individual property interests and the public interest. It is therefore not surprising that the description of the arbitrariness inquiry in the *FNB* case is explicitly and primarily concerned with this balance: "a deprivation of property is 'arbitrary' as meant by section 25 when the 'law' referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair".⁴⁰ The "complexity of relationships" to be considered in determining whether the authorising law provides sufficient reason for the deprivation⁴¹ pivots on the relationship between means (the deprivation) and ends (the purpose of the law) and between the purpose of the deprivation (public interest) and the person whose property is affected, taking into account the nature of the property and the extent of the deprivation (individual right). Consequently, where the property is ownership of land or a corporeal movable, or when the deprivation embraces all the incidents of ownership rather than only some incidents and those only partially, a more compelling purpose will have to be established for the authorising law to constitute sufficient reason for the deprivation.

It is striking that the court supports its description of arbitrariness with contextual constitutional and social argument similar to what is relied on in the property inquiry (but that is absent from the deprivation inquiry)⁴² and with extensive comparative analysis.⁴³ From the contextual considerations, the court concludes that (1) context is crucial, in the sense that the concept "arbitrary" appears in and must be construed as part of a comprehensive and coherent bill of rights in a comprehensive and coherent constitution;⁴⁴ (2) context includes the jurisprudential context in which the constitution came into existence and functions, including international law and foreign law;⁴⁵ (3) the historical context in which the property clause came into existence is one of conquest and taking of land in circumstances which, to this day, are a source of pain and tension; this context and the constitutional necessity to regulate restitution and other forms of redress are relevant to the fact that the purpose of section 25 is not merely to protect private property but also to advance

³⁹ S 25(1) provides: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

⁴⁰ the *FNB* case (n 2) par 100. See Rautenbach (n 17) 166 182-183.

⁴¹ Set out in some detail in the crucial par 100 of the *FNB* case (n 2).

⁴² the *FNB* case (n 2) par 63-66.

⁴³ the *FNB* case (n 2) par 71-96.

⁴⁴ the *FNB* case (n 2) par 63.

⁴⁵ the *FNB* case (n 2) par 64.

the public interest in relation to property.⁴⁶ The comparative analysis of foreign law indicates that the court's contextual interpretation of the non-arbitrariness requirement is justified.⁴⁷

The constitutional court applied its arbitrariness test to the deprivation of property brought about by section 114 of the Customs and Excise Act 91 of 1964 with a surprising amount of further discussion of foreign law,⁴⁸ but essentially the court followed the approach it had set out before, namely to determine whether there is sufficient reason to warrant the deprivation on all the relevant facts of the particular case. The court described the purpose of the deprivation, namely to secure payment of a customs debt, as “a legitimate and important legislative purpose, essential for the financial well-being of the country and in the interest of all its inhabitants”.⁴⁹ However, having considered the “complexity of relationships” set out in paragraph 100, the court concluded that section 114 “casts the net far too wide” because it

“sanctions the total deprivation of a person's property under circumstances where (a) such *person* has no connection with the *transaction* giving rise to the customs debt; (b) where such *property* also has no connection with the *customs debt*; and (c) where such person has not transacted with or placed the customs debtor in possession of the property under circumstances that have induced the Commissioner to act to her detriment in relation to the incurring of the customs debt.”⁵⁰

In the absence of any nexus of this kind, there was insufficient reason for the deprivation authorised by section 114 and accordingly it was arbitrary for purposes of section 25(1) and constituted a limitation of the right.⁵¹ Although nothing was said explicitly in the section dealing with the application of the test to section 114 of the act, it is clear that the level of scrutiny in this case was closer to the proportionality end of the scale because of the impact and scope of the deprivation, which resulted in the affected owner losing ownership of its corporeal movables.

The focus and contours of the arbitrariness inquiry are therefore shaped by contextual factors that suggest that this is a significant part of a section 25 challenge. It is true that the arbitrariness inquiry may be subject to variations in the level of scrutiny in specific cases,⁵² but deciding whether there is sufficient reason to

⁴⁶ the *FNB* case (n 2) par 64.

⁴⁷ the *FNB* case (n 2) par 97: “there are appropriate circumstances where it is permissible for legislation, in the broader public interest, to deprive persons of property without payment of compensation”, and par 98: “for the validity of such deprivation, there must be an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve. It is one that is not limited to an enquiry into mere rationality, but is less strict than a full and exacting proportionality examination.”

⁴⁸ the *FNB* case (n 2) par 101-107. *Cf* the critical remarks of Roux (n 3) 46-23.

⁴⁹ the *FNB* case (n 2) par 108.

⁵⁰ the *FNB* case (n 2) par 108.

⁵¹ the *FNB* case (n 2) par 109.

⁵² In a sense, the whole of the court's analysis in the *FNB* case (n 2) par 61-66 is directed at this point. The conclusion that the arbitrariness standard “is more demanding than an enquiry into mere rationality” but simultaneously “a narrower and less intrusive concept than that of the proportionality evaluation required by the limitation provisions of section 36” appears and is justified in par 65, 66 (“[i]n certain circumstances the legislative deprivation might be such that no more than a rational connection between means and ends would be required, while in others the ends would have to be more compelling to prevent the deprivation from being arbitrary”), par 98, 100(g) (“[d]epending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution”).

warrant a particular deprivation of property is a matter to be decided on all the relevant facts of each particular case.⁵³ In short, one might infer from this statement, once it has been determined that there was a deprivation of property as meant in section 25(1), arbitrariness analysis of the kind foreseen in the *FNB* decision and at a suitable level of scrutiny, based on the relevant facts of a particular case, is a significant part of the section 25 challenge that should complete the process of striking the desired balance between individual property and the public interest. As appears from section 4 below, this is an important conclusion that underlines the significance of Roux's observation, albeit in an indirect and roundabout way.

2.7 Justification

The constitutional court has adopted a two-stage approach to constitutional challenges in general, according to which the first question in any constitutional challenge is whether a constitutional right has been limited and the second whether that limitation can be justified.⁵⁴ For purposes of section 25, the first stage involves the question whether the property right in section 25 has been limited by a deprivation or expropriation that does not satisfy the requirements in either section 25(1) or 25(2)-(3), and the second whether that limitation can be justified in terms of section 36.⁵⁵ Because of the broad, genus-species definition of deprivation and expropriation and the layered, contextual approach to non-arbitrariness that the *FNB* case adopted, it has become clear that the relationship between the two stages of a constitutional challenge is problematic in property challenges. Academic authors pointed out, in varying terminology but generally to the same effect, that once a court has established, in terms of the *FNB* test, that a deprivation of property is arbitrary it would be problematic to justify the same deprivation in terms of section 36. Consequently it has been said that the two stages of the constitutional challenge are "telescoped" into one by the *FNB* decision⁵⁶ or that it is unlikely that usual section 36 justification analysis (second stage) could apply to section 25 arbitrariness challenges.⁵⁷

To some extent, the point is a logical one that is not really affected or caused by the *FNB* decision; part of the problem simply results from the fact that section 25 requires a deprivation or expropriation of property, just like section 36(1) requires a limitation, to be authorised by law of general application. Logically, if a court should find that a deprivation is not authorised by law of general application, there is simply no way that the deprivation could be justified in terms of section 36(1), regardless of anything that was decided in the *FNB* case. However, apart from this formal validity requirement, the factors (the "complexity of relationships") that the court set out in

⁵³ the *FNB* case (n 2) par 100 (h).

⁵⁴ *S v Makwanyane* 1995 3 SA 391 (CC) par 100-102; *Ferreira v Levin*; *Vryenhoek v Powell NO* 1996 1 SA 984 (CC) par 44.

⁵⁵ S 36(1) provides: "36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

- a. the nature of the right;
- b. the importance of the purpose of the limitation;
- c. the nature and extent of the limitation;
- d. the relation between the limitation and its purpose; and
- e. less restrictive means to achieve the purpose."

⁵⁶ Roux (n 3) 46-20; Roux and Davis (n 7) 20-9.

⁵⁷ Van der Walt (n 24) 78-79.

the *FNB* case to establish whether the law that authorises a deprivation⁵⁸ provides sufficient reason for the deprivation (to prevent it from being arbitrary) significantly overlap with the factors enumerated in section 36 to be taken into account to establish whether a limitation of a constitutional right could be justified. Much of the non-arbitrariness analysis prescribed in the *FNB* case turns on the relationship between means and ends, which is echoed in the justification factors enumerated in section 36(1). The substantive core of the non-arbitrariness test in the *FNB* case concerns the relationship between the purpose of the deprivation, the nature of the affected right and the extent of the deprivation; that is almost identical to the factors in section 36(1). Consequently, once a deprivation has failed the non-arbitrariness test as it is set out in the *FNB* case, it is unlikely that it could pass virtually the same test in terms of section 36(1).

This conclusion is not affected significantly by the variable level of scrutiny foreseen in the *FNB* case, nor is it affected much by the somewhat enigmatic phrase “[a] limitation [that] is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom” used in section 36(1). As the *FNB* decision explains, either a more rationality-oriented or a more proportionality-oriented assessment is possible with reference to the non-arbitrariness factors – the former would simply focus more on the means-end balancing and the latter more on the contextual, proportionality-of-effect balancing. The same is true for the factors in section 36(1): if the level of scrutiny tends towards rationality, the focus would probably not fall on the nature and extent of the limitation and less restrictive means to achieve the purpose, but rather on the means-end balance. And, although the list in section 36(1) is open-ended, the question whether a particular limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom is always going to be answered with reference to the listed factors and not on the basis of sweeping normative judgments about democratic values, human dignity, equality or freedom that are completely unrelated to the purpose of the limitation, the means selected to achieve that purpose, and the effect that it has on the affected rights holder. In short, in view of the overlaps between the validity requirements in section 25 and the justification requirements in section 36(1), and given the particular meaning attached to non-arbitrariness in the *FNB* decision, it is difficult to imagine an example in which a deprivation could fail the non-arbitrariness test and still be justified in terms of section 36(1).

This observation obviously supports Roux’s arbitrariness vortex thesis to the extent that the whole section 36 justification analysis, and with it the customary second stage of a constitutional challenge, is effectively “telescoped” or “sucked” into the first-stage arbitrariness test. However, the *FNB* decision acknowledged but refused to simply accept this conclusion and, once it had concluded that the deprivation of property authorised by section 114 of the Customs and Excise Act 91 of 1964 was indeed arbitrary,⁵⁹ it proceeded to an admittedly somewhat summary second-stage justification analysis.⁶⁰ Despite the difficulty of conceiving of a way in which an arbitrary deprivation might be saved by the justification analysis, the court pointed out that section 36 draws no distinction between any rights in the bill of rights, nor does either the text or the purpose of section 36 suggest that any right in the bill of rights is excluded from limitation under its provisions. Since the court did not find it necessary to decide this question finally, it assumed, without deciding,

⁵⁸ the *FNB* case (n 2) par 100.

⁵⁹ the *FNB* case (n 2) par 109.

⁶⁰ the *FNB* case (n 2) par 110-112.

that an infringement of section 25(1) of the constitution is subject to the provisions of section 36, only to conclude that in the case at hand, the arbitrary deprivation of property authorised by section 114 of the Customs and Excise Act could not be justified in terms of section 36(1).⁶¹

It seems fair to say that the logical effect of the formulation of section 25 and section 36(1), combined with the content and structure given to non-arbitrariness analysis in the *FNB* decision, is to effectively render section 36 justification analysis redundant, at least for purposes of section 25(1) deprivations that are held to be arbitrary. This effect is indeed an example of Roux's arbitrariness vortex, at least as far as the justification part of the analysis (*FNB* question 4) is concerned. However, while the *FNB* decision acknowledged this logical conundrum it declined the opportunity to make any final finding on it. Any firm conclusions on this aspect of the vortex thesis must therefore be based on analysis of subsequent case law.

2.8 Conclusions on the arbitrariness vortex in the *FNB* case

From the analysis so far it is possible to draw a few preliminary conclusions regarding Roux's arbitrariness vortex thesis and its role in the *FNB* decision. Firstly, it is reasonably clear that the analytical rhythm or methodology for interpreting and applying section 25 set out in the *FNB* decision is the backdrop, if not the cause, of Roux's vortex thesis and that it also informs any observations about the role that the arbitrariness vortex played in the *FNB* decision or might play in future. If section 25 challenges are structured according to the set of seven questions listed in the *FNB* case (perhaps plus the beneficiaries issue), any perceived tendency to depart from the sequence suggested by or embodied in that list, and particularly to focus on any one item in the list to the exclusion of others or with the effect of relegating them to a less significant role, would result in the kind of effect that Roux described. The nature, composition and function of the list of questions in *FNB* is therefore of primary analytical importance.

Secondly, it can be said that Roux's arbitrariness vortex thesis receives support from the *FNB* judgment at least in so far as it has become clear that the structure and wording of section 25(1) and section 36(1), combined with the meaning that the *FNB* decision attached to the arbitrariness test, create the distinct logical possibility that it would be very difficult, if not impossible, to justify a deprivation in terms of section 36(1) once it has been branded arbitrary in terms of section 25(1). The effect is that section 36(1) justification analysis is effectively "telescoped" or "sucked" into the section 25(1) arbitrariness test. However, in the *FNB* case the court declined the invitation to reach a final decision on the point and assumed, without deciding, that section 36 justification applies to all rights, including section 25. It can therefore perhaps be said that the arbitrariness vortex thesis gained strong logical support in the *FNB* case, but no judicial support, as far as the telescoping of the two stages of the constitutional challenge is concerned.

The methodology or analytical rhythm for analysis of section 25 proposed in the *FNB* case is perhaps the strongest indication of a potential arbitrariness vortex, since that methodology suggests that problematic expropriation laws might always be considered as authority for arbitrary deprivation first and might stumble over the arbitrariness hurdle, never to reach expropriation inquiry. However, since the *FNB* case did not deal with expropriation, no firm conclusions on this point are possible from the decision. It has been pointed out in the academic literature, with some

⁶¹ the *FNB* case (n 2) par 113.

hindsight gained from other decisions, that this arbitrariness vortex effect might well be watered down in cases that obviously deal with expropriation, to the extent that courts might be willing to bypass the arbitrariness analysis and go straight to expropriation analysis.

Apart from these rather hesitant observations, it must be added that in the *FNB* decision the constitutional court followed the methodology it had set out as far as the property question is concerned, and did not allow the arbitrariness issue to dominate its decision on the property question. Instead, it considered wider contextual, constitutional and social factors that are extraneous to the arbitrariness issue in reaching its decision on the property question. Moreover, the court followed the same contextual approach in deciding the beneficiaries issue, which was seen as a preliminary question and not included in the list of seven property-related questions. The deprivation question was decided quite summarily, without reference to the same contextual factors, but also without reference to arbitrariness issues.

In sum, the indications that some form of arbitrariness vortex logic dominated or even influenced the court in the *FNB* decision itself are rather weak. In fact, the court's analysis on the issues of beneficiaries and on the property question shows that it followed a contextual approach to the interpretation of section 25(1) that took into consideration constitutional, social and historical factors that frame the whole of section 25 in its broader constitutional setting, instead of allowing any of its discrete parts to dominate the interpretation of the whole. The two points on which some form of vortex effect does seem to become possible or even likely on the basis of the court's approach to section 25, namely the genus-species definition of the relationship between deprivation and expropriation and the distinction between the two stages of a constitutional challenge, did not in fact produce any firm evidence of an arbitrariness vortex in the decision because the case did not deal with expropriation at all and the court insisted on following the two-stages methodology.

[to be concluded]