

Section 25 vortices (part 2)*

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3 Subsequent decisions

3.1 Introduction

Even when he first identified the arbitrariness vortex, Roux pointed out that courts may well not follow the methodology set out in the *FNB* case strictly and that deviations might reduce the vortex effect in some cases. In some subsequent decisions, the constitutional court did follow its approach in the *FNB* case, but it has become clear that the arbitrariness vortex is not going to materialise in a pure form or consistently and that the court will indeed deviate from the *FNB* methodology in ways that will at least water the vortex effect down. Perhaps more surprisingly, subsequent decisions have also shown that the court will deviate from the *FNB* methodology in ways that might create new vortices, centred on other parts of the section 25 inquiry.

It is impossible in this article to analyse all the relevant constitutional court decisions on section 25, let alone decisions from other courts. In what follows the approach is rather to select for discussion a few decisions, mostly from the constitutional court, that illustrate the points on which the court either more or less followed its *FNB* approach or deviated from it.

3.2 Beneficiaries

Since the court in the *FNB* case decided that a corporate juristic person does enjoy the protection of section 25, the beneficiaries issue has not come up for decision too often. In *City of Tshwane*⁶² the court confirmed, for the first time in South African law,⁶³ that section 25 protects private property and that the state cannot, as a property owner, claim its protection. This does not mean that the constitution denies the state's right to own property, but since either deprivation or expropriation of state property that triggers section 25 protection could arise only from state regulation of property, one state organ cannot rely on the bill of rights to protect its property against regulatory action by another. If “deprivation” or “expropriation” issues should arise between different tiers or organs of government respectively owning property and regulating its use, the ensuing conflicts should be resolved in terms

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⁶² *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC). See further on the *City of Tshwane* decision Van der Walt “Constitutional property law” 2015 *ASSAL*.

⁶³ This principle is also applied, with further refinements, in foreign law; see eg Van der Walt (n 24) 71-72 (German law).

of chapter 3 of the constitution (co-operative government) and not chapter 2 (bill of rights). In the *City of Tshwane* case the section 25 challenge was therefore restricted to the private intervening party (SMI Trading CC) whose property was affected by installations established under section 22 of the Electronic Communications Act 36 of 2005. This decision was based on an analysis of the constitutional context and function of section 25 and not influenced by the arbitrariness vortex.⁶⁴

The beneficiaries issue also came up, indirectly and in a way that implicates Roux's vortex thesis, in the *Shoprite Checkers* case.⁶⁵ The fact that the beneficiaries issue raised its head in this decision at all was somewhat surprising, seeing that the question was the same fairly straightforward one already decided in the *FNB* case, namely whether a corporate juristic person (in this case Shoprite Checkers (Pty) Ltd) was entitled to the property rights protection offered by section 25. The court accepted that Shoprite had standing to bring a constitutional challenge under section 25, provided that it could show the presence of a protected property interest. For purposes of this qualification, the court defined a protected property interest as one that promotes "socially-situated individual self-fulfilment".⁶⁶ Obviously, property can in principle only promote individual self-fulfilment in natural persons, which indirectly but effectively restricts the beneficiaries of section 25 protection with reference to the court's individual-self-fulfilment definition of property. In a roundabout way, proof of a protected property interest therefore becomes an issue that affects standing. Or, stated differently, the beneficiaries issue is potentially sucked into the property inquiry, thereby creating a vortex effect, located in the property question, not unlike the arbitrariness vortex Roux described.

In so far as the decision in the *Shoprite Checkers* case can be said to create a vortex effect, it would be a step backwards in the development of section 25 doctrine on beneficiaries. It appeared as if the *FNB* decision had settled the question whether corporate juristic persons benefit from the protection of section 25 reasonably clearly, on the basis of principled reasoning deriving its force from the constitution and other contextual considerations, and if the effect of the *Shoprite Checkers* decision is to suck the beneficiaries issue into a property vortex, that would destroy the measure of clarity and certainty that the *FNB* case had established on this point. Since the beneficiaries issue is in fact a reasonably straightforward one that can be cleared up with a relatively large degree of certainty, with reference to section 8(4) and earlier case law, it arguably serves no purpose to open the matter up again by discarding what appeared to be reasonably clear and sensible guidelines and rendering future doctrinal development subject to analysis in a different part of the section 25 challenge. Such a development would be particularly problematic if it proved to open the beneficiaries issue up, as far as corporate juristic persons are concerned, to reconsideration in every individual case, based on the "worthiness" of the particular claimant's property interest. Since the *FNB* case decided the beneficiaries issue, as far as corporate juristic persons are concerned, in a principled, contextually reasoned analysis that relied on relevant constitutional provisions, the constitutional and social context and function of section 25, and since it was framed in a way that

⁶⁴ the *City of Tshwane* case (n 62) par 112, 160 (majority judgment); 53-55 (minority judgment).

⁶⁵ *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 6 SA 125 (CC). For a discussion of the *Shoprite Checkers* case see Rautenbach "Dealing with the social dimensions of the right to property in the South African bill of rights" 2015 *TSAR* 822 826-827.

⁶⁶ The vortex effect of the *Shoprite Checkers* decision is discussed in more detail in the section on property below.

provides a clear and useful abstract guideline for future cases, there seems to be no reason to discard the result reached in that decision and embark on a different route, as suggested by the *Shoprite Checkers* decision, that could potentially subject the beneficiaries question to something like a property vortex.

3.3 Property

In the *FNB* case the property question was treated neither as a threshold issue, nor as a secondary issue that is sucked into the arbitrariness vortex. Instead, as is argued in section 2 above, the court dealt with the property question in a principled manner, relying on constitutional and contextual factors outside of section 25 in its analysis of the question whether a particular property interest should be recognised as property for purposes of section 25. The property interest at stake in the *FNB* case (corporeal movables) was unproblematic, but the indication was that extensions of the category of interests to be recognised as property, beyond that which is traditionally recognised as property in private law, would require principled and contextual analysis of the kind set out in the *FNB* case.

This trend was continued in a number of important subsequent decisions. As could be expected, the property question does not require much analysis in cases dealing with ownership of land and corporeal movables,⁶⁷ or cases dealing with real rights in private law, such as servitudes in land.⁶⁸ In a few instances the court relied on some contextual analysis of constitutional and social considerations, much in the way that the court did in the *FNB* case, when deciding the property issue.⁶⁹ However, the majority of decisions after the *FNB* case spent little time on contextual analysis, even when the court had to decide whether to include a property interest that has not been considered in a constitutional challenge before.⁷⁰ In some instances, the court simply assumed that the interest in issue was property, without deciding it, because a decision on the point would not affect the outcome of the case because

⁶⁷ In the *Du Toit* case (n 33) it was contested whether the property at stake was a right to use land temporarily or movable corporeal property (gravel) removed from that land, but the court did not spend any time on the property question. *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC); *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC); *Arun Property Development (Pty) Ltd v Cape Town City* 2015 2 SA 584 (CC) and the *City of Tshwane* case (n 62) dealt with ownership of land and owners' entitlements to use their land; none of these spent any time on the property question.

⁶⁸ The clearest decision to date on real rights in land is a high court decision: *Ex parte Optimal Property Solutions CC* 2003 2 SA 136 (C) par 19 (restrictive conditions, compared to praedial servitudes).

⁶⁹ Admittedly, in some instances the contextual analysis was not primarily aimed at answering the property question but elicited by another related issue, such as the constitutional purpose of protecting property. See *eg* the *Reflect-All* case (n 67), which dealt with ownership of land and the use entitlements of landowners and the court simply assumed that this is property for s 25 purposes, although it refers to the constitutional, social and historical context of the protection of property in par 30-32. In *Phumelela Gaming and Leisure Ltd v Gründlingh* 2007 6 SA 350 (CC) par 34-38 the court's primary focus was not the property question – it accepted for argument's sake that goodwill might be property protected by s 25 – but rather whether a particular development of the common law of delict was justified to protect that property interest. In view of a principled analysis that considered a range of rights in their constitutional and social context the court decided that the claimed development of the common law would have the effect of immunising one party's property rights against competition, which is not what s 25 is intended to do.

⁷⁰ Without much discussion, the court has accepted that a trade mark is s 25 property: *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 1 SA 144 (CC). Compare the supreme court of appeal decision in *British American Tobacco South Africa (Pty) Ltd v Minister of Health* (463/11) 2012 ZASCA 107 (20 June 2012).

the alleged deprivation would not be arbitrary in any event.⁷¹ In others, the reason for this lack of in-depth analysis is that the property issue was settled in earlier case law or in foreign law. However, even when the property issue was ignored or dealt with summarily, none of these decisions creates a strong impression that the property issue was either decided or avoided under the effect of an arbitrariness vortex. Arguably, judicial avoidance in the form of failing to reach a firm decision on the property issue because it is clear from the outset that the alleged deprivation of that property interest would not be arbitrary does not necessarily confirm the arbitrariness vortex thesis any more than avoiding the clear right issue does in an interdict application where it is clear from the outset that there is an alternative remedy available; or avoiding the peaceful and undisturbed possession issue when it is clear from the outset that the alleged spoliation was not unlawful because it was properly authorised by law. The lines may sometimes become blurry, but one should not be overly hasty in identifying an example of Roux's arbitrariness vortex when Occam's razor would suggest an equally valid and more straightforward explanation in the form of judicial expediency.

In the *Opperman* case⁷² the court decided that the right to recover money paid (on the basis of unjustified enrichment) was property for purposes of section 25. The right to claim restitution on the basis of enrichment is a personal right, and up to that point, the court had not yet decided whether personal rights emanating from contract, delict, or enrichment are property under section 25. Without extensive contextual constitutional and social analysis, relying in part on foreign law, the court simply decided that

“[i]n the circumstances of this case, the recognition of the right to restitution of money paid, based on unjustified enrichment, as property under section 25(1) is logical and realistic. It would be in accordance with developments in other jurisdictions where personal rights have been recognised as constitutional property. Intangible property has become important in modern-day society and

⁷¹ In the *Law Society* case (n 33) par 84 the court assumed, but found it unnecessary to decide, that a delictual claim for loss of earning capacity or support is property. The claim was that s 17(4)(c) of the Road Accident Fund Act 56 of 1996, as amended by the Road Accident Fund Amendment Act 19 of 2005, by limiting the amount of compensation that the Road Accident Fund is obliged to pay for claims for loss of income or a dependant's loss of support arising from the bodily injury or death of a victim of a motor accident, engages s 25(1) when it causes medical costs, reduces or destroys earning capacity and cuts off dependants' support from their breadwinners. The argument was that the medical costs incurred, reduced or lost earning capacity and loss of support constitute a bundle of rights and assets or rights with a monetary value, or new property, all of which are protected as property by s 25 (par 81). The court declined the opportunity to decide this property issue because it had already decided, on a challenge that was unconnected to s 25, that the regulatory scheme was rational, and thus there was no chance that the effect of the same scheme could constitute arbitrary deprivation of property: par 86. Extensive analysis of the property issue was therefore unnecessary, but in par 83 the court did state the following: “For present purposes let it suffice to state that the definition of property for purposes of constitutional protection should not be too wide to make legislative regulation impracticable and not too narrow to render the protection of property of little worth. In many disputes, courts will readily find that a particular asset of value or resource is recognised and protected by law as property. In other instances, determinations will be contested or prove elusive.”

⁷² *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) par 63-64. S 89(5)(c) of the National Credit Act 34 of 2005 rendered money-lending transactions by unregistered credit providers void and declared any common law enrichment claim that the lender might have to recover the unpaid debt forfeit to the state. See further on the *Opperman* decision Van der Walt “Constitutional property law” 2013 *ASSAL* 221.

property should not be so narrowly interpreted as to diminish the worth of the protection given by section 25.⁷³

In the *Cool Ideas* case⁷⁴ the court followed its decision in the *Opperman* case,⁷⁵ without further discussion, and confirmed that an enrichment claim is property for purposes of section 25. In the *Chevron* case⁷⁶ the court had little trouble in deciding that money at hand⁷⁷ was property for purposes of section 25.

The first decision since the *FNB* case in which the property question again received in-depth attention from the constitutional court was the *Shoprite Checkers* case,⁷⁸ which not only did not allow the property question to be sucked into an arbitrariness vortex but in fact turned Roux's arbitrariness vortex thesis on its head and potentially created a property vortex, which threatens to suck all other aspects of the section 25 challenge, including the arbitrariness issue, into the property inquiry. This vortex effect was created in two different ways in two of the separate judgments. The judgment of Froneman J causes a potential vortex effect by adopting a normative-constitutional approach to the interpretation of section 25 as a whole, in terms of which the property question assumes the form of a "deserving-property" inquiry. Froneman J explains his approach in the following terms:

"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 section 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. This judgment suggests that our evolving conversation on this issue should continue to seek our conception of property within the framework of values and individual rights in the Constitution. It further asserts that the level of constitutional protection should depend on the kind of constitutional interest involved and the core purpose associated with that type of property interest."⁷⁹

At a later point in the judgment, Froneman J explains⁸⁰ that the kind of property that deserves section 25 protection should be determined in accordance with the founding constitutional values of dignity, freedom and equality⁸¹ and other, related rights that are protected by the constitution, such as dignity.⁸² The goal should be to seek a conception of property that is rooted in the constitution itself, within the normative framework of the fundamental values and individual rights in the constitution. For this purpose, it is necessary to extend the conception of property "to embrace constitutional entitlements beyond the original ambit of private common

⁷³ the *Opperman* case (n 72) par 63.

⁷⁴ *Cool Ideas 1186 CC v Hubbard* 2014 4 SA 474 (CC) par 38. See further on the *Cool Ideas* decision Rautenbach 2014 *LitNet Akademies* 171-188; Van der Walt "Constitutional property law" 2014 *ASSAL* 195 196-199.

⁷⁵ In the context of the Housing Consumers Protection Measures Act 95 of 1998.

⁷⁶ *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport* 2015 (10) BCLR 1158 (CC) par 16.

⁷⁷ The phrase "money at hand" refers to money that the complainant had in its account and would have had to pay to someone else in terms of the impugned s 89(5)(b) of the National Credit Act 34 of 2005. To the extent that "money at hand" practically always refers to money in a bank account – and therefore a personal right against the bank – the doctrinal difference between the decisions in the *Opperman* and *Chevron* cases is negligible.

⁷⁸ the *Shoprite Checkers* case (n 65). See further on the *Shoprite Checkers* decision Van der Walt (n 62).

⁷⁹ the *Shoprite Checkers* case (n 65) par 4.

⁸⁰ the *Shoprite Checkers* case (n 65) par 44.

⁸¹ s 1(a) of the constitution.

⁸² s 10 of the constitution, read with s 7 and 39(1)(a).

law property [so as to] ensure that the property clause does not become an obstacle to the transformation of our society, but central to its achievement”.⁸³ Like the *FNB* case, the Froneman judgment therefore strives to interpret section 25 within a normative, contextual framework that takes into account the constitutional and the social, historical and economic considerations that are relevant to the constitutional purpose and meaning of section 25. The two normative-contextual explanations of section 25’s constitutional framework are strikingly similar.

Froneman J’s comments in the *Shoprite Checkers* case seem to lean towards expanding the private-law notion of property so as to facilitate the protection of a wider range of property-related interests that are important to transformation. To that extent, the judgment seems to start out from the same point of departure as the *FNB* judgment, assuming that private-law property qualifies as section 25 property and allowing for the possibility that this protection might be extended to a wider range of property interests for constitutionally and contextually justified reasons. One might therefore expect the rest of the judgment to consider types of property that are not necessarily protected as property in private law but that deserve section 25 protection for some constitutionally or contextually justified reason, but instead it focuses on the role that property plays in the promotion of non-property constitutional rights and objectives. As a consequence, the judgment potentially does not expand, but in fact restricts the notion of property to “deserving property” interests that serve the normative constitutional goal of promoting socially-situated individual self-fulfilment, as appears from the following passage:⁸⁴

“The objective normative values of the Constitution thus require us to determine what kind of property deserves protection under the property clause, by reference to the Constitution itself. The fundamental values of dignity, equality and freedom necessitate a conception of property that allows, on the one hand, for individual self-fulfilment in the holding of property, and, on the other, the recognition that the holding of property also carries with it a social obligation not to harm the public good. The function that the protection of holding property must thus, broadly, serve is the attainment of this socially-situated individual self-fulfilment. The function of personal self-fulfilment in this sense is not primarily to advance economic wealth maximisation or the satisfaction of individual preferences, but to secure living a life of dignity in recognition of the dignity of others. And where the holding of property is related to the exercise, protection or advancement of particular individual rights under the Bill of Rights, the level of the protection afforded to that holding will be stronger than where no relation of that kind exists.”

Recognition for section 25 purposes of the property interest at stake in the *Shoprite Checkers* case – a so-called grocer’s wine licence that allows the holder to sell table wine off the shelf in a grocer’s shop – is a complex and difficult issue because the grocer’s wine licence, like all licences, originates from state approval and its continuation and exercise depend on state regulation.⁸⁵ As all three judgments in the *Shoprite Checkers* case pointed out, licences in this respect resemble other interests that also originate in state grant, such as social and welfare rights, with which they have since the famous Reich article been lumped together under the somewhat misleading label of “new property”.⁸⁶

⁸³ the *Shoprite Checkers* case (n 65) par 46.

⁸⁴ the *Shoprite Checkers* case (n 65) par 50. Cf Rautenbach (n 65) 827.

⁸⁵ the *Shoprite Checkers* case (n 65) par 58.

⁸⁶ Reich “The new property” 1964 *Yale LJ* 733-787. Cf Van der Walt “Protecting social participation rights within the property paradigm: a critical reappraisal” in Cook (ed) II *Modern Studies in Property Law* (2003) 27-41 for a critical evaluation of the applicability of the notion of “new property” in South African constitutional law.

To some extent, Froneman J's analysis of the property question in the *Shoprite Checkers* case, in the context of the normative-constitutional framework he develops, was inspired by the difficulty of recognising licences as constitutional property, but the problem of recognising the grocer's wine licence as constitutional property was not what caused the potential vortex in this judgment. In principle, casting the property question into the form of a "deserving-property" requirement against the backdrop of a normative-constitutional goal such as promoting socially-situated individual self-fulfilment, as Froneman J did, would have a vortex effect regardless of the kind of property interest that is at stake. If the applicant has to prove, as an initial threshold requirement before section 25 protection is triggered, that her property interest deserves section 25 protection because it serves broader, normative-constitutional goals – such as *socially-situated individual self-fulfilment* – in a way that pre-empts a particular balancing of individual interests and the public interest, it seems inevitable that the balancing of individual interests and the public interest that is inherent to the whole of section 25 will be prefigured, and potentially completed, during the property inquiry of the section 25 challenge rather than during any other inquiry such as deprivation or arbitrariness. Stated differently, once it has been decided that a particular property interest deserves section 25 protection because it serves a normative-constitutional goal that involves or requires a suitable balancing between individual interests and the public interest, it becomes unnecessary to analyse other aspects of the section 25 challenge such as deprivation or arbitrariness that involve the same balance. In short, the whole of the section 25 challenge is sucked into the property question, which therefore acquires a real vortex effect.

In the *Shoprite Checkers* case, Froneman J managed to avoid this property vortex effect. The property vortex might possibly have surfaced in a number of different ways in the decision, but in the particular case its most obvious effect would have been to exclude claimants, particularly corporate juristic persons, who could not prove that their property interests were "deserving property" because it is unlikely, if not impossible, that the commercial property interests of corporate holders could serve "socially-situated individual self-fulfilment". Froneman J avoided this outcome by imagining an individual natural person who holds the same grocer's wine licence under comparable circumstances and who would have been similarly affected by the statutory amendment that terminated that kind of licence. Such an individual property holder's interest in the wine licence would satisfy the requirement that it protects the holder's "socially-situated individual self-fulfilment" and therefore – in an abstract constitutional challenge, and taking into account the analysis of the beneficiaries issue in the *FNB* case, the fact that licences of this kind are considered constitutional property in some foreign jurisdictions, and that the grocer's wine licence displays certain features that would qualify it as a property-type interest – Froneman J decided that the licence qualifies as property for purposes of section 25.⁸⁷

The vortex effect of property analysis in the *Shoprite Checkers* case is even clearer from the (on this point dissenting) judgment of Moseneke DCJ, who rejected the normative-constitutional framework of the Froneman judgment, arguing that the objective, inherent value of an interest should be considered to determine whether it constitutes property, and concluded that a grocer's wine licence does not constitute property for purposes of section 25. Taking his cue from the *FNB*

⁸⁷ the *Shoprite Checkers* case (n 65) par 61-70.

approach, Moseneke DCJ considered this analysis to apply only to interests that are not recognised as property at common law, customary law or in legislation, with the result that the court must decide “whether extending constitutional protection to the interest would be consistent with the Bill of Rights, having regard to the values underlying the final Constitution”.⁸⁸ The courts have cautiously, case by case, recognised ownership of or interests in certain real or incorporeal personal rights as property for purposes of section 25, and the question in the *Shoprite Checkers* case was to decide “whether what has been termed ‘new property’ should be recognised for the purposes of section 25, and further, whether a distinction must be made between these various forms of incorporeal property”.⁸⁹ Judging from an overview of foreign case law, Moseneke DCJ concluded that

“[e]ven if one is inclined to extend constitutional protection to ‘new property’, not all government largesse can be seen as ‘property’ and that even if this Court were to push the boundaries of our notions of property, liquor licences might not be the ideal type of government largesse with which to push the boundaries, nor the ideal factual matrix within the category of ‘licences’”.⁹⁰

One could debate Moseneke DCJ’s argument concerning recognition of so-called “new property” as property for purposes of section 25,⁹¹ the place of licences in that broad category and the differences between various kinds of licences, but the vortex effect of the (on this point) dissenting judgment’s property analysis is clearer from its line of reasoning than from the Froneman judgment. Moseneke DCJ argued that “[i]f a liquor licence is seen as ‘property’ then a strong entitlement is created in the hands of the licence holder. This would tip the scales and arguably diminish the ability of the Legislature to effectively regulate an industry where regulation is of paramount importance”.⁹² An important consideration is therefore whether recognition of a liquor licence as constitutional property would render the definition of property too wide and make legislative regulation impracticable.⁹³ The wider the definition of property, the tighter the understanding of deprivation and arbitrariness would have to be to prevent every change in a licensing law from attracting a constitutional challenge on the basis of section 25. A wide understanding of property that includes licences would also raise the question whether a termination of licences amounts to expropriation that entitles former holders of licences to compensation.⁹⁴ In other words, rather than decide whether every regulatory interference with a liquor licence constitutes arbitrary deprivation or even expropriation that requires compensation, Moseneke DCJ would not recognise these licences as property in the first place and allow the executive and the administration the necessary leeway to regulate the licencing scheme according to the applicable legislative framework, leaving aggrieved licence holders to litigate alleged infringements on the basis of administrative law. In this way, the potentially complex rationality or proportionality analysis that would have been necessary in the arbitrariness stage of a property challenge (or eventually in an expropriation challenge) is avoided by sucking the whole issue into the property inquiry and deciding upfront that there is no protected property interest to begin with.

⁸⁸ the *Shoprite Checkers* case (n 65) par 104, citing Roux and Davis (n 7) 20-15.

⁸⁹ the *Shoprite Checkers* case (n 65) par 108.

⁹⁰ the *Shoprite Checkers* case (n 65) par 110-113.

⁹¹ In this regard see *eg* Van der Walt (n 86) 27-41.

⁹² the *Shoprite Checkers* case (n 65) par 120.

⁹³ the *Shoprite Checkers* case (n 65) par 124.

⁹⁴ the *Shoprite-Checkers* case (n 65) par 125.

This approach would have a true vortex effect. In all cases where the property interest at stake is not recognised or treated as property at common law, customary law or in legislation, the courts would be free to decide that there is no property interest to begin with and leave the applicant to rely on her remedies in administrative law, rather than find a protected property interest and subsequently (in the deprivation or arbitrariness inquiry) balance out the protection of the individual interest and the public interest in the regulatory project. Since many of the property interests that resemble the grocer's wine licence in the *Shoprite Checkers* case originate in or are subject to extensive regulatory legislation, this approach would make the property vortex the default judicial position in a significant, and economically important, sector of the economy. Considering the constitutional court's hesitancy in deciding whether the Promotion of Administrative Justice Act 3 of 2000 applies to section 25-type cases, combined with the fact that the regulation of this kind of property interests is often effected directly by legislation and not through intervening administrative action, which creates a complex set of questions about the applicability of the act, it is a moot question whether the property vortex that might result from this approach would undermine the constitutional protection that the affected holders of heavily regulated property enjoy. Apart from administrative justice, it even seems possible that the vortex effect of this approach might force affected holders to resort to the equality provision for constitutional protection.

3.4 Deprivation and expropriation

Two aspects of the post-*FNB* case law deserve mention, namely the potentially vortex-creating definition of deprivation that was mooted in one constitutional court decision soon after the *FNB* case and followed in most other decisions, but without any real vortex effect; and the fact that Roux's prediction concerning the undermining of the arbitrariness vortex effect in expropriation cases was confirmed by subsequent case law.

In the *Mkontwana* case the deprivation issue was not in dispute,⁹⁵ and the court explicitly relied on the *FNB* decision for its approach to deprivation, but Yacoob J nevertheless formulated a narrower definition of deprivation that could, if applied strictly, suck the whole property challenge into the deprivation inquiry because it apparently locates a significant part of the process of striking a proper balance between the protection of individual interests and the public interest in the determination of whether a deprivation "goes beyond normal restrictions on property":

"Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. It is not necessary in this case to determine precisely what constitutes deprivation. No more need be said than that at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation."⁹⁶

⁹⁵ the *Mkontwana* case (n 67). All parties agreed that the challenged provisions, s 118(1) of the Local Government: Municipal Systems Act 32 of 2000 and s 50(1)(a) of the Gauteng Local Government Ordinance 17 of 1939, bring about a deprivation of property: par 32.

⁹⁶ the *Mkontwana* case (n 67) par 32. See Van der Walt "Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*" 2005 *SALJ* 75-89.

In a concurring judgment, O'Regan J focused on the fact that the impugned legislation does not deprive affected owners of their ownership of land, but only of one of the incidents of ownership, namely the ability to alienate their immovable property.⁹⁷ Although she used the terminology of Yacoob J's judgment, O'Regan J cautioned that it would defeat the purposes of section 25(1) if the notion of deprivation were understood too narrowly.⁹⁸ However, the point (and effect) of O'Regan J's wider definition of deprivation was not to move the court away from Yacoob J's normal-in-an-open-and-democratic-society definition of deprivation but to ensure that partial deprivations that affect just one of a landowner's entitlements are included in the definition of deprivation. Considering the importance of the entitlement to dispose of property and the effect that the statutory prohibition on alienation may have, she concluded that the relevant section does constitute a deprivation of property for purposes of section 25(1) because "[s]uch an impairment of the right to alienate property is neither trivial, nor is there any suggestion by the litigants that such limitations are ordinarily imposed by most open and democratic societies."⁹⁹ The idea that impairment of just one of a landowner's entitlements might be sufficient to establish a deprivation was followed in the *Reflect-All* case.¹⁰⁰ To that extent, the *Mkontwana* case is authority for expanding the definition of deprivation. However, to the extent that it defined deprivation with reference to what is perceived as normal in an open and democratic society, the *Mkontwana* decision at least potentially restricts the notion of deprivation to something significantly narrower than the wide definition used in the *FNB* case, since it would exclude from section 25 review all regulatory interferences with property that are perceived as normal in an open and democratic society: land-use and planning regulation; regulatory control over the use of potentially dangerous property such as motor vehicles or firearms; and of course regulation of all licences and permits. A literal interpretation of the *Mkontwana* definition would have restricted deprivation to just those deprivations that are not to be expected in an open and democratic society; in other words, just those excessive and disproportionate deprivations that would have failed the section 36 justification test.

In subsequent cases the constitutional court routinely refers to its discussion of deprivation in the *Reflect-All* case,¹⁰¹ where it cited both the *FNB* and *Mkontwana* decisions and concluded that a narrow interpretation of deprivation was undesirable and that a deprivation merely had to be significant. However, subsequent decisions cite the *Mkontwana* definition without comment on, and apparently without abiding by, the notion that only those interferences with private property that exceed what is to be expected as normal in an open and democratic society qualify as deprivations. The implication of that narrow definition, namely that any regulatory interference with property that is to be expected in an open and democratic society would in principle be insulated against section 25(1) scrutiny, seems to have consistently escaped the court's notice.¹⁰² At most, the post-*Mkontwana* decisions seem to focus on the idea that a deprivation must be legally significant in the sense of not being *de minimis*. In the *Shoprite Checkers* case the court explained, in what is the clearest

⁹⁷ the *Mkontwana* case (n 67) par 84-91.

⁹⁸ the *Mkontwana* case (n 67) par 89.

⁹⁹ the *Mkontwana* case (n 67) par 91.

¹⁰⁰ the *Reflect-All* case (n 67) par 38.

¹⁰¹ the *Reflect-All* case (n 67) par 36, referring to O'Regan J's minority judgment in the *Mkontwana* case par 89.

¹⁰² See Van der Walt (n 96) 75-89.

formulation of this *Mkontwana*-inspired deprivation test, that deprivation requires an interference with property that is significant enough to “have a legally relevant impact on the rights of the affected party”.¹⁰³ Apparently, what was a strikingly narrow definition with a potentially sweeping vortex effect in the *Mkontwana* decision now seems to be associated simply with the much less restrictive – and actually common-sense – observation that deprivation must be significant enough to be legally relevant. There is no significant difference between the *FNB* definition and this refinement of it.

The result is that, instead of a narrow test that would exclude all but the most excessive and abnormal deprivations of property, the *FNB* test is generally still followed, making it clear that a deprivation must be legally significant, in other words not *de minimis*, to trigger section 25. This has prevented the *Mkontwana* definition from having a vortex effect that would suck the whole section 25 challenge, and particularly the arbitrariness test and the section 36 justification stage, into the deprivation inquiry. In the *Chevron* case¹⁰⁴ the court followed the phraseology of the narrow *Mkontwana* definition of deprivation fairly closely, but nevertheless decided that “ordering the refund of money that a credit provider has already received is a deprivation”, without reflecting on the question whether such a statutory obligation to refund goes beyond what is expected in an open and democratic society.

Roux’s suggestion that the arbitrariness vortex might not affect cases in which the courts find it necessary or desirable to go to expropriation issues (either *FNB* question 5 or question 6) directly, instead of via the non-arbitrariness and justification route,¹⁰⁵ was borne out in a number of cases. The case law can be classified according to four different approaches. Some decisions simply confirm Roux’s suggestion and go straight to one of the technical expropriation issues such as compensation. In the *Du Toit* case¹⁰⁶ the question was whether the compensation award, to be paid in terms of section 12 of the Expropriation Act 63 of 1975 for an expropriation under section 8 of the National Roads Act 54 of 1971, was just and equitable in accordance with the requirement in section 25(2) and 25(3) of the constitution. To decide how the compensation should be calculated and whether the award was just and equitable the court went straight to section 25(2)-(3) and its implications for the relevant statutory provisions and did not indulge in deprivation or arbitrariness analysis at all.¹⁰⁷

A second group of cases seem to be (and are pleaded as) expropriation cases, but the courts nevertheless consider the deprivation issue relatively extensively because it is not clear or undisputed that they indeed turn on one of the technical expropriation questions. For instance, the *Offit* case¹⁰⁸ started out as an effort to either block an alleged intended expropriation or to force the relevant state body to proceed with threatened but not realised expropriation, but in the supreme court of appeal the challenge morphed into the question whether the continued threat of expropriation constituted arbitrary deprivation of property, and consequently the constitutional court considered and decided the section 25(1) deprivation issue. Following the *Mkontwana* case and holding that a deprivation has to be at least “a substantial interference or limitation that goes beyond the normal restrictions

¹⁰³ the *Shoprite Checkers* case (n 65) par 73, citing the *Reflect-All* case (n 67) par 35-36; followed in the *City of Tshwane* case (n 62) par 167.

¹⁰⁴ the *Chevron* case (n 76) par 17-18.

¹⁰⁵ Roux (n 3) 46-24.

¹⁰⁶ the *Du Toit* case (n 33).

¹⁰⁷ the *Du Toit* case (n 33) par 16-24.

¹⁰⁸ *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2011 1 SA 293 (CC).

on property use and enjoyment”,¹⁰⁹ the court concluded that neither the forceful bargaining tactics nor the empty threats of expropriation of the relevant state body constituted a deprivation.¹¹⁰

In a third group of cases, of which the *Agri SA* case¹¹¹ is the clearest and most important, it is not obvious that there has been an expropriation either and therefore one might expect the court to start off with the deprivation question and only later establish, according to the *FNB* methodology, whether the deprivation amounted to an expropriation. However, in line with Roux’s analysis, this does not always happen when the distinction between deprivation and expropriation is in dispute. In the *Agri SA* case the claimant brought the case as a claim for compensation for expropriation. Moreover, the parties agreed that there had been a deprivation of property in terms of the Mineral and Petroleum Resources Development Act 28 of 2002; that the deprivation was not arbitrary; and that it “rose to the level of expropriation”.¹¹² The constitutional court dismissed the supreme court of appeal’s finding that the claimant had not been deprived of anything and went straight on to the expropriation issue.¹¹³ Taking as its point of departure the assumption that “[t]here can be no expropriation in circumstances where deprivation does not result in property being acquired by the state”,¹¹⁴ the court concluded that the claimant in this particular case had not been expropriated.¹¹⁵ The decision does not establish authority for the proposition that cases that are brought on the basis of claims for compensation for expropriation shall be decided on the basis of section 25(2) and 25(3) – the court did not avoid considering the deprivation issue completely and the arbitrariness issue was ignored only because the parties agreed that the deprivation was not arbitrary. However, the decision does indicate that cases that come to court on the basis of a claim for compensation for expropriation might be decided largely on the technical section 25(2)-(3) expropriation issues if the claimant does not raise the arbitrariness issue, even when it is not obvious that the case deals with a formal expropriation at all. Similarly, in the *Arun* case¹¹⁶ the court held that the impugned section 28 of the Land Use Planning Ordinance 15 of 1985 (Western Cape), which provides for development contributions (without compensation) for roads infrastructure that are necessitated by the particular development and apparently also for so-called excess contributions, must be given “a meaning that is at peace with section 25(2) of the Constitution”. In other words, even though this is not made clear by the relevant legislation, the compulsory acquisition of excess land is treated as an expropriation that needs to be reconciled with the requirements in section 25(2) of the constitution by subjecting it to a compensation obligation. Consequently, the court does not indulge in deprivation analysis at all but goes directly to the expropriation issues.

There are few clear examples of a fourth category of cases, where the court in fact follows the full analysis foreseen in the *FNB* case, starting with deprivation

¹⁰⁹ the *Offit* case (n 108) par 41-42.

¹¹⁰ the *Offit* case (n 108) par 43-46.

¹¹¹ *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC). See further on the *Agri SA* decision Van der Walt (n 72) 226-230.

¹¹² the *Agri SA* case (n 111) par 24, 46, 53.

¹¹³ the *Agri SA* case (n 111) par 50-54.

¹¹⁴ the *Agri SA* case (n 111) par 59.

¹¹⁵ the *Agri SA* case (n 111) par 72. The court left the possibility open that expropriation in terms of the act may be proven in another case: par 75.

¹¹⁶ the *Arun* case (n 67) par 40-41. On the *Arun* case see further Slade “Compensation for what? An analysis of the outcome in *Arun Property Development (Pty) Ltd v Cape Town City* 2015 2 SA 584 (CC)” 2016 *PELJ*; Van der Walt (n 74) 206-215.

and from there proceeding to expropriation. In the *Reflect-All* case the court first determined that the deprivation of property brought about by section 10 of the Gauteng Transport Infrastructure Act 8 of 2001 was not arbitrary and then decided that the relevant sections do not constitute expropriation of property either.¹¹⁷ Given the decision that the deprivation did not amount to expropriation, the court did not subject the expropriation to justification analysis. In *Nhlabathi v Fick*¹¹⁸ the land claims court did apply the full *FNB* test through all its stages, ending with the question whether the non-consensual appropriation of a grave as either a non-compliant deprivation or a non-compliant expropriation could be saved by section 36 justification analysis. Considering the question whether the non-consensual burial rights created in favour of farm labourers in section 6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997, the court worked its way through the full section 25 test set out in the *FNB* case,¹¹⁹ first establishing that the appropriation of a grave by an occupier will deprive the landowner of property but that section 6(2)(dA) nevertheless does not authorise arbitrary appropriation of a grave.¹²⁰ It then assumed, without deciding, that the deprivation might also establish a *de facto* expropriation of a servitude over the land, applied the requirements in section 25(2) and 25(3) and decided that if section 6(2)(dA) does indeed authorise expropriation of a servitude, it either complies with the constitutional requirements (for instance if one assumes an implied right to compensation) or, in the absence of provision for compensation, it is justifiable in terms of section 36(1) of the constitution.¹²¹

3.5 Arbitrariness

The arbitrariness test set out in the *FNB* case was applied extensively in only a handful of subsequent cases,¹²² which already suggests that there is less evidence of an arbitrariness vortex effect than might have been expected. In some decisions, the arbitrariness analysis, at least in the form that was foreseen in the *FNB* case, is downright cursory.¹²³ In addition, the decisions that indulged in arbitrariness analysis tended to precede that with some sort of deprivation analysis,¹²⁴ at least when the deprivation was not common cause or obvious.¹²⁵ Again, in instances where the property interest at stake was not something obvious like land, the courts also resorted to property analysis.¹²⁶ Even in expropriation cases such as the *Du Toit* case¹²⁷ (a right to use land temporarily or a right to remove a certain volume of gravel from the land) and the *Agri SA* case¹²⁸ (mineral rights, exploitation of minerals, the right to prospect and mine, the landowner's right not to exploit minerals), where the

¹¹⁷ the *Reflect-All* case (n 67) par 35-38, 65.

¹¹⁸ (LCC42/02) 2003 ZALCC 9 (8 April 2003).

¹¹⁹ the *Nhlabathi* case (n 118) par 27-34.

¹²⁰ the *Nhlabathi* case (n 118) par 30.

¹²¹ the *Nhlabathi* case (n 118) par 32-34.

¹²² the *Mkontwana* case (n 67) par 36-64, 93-123; the *Reflect-All* case (n 67) par 34-60; the *Shoprite Checkers* case (n 65) par 77-86.

¹²³ the *City of Tshwane* case (n 62) par 154.

¹²⁴ See eg the *Mkontwana* case (n 67) par 32-33 (even though the parties agreed that there was a deprivation); the *Reflect-All* case (n 67) par 35-38; the *Shoprite Checkers* case (n 65) par 73-76.

¹²⁵ See eg the *Nhlabathi* case (n 118) par 30: the deprivation was obvious because the landowner was permanently deprived of all use of the relevant piece of land. Compare the *Cool Ideas* case (n 74) par 38.

¹²⁶ See eg the *Law Society* case (n 33) par 84; the *Opperman* case (n 72) par 63-64; the *Cool Ideas* case (n 74) par 38; the *Chevron* case (n 76) par 16; the *Shoprite Checkers* case (n 65) par 57-72.

¹²⁷ the *Du Toit* case (n 33) par 16.

¹²⁸ the *Agri SA* case (n 111) par 32-46.

tendency was to go straight into the expropriation analysis, the court considered the exact nature of the property involved; in the *Agri SA* case the court also analysed the deprivation question.¹²⁹

In the *FNB* case the court mentioned in passing that a deprivation would be arbitrary when the authorising law does not provide sufficient reason for it *or is procedurally unfair*,¹³⁰ and proceeded to analyse the substantive sufficient-reason test without saying anything more about procedural arbitrariness. In subsequent case law the notion of procedural arbitrariness in terms of section 25(1) has played a minor and inconclusive role. In the *Mkontwana* case it was argued that the authorising legislation was procedurally unfair because it does not oblige municipalities to keep landowners informed of debts run up for services delivered on their properties, but in a contextual analysis borrowing from administrative law the court concluded that municipalities should not be required to furnish owners with information on a continuous basis for the law to be procedurally fair.¹³¹ In the *Reflect-All* case it was also contended that the impugned legislation authorised procedurally arbitrary deprivation because it allowed proclamation of route determinations without allowing landowners any process to consider their interests, but the court rejected this argument, arguing that the legislative scheme provided sufficient opportunities for landowners' interests to be heard and considered and that it was therefore procedurally fair.¹³² In the *Opperman* case,¹³³ the court followed its earlier judgment in the forfeiture case of *Mohunram*,¹³⁴ where it decided that a forfeiture law that gives a court no discretion when considering whether to declare property forfeit would result in the law authorising arbitrary deprivation of property for purposes of section 25(1). This seems to have established the principle that a law authorising deprivation might be in conflict with section 25(1) if it leaves the court without any discretion whether to allow the deprivation or not, but in addition to the brief reference to the *Mohunram* case the court also applied the *FNB* test for substantive arbitrariness,¹³⁵ so that it is unclear whether the case was actually decided on procedural arbitrariness. The dissenting judgment in the *City of Tshwane* case concluded that the impugned legislative provision was procedurally arbitrary because "it places the rights it creates for the licensee above the constitutional rights of the landowner without a procedurally fair process",¹³⁶ but because of the common law framework within which the majority decision interpreted the statutory provision it disagreed, holding that the possible deprivation that the section authorises was not procedurally or substantively arbitrary.¹³⁷ It has been argued that the notion of procedural arbitrariness in terms of section 25(1) can only make sense if it applies to deprivations that do not result from administrative action, since the procedural fairness of administrative action should be adjudicated in terms of the Promotion

¹²⁹ the *Agri SA* case (n 111) par 48-53.

¹³⁰ the *FNB* case (n 2) par 100.

¹³¹ the *Mkontwana* case (n 67) par 65-67.

¹³² the *Reflect-All* case (n 67) par 40-47.

¹³³ the *Opperman* case (n 72) par 69.

¹³⁴ *Mohunram v National Director of Public Prosecutions (Law Review Project as Amicus Curiae)* 2007 4 SA 222 (CC) par 121.

¹³⁵ the *Opperman* case (n 72) par 68, 70-72.

¹³⁶ the *City of Tshwane* case (n 62) par 64. It bears pointing out that s 25(1) proscribes legislation that authorises arbitrary deprivation and not law that is arbitrary. Describing the authorising law or the actual action that brings about the deprivation as arbitrary is unnecessarily confusing.

¹³⁷ the *City of Tshwane* case (n 62) par 154.

of Administrative Justice Act 3 of 2000 (PAJA),¹³⁸ but the constitutional court has generally been loath to decide whether the act applies to a particular deprivation challenge and the matter has not enjoyed much attention. In general, it cannot be said that the notion of procedural arbitrariness has been sufficiently prominent in section 25(1) cases to have any kind of vortex effect.

In view of these brief observations it is difficult to uphold any strong version of the arbitrariness vortex thesis with reference to post-*FNB* case law. The arbitrariness inquiry does not always feature prominently in section 25 challenges and is sometimes bypassed; and even when it does feature prominently it does not necessarily result in the courts ignoring or glossing over the property or deprivation inquiry to strike the required balance between the protection of individual property interests and the public interest in the proportionality-type balancing of the arbitrariness stage.

3.6 Justification

It has been noted in section 2 above that if it should be decided that section 36 does not apply to section 25 rights that would establish a vortex effect to the extent that the possibility of justification in terms of section 36 is precluded by the effect of the arbitrariness decision. The question is therefore whether the arbitrariness test, as it was set out in the *FNB* case, in fact has such a vortex effect on the justification stage of a section 25 challenge.

Ever since the *FNB* decision the constitutional court (and lower courts) on occasion commented on the observation, noted but not decided in the *FNB* case, that it might be impossible or unnecessary to proceed to section 36 justification analysis once a court has decided that a particular deprivation of property was arbitrary and therefore in conflict with section 25(1) of the constitution.¹³⁹ In the *Shoprite Checkers* case the court came closest to deciding that justification under section 36 would be impossible or unnecessary once it has been established that a deprivation was arbitrary. However, the court's somewhat opaque statement to this effect is insufficient to establish such a vortex effect:

“The parties are in agreement that if arbitrariness is found under the *FNB* formulation, justification under section 36(1) will be difficult to find. The reason, I think, should now be clear. The nature of any infringement of the right to protection of property under section 25(1) is dependent on the substantive constitutional or other interest affected. Once the interest is identified and the *FNB* approach to arbitrariness is applied, there can be no further independent infringement that would require further justification under section 36.”¹⁴⁰

Generally, the court simply follows the *FNB* approach, namely to acknowledge the conceptual difficulty involved in justifying an arbitrary deprivation in terms of section 36, given the substantive similarities and overlaps between the factors involved in section 25(1) arbitrariness analysis and section 36(1) justification analysis, but accepting that section 36 does not exclude any provision in the bill of rights and that it therefore applies to section 25, at least in principle.

In the *Nhlabathi* case¹⁴¹ the land claims court concluded, without deciding, that if an appropriation of a grave site in terms of section 6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997 proved to be in conflict with section 25(2) of the

¹³⁸ Van der Walt (n 24) 264-270.

¹³⁹ the *Opperman* case (n 72) par 73-75; the *Shoprite Checkers* case (n 65) par 87; the *City of Tshwane* case (n 62) par 77 (dissenting).

¹⁴⁰ the *Shoprite Checkers* case (n 65) par 87.

¹⁴¹ (n 118) par 32-34.

constitution because it were held to provide for expropriation without compensation, the requirements of section 6(2)(dA), particularly the balancing of interests; the necessity for an established practice; and the restricted nature of the rights which are appropriated; would justify in terms of section 36 of the constitution the absence of a statutory right to compensation. The court did not consider the possibility that a similar result could have been reached in terms of section 25(2)-(3) itself, in the sense that the absence of compensation might in some cases be justified, in a proper contextual analysis, by the just-and-equitable-compensation requirement in those sections, just as it might be justified by a contextual application of the section 36 factors. In effect, the court decided that section 36 justification analysis would still be possible even if a particular expropriation would limit section 25 rights by authorising expropriation that does not comply with at least one of the section 25(2)-(3) requirements (namely compensation). It is unclear whether the implications of the *Nhlabathi* decision can be generalised to other expropriation requirements such as authority and public purpose or public interest, but given the formulation of section 36 it is more likely that expropriation that fails to satisfy those requirements would cause the same problems with section 36 justification as have been noted with regard to section 25(1). In the absence of a compensation requirement in section 25(1), the *Nhlabathi* decision does not have any clear-cut implications for the arbitrariness vortex thesis.

In general it is probably fair to say that something like a vortex effect is identifiable in the interaction between section 25(1) arbitrariness analysis (first stage of a constitutional challenge) and section 36 justification analysis (second stage), in that the factors considered for purposes of the two stages overlap to such an extent that a decision of section 25(1) arbitrariness in the first stage renders a contradictory section 36 justification decision in the second stage highly unlikely, if not impossible. Roux's initial notion of a "telescoping" effect, 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, is to that extent supported by the developing case law.¹⁴² However, the *Nhlabathi* judgment indicates that the same might not be true for expropriation in terms of section 25(2)-(3), at least in so far as expropriation does not comply with one section 25(2) requirement, namely just and equitable compensation.

4 *Conclusions: Avoiding the vortex effect*

It does not really matter whether – or to what extent – Roux's arbitrariness vortex thesis was proven correct by case law. Its value lies in the accuracy of the observation that a tendency to decide the core of a section 25 challenge – striking the right balance between the protection of individual property rights and the public interest in regulating the use of property – in a way that would focus on just one aspect of section 25, and that would consequently render other aspects redundant or unimportant, would be a mistake that would negate the contextual and constitutional unity and complexity of the section 25 right.

¹⁴² See Roux and Davis (n 7) 20-8, citing De Waal, Currie and Erasmus (n 7) 393-394 (now Currie and De Waal *The Bill of Rights Handbook* (2013) 557).

The constitutional court has repeatedly emphasised that no single constitutional right, and no discrete part of a constitutional rights provision, should be interpreted in isolation. Instead, every right, and all parts of a rights provision, must be interpreted and applied in the context of the whole provision, seen against the backdrop of all the other rights in the bill of rights and the provisions in the rest of the constitution, as well as the historical, social, economic and legal context within which the constitution and a specific rights provision was adopted.¹⁴³ In the *FNB* case the court underlined this contextual approach,¹⁴⁴ adding with emphasis that “[t]he subsections which have specifically to be interpreted in the present case must not be construed in isolation, but in the context of the other provisions of section 25 and their historical context, and indeed in the context of the Constitution as a whole.”¹⁴⁵

Arguing from first principles, any approach that would have a vortex effect on the interpretation of section 25 must therefore be suspect. At the risk of belabouring Roux’s point: if a particular interpretive approach to section 25 results in a vortex that consistently causes the core of the section 25 challenge, namely striking the constitutionally required balance between the protection of individual property rights and the public interest in regulating the use of property, to be located within one particular part of section 25, under circumstances where the balance could just as well have been struck in another part, or in a combination of all the parts taken together, that approach is probably distorting the contextual unity of interpretation that the quotation from the *FNB* decision above refers to.

The singular merit of Roux’s arbitrariness vortex thesis is therefore the fact that he identified, in the architecture of the *FNB* decision, the potential and the danger of creating such a vortex effect around the arbitrariness test. As appears from the analysis in section 2 above, this potential was particularly clear in two features of the *FNB* decision highlighted by Roux: firstly the seemingly strict genus-species relationship between deprivation and expropriation as the *FNB* case defined them; and secondly the problematic overlaps between the two stages of a constitutional challenge as it had been defined in earlier constitutional court decisions. Subsequent decisions have shown, very much in line with the *FNB* decision itself, that neither the property question nor the deprivation question would necessarily be sucked into the arbitrariness vortex – both would be decided on their own contextual merit as and when necessary, and when they are in fact judicially avoided or decided summarily and without much contextual analysis, that would probably be either because the matter had been settled before in older case law, in established private law or constitutional doctrine, or in comparative law, or else because of “normal” judicial avoidance strategies in instances where a firm decision on one of these points would have no effect on the outcome of the case. To a certain extent some of these decisions seem to confirm Roux’s arbitrariness vortex thesis in that the property or deprivation question is left undecided and the “real” decision is left for the arbitrariness inquiry, but the analytical support they provide for the thesis is rather weak because of Occam’s razor – the fact that a similar judicial avoidance strategy is followed in other areas, on the principle that it is unnecessary to decide point A if it would make no difference to an inevitable decision on the subsequent point B, suggests that a more general explanation regarding judicial avoidance

¹⁴³ See *eg S v Makwanyane* (n 54) par 10; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) par 8-23.

¹⁴⁴ the *FNB* case (n 2) par 32, 47-50.

¹⁴⁵ the *FNB* case (n 2) par 49.

strategies could explain the outcome equally well, without relying on the vortex thesis.

In the area of the relationship between deprivation and expropriation, case law after the *FNB* decision indicates that Roux's qualification to the vortex thesis was accurate, and that courts will bypass the section 25 deprivation inquiry – and with it the arbitrariness inquiry – altogether and go straight to the expropriation inquiry if it is clear from the outset that the dispute involves either the question whether there has been an expropriation that requires compensation, or a technical question regarding compliance with one of the expropriation requirements such as the amount of compensation. One of the two major areas in which the arbitrariness vortex seemed most likely to occur, judging on the basis of the architecture of the section 25 challenge as it was set out in the *FNB* case, was thus avoided in subsequent case law.

This outcome should not necessarily be met with an unqualified sigh of relief. In some of the expropriation cases, notably the *Agri SA*,¹⁴⁶ *Arun*¹⁴⁷ and *City of Tshwane*¹⁴⁸ cases, the court has displayed a willingness to treat a particular statutory interference with private property as expropriation and therefore to bypass section 25(1) analysis and go straight to expropriation analysis based on section 25(2)-(3), in circumstances where the legislation involved does not clearly state the intention or the authority to expropriate and where it must have been at least questionable whether expropriation was indeed possible and legitimate. Whether judicial acceptance of a notion of statutory expropriation is desirable or indeed possible, and how that would relate to the equally problematic notion of constructive expropriation, is a question for another occasion, but it is worth noting here that it is not clear that judicially bypassing the deprivation inquiry and moving straight into the expropriation inquiry is jurisprudentially wise – or doctrinally possible – in these instances.

The implications of the arbitrariness vortex thesis for the relationship between the two stages of a constitutional challenge is more problematic. On the one hand, it should be clear that part of the problem is not caused by any vortex effect caused by the *FNB* case's interpretation of section 25(1), but simply by the conceptual and structural overlap between section 25 and section 36. For instance, a deprivation or expropriation that is in conflict with section 25(1) or section 25(2) for not being authorised by law of general application can clearly not be justified in terms of section 36(1), simply because the latter also allows only limitations caused by law of general application to be justified. This has nothing to do with a vortex effect.

In the second place, it is probably fair to say that there is a fair to strong possibility that the *FNB* case's analysis might cause a vortex effect between the arbitrariness inquiry and the possibility of a section 36 justification stage, to the extent that a finding of arbitrariness would very likely render any section 36 justification analysis redundant for the reasons pointed out earlier. This effect would in fact confirm the arbitrariness vortex thesis. However, from the *FNB* case onwards the court has consistently noted this problem but pointed out that section 36 does not exclude any rights provision in the bill of rights, and therefore proceeded to what inevitably proved to be unsuccessful section 36 justification analysis.

¹⁴⁶ (n 111).

¹⁴⁷ (n 67) par 40-41.

¹⁴⁸ (n 62). In par 149 the court was even willing to treat the *ex lege* establishment of a common law right of way of necessity as a "kind of expropriation" even though there is no common law authority for expropriation.

The fact that the court has consistently refused to simply accept that section 25 renders section 36 redundant may well be a good thing. Judging from the admittedly weakish authority of the *Nhlabathi* judgment of the land claims court,¹⁴⁹ it may well be that section 36 justification analysis is not rendered redundant by a finding of non-compliance with the expropriation requirements in section 25(2)-(3), and particularly with the compensation requirement. It looks possible that a finding to the effect that a particular expropriation does not serve a public purpose or the public interest would also be impossible to justify in terms of the section 36 requirements, but the fact that a law of general application authorises expropriation in a particular instance without any provision for compensation might well be capable of justification, partly because the factors for just and equitable compensation in section 25(3) arguably already leave room for the possibility. The court's argument in the *Nhlabathi* case indicates that such a possibility does exist and therefore it is as well to leave room for section 36 justification of a law that does not comply with the section 25 requirements, at least in so far as it authorises expropriation and the issue revolves around compensation. In the strict *FNB* version of section 25 analysis, where every section 25 challenge starts with the deprivation question, such a law would probably have fallen foul of the arbitrariness test in section 25(1), probably proved to be non-justifiable in terms of section 36, and have been unconstitutional. By separating the section 25(1) and 25(2)-(3) cases from each other in the way that post-*FNB* decisions suggest, and by leaving room for section 36 justification in expropriation cases dealing purely with compensation, the arbitrariness vortex effect can be escaped altogether.

As appears from the analysis in section 3 above, two post-*FNB* decisions might have a similar vortex effect, if they were followed strictly. From subsequent case law it appears as if the potential deprivation vortex that might have been caused by the normal-in-an-open-and-democratic-society definition of deprivation in the *Mkontwana* case¹⁵⁰ to date has not, and probably will not, materialise because later decisions simply read the *Mkontwana* decision as authority for the proposition that a deprivation must be legally significant. It is too early to tell whether the deserving-property approach that Froneman J proposed in the *Shoprite Checkers* case¹⁵¹ will have any vortex effect, but from the reaction in the dissenting judgments it seems unlikely and, even if it does, it might be restricted to rare cases in which relatively unusual and contentious property interests are at stake.

For the moment being, it seems as if section 25 jurisprudence might develop further without serious influence from any vortex effect. Assuming that the principles of contextual interpretation set out at the beginning of this section above are the starting point, the question is, then, how the further development of section 25 jurisprudence should look and how the threat of vortex effects can be avoided.

The starting point has to be the principle, set out in the *FNB* case and quoted at the beginning of this section above, that the subsections of section 25 must not be construed in isolation, but in the context of the whole of section 25, in their historical and social context, and in the context of the constitution as a whole, even when it is or seems clear that a particular subsection applies more directly to the case at hand than others. In other words, vortices that cause the desired balance between the protection of individual property and the public interest in the regulation of the use of property to be struck primarily or only on the basis of a single subsection in

¹⁴⁹ the *Nhlabathi* case (n 118) par 32-34.

¹⁵⁰ (n 67).

¹⁵¹ the *Shoprite Checkers* case (n 65).

isolation must be avoided. Two strategies seem to be important in avoiding vortices and ensuring the contextual interpretation that is required.

Firstly, it is necessary in every single case to at least consider the constitutional, historical and social context within which section 25 was promulgated and within which it operates. This context has been canvassed extensively in decisions such as the *FNB*, *PE Municipality*, *Agri SA* and *Shoprite Checkers* cases and it is unnecessary to repeat those analyses here. Suffice it to say that different aspects of the broad context might be more directly relevant in particular cases, and sometimes the relevance of this context might seem remote or tenuous, but it has to be considered. At the very least, as the *FNB* case makes clear, considering this context is necessary to highlight the tension that characterises the constitutional and legal function and character of section 25, between the protection of individual property rights and the promotion of the public interest in the regulation of the use and enjoyment of property. No section 25 case can be decided without reflection on that tension and the balance that the court is consequently required to strike in the particular instance.

However, that is not enough. The *Shoprite Checkers* case could be seen as an example of a case where the constitutional court did reflect upon the constitutional, historical and social context (as the court did in the *FNB* case), but then (in contrast to the *FNB* case) arguably did not reflect enough about what comes next. In addition to contextualisation, there is also a need for an angle of approach¹⁵² that will allow working through the different parts of section 25 in a thoughtful way that supports rather than undermines the contextual interpretation striven for. It could perhaps be said that what Ackermann J aimed for in the *FNB* case was exactly such a contextualised angle of approach, which was arguably undermined in so far as some parts of the approach (the genus-species definition of deprivation and expropriation, combined with the idea that all section 25 challenges should start with section 25(1)) acquired the character of a prescriptive technique or methodology – what Roux refers to as an algorithm – that in turn created the risk of a vortex. An angle of approach would also start out by identifying the different parts of a section 25 challenge – the *FNB* questions – and suggest a way of working through them in some sort of sequence but, in contrast to parts of the *FNB* decision, the *Mkontwana* definition of deprivation and the Froneman definition of deserving property in the *Shoprite Checkers* case, it would avoid conceptual, definitional or logical moves that would create the risk of vortices. What follows is no more than a few first ideas about how such an angle of approach might look.

Firstly, as far as identification of the parts of a section 25 challenge is concerned, the *FNB* list of seven questions is a good starting point. However, with the benefit of hindsight it is possible to suggest small amendments to that list in view of subsequent case law. An amended list might look something like this:

1. Beneficiaries: is the complainant a beneficiary of section 25 protection?
2. Property: is the alleged property interest constitutional property for purposes of section 25?
3. Deprivation or expropriation: is the alleged interference with the protected property interest:
 - a. a deprivation of property covered by section 25(1)?

¹⁵² This handy phrase is from Botha, who first used it at a workshop in 2007, explaining that it provides a starting point and a preliminary direction, while pointedly avoiding the pretence of a technique that produces ready or final answers.

- b. an expropriation of property covered by section 25(2)-(3)?
- 4a. Deprivation: if the interference is a deprivation of property, is it:
 - a. authorised by law of general application?
 - b. if it is authorised by law of general application, does the law permit arbitrary deprivation of property?
- 4b. Expropriation: if the interference is an expropriation, is the expropriation:
 - a. authorised by law of general application?
 - b. for a public purpose or in the public interest?
 - c. accompanied by provision for just and equitable compensation?
- 5. Justification: if the law of general application
 - a. permits arbitrary deprivation of property
 - b. authorises expropriation without providing for just and equitable compensation is,
 - it justifiable in terms of section 36(1)?

This amended list is informed by experience from post-*FNB* case law and therefore includes the beneficiaries question as one of the issues to be decided in the contextual inquiry; makes provision for an early decision on the issue whether the case deals with a deprivation or an expropriation, so that the inquiry can thereafter proceed along one of the two alternate lines; and simplifies the justification inquiry in view of the (even remote) possibility of successfully justifying a deprivation or expropriation that fails certain elements of their respective section 25 tests. Clearly, the idea is that every step should start with contextualisation, considering the constitutional, historical and social context already identified in earlier cases, but at the same time it is possible that every new case does not require that contextualisation for every step. Two considerations should play a role in deciding whether, and how much, contextualisation is required in a particular case on a particular point.

Firstly, there are certain constitutional baselines that render it unnecessary to engage in extensive contextual interpretation on a particular point. These baseline positions can generally be taken as a point of departure without further analysis. Secondly, these baselines can be expanded upon, clarified or analysed further in case law, thus also making it unnecessary to revisit certain points already decided in a full contextual analysis in prior decisions. For instance, as far as beneficiaries are concerned it is not necessary to decide whether a natural person is a beneficiary of the section 25 right – section 25(1) starts off with the words “no one”; the section does not qualify its beneficiaries as some other sections do (for instance restricting it to citizens); and the general provision in section 7(1) that it “enshrines the rights of all our people” therefore applies. Natural persons are beneficiaries of the section 25 right as a constitutional baseline and the courts do not have to engage in full contextual analysis to come to that conclusion. Juristic persons are more problematic, though. Section 8(4) provides the primary constitutional provision that regulates the qualification of juristic persons as beneficiaries for the section 25 right; this provision must be interpreted contextually, as was done in the *FNB* case, to determine whether a particular category of juristic persons is included. Once it has been done for a particular category of juristic persons, however, it might be unnecessary to go through the whole exercise again, unless there is a particular reason to reconsider the matter. Therefore, in view of the *City of Tshwane* decision it is unnecessary to again consider the question whether the state is a beneficiary – it is not. Similarly, it is arguably unnecessary to engage in full contextual analysis to decide whether corporate commercial juristic persons such as public companies are beneficiaries – the *FNB* case engaged in the full contextual analysis and decided that

(and why) they are, and the matter only needs to be reconsidered if there is a good reason, for instance when it is unclear whether the particular commercial juristic person is in exactly the same position as a public company. There are many other issues that have to be cleared up on the beneficiaries issue, for instance the position of semi-state bodies and publicly funded, regulated or owned institutions such as schools and universities, South African Airways, the SABC and many others.¹⁵³ If a case involving any of these bodies should come up the court would have to engage in a contextual analysis, probably similar to that in the *FNB* case,¹⁵⁴ to decide when and how the protection of section 25 is to be extended to it on the basis of section 8(4).

Constitutional baselines also exist in other areas of section 25, some created by law and others developed in case law. The principle that property interests that are traditionally regarded and protected as property in private law are also recognised as property for purposes of section 25 is widely established in comparative constitutional law, and it was apparently adopted as a constitutional baseline in the *FNB* case, where the court stated that “ownership of a corporeal movable must – as must ownership of land – lie at the heart of our constitutional concept of property”.¹⁵⁵ From that baseline the courts can expand and develop the constitutional notion of property incrementally, relying on contextual analysis every time when a new category of interest is to be considered, so that over time it becomes unnecessary to engage in a contextual analysis to decide that a particular interest is recognised as property because its recognition had already been established in prior case law. Full contextual analysis is therefore reserved for cases dealing with new, and particularly difficult, categories such as the grocer’s wine licence in the *Shoprite Checkers* case. The last word has probably not been said on that particular category of section 25 property – licences, permits and other interests that originate in, exist by the grace of and remain subject to regulatory control – and further analysis is no doubt necessary.¹⁵⁶ An aspect that has not been clarified sufficiently in the *Shoprite Checkers* case and that deserves further attention is the distinction between licences, permits, quotas and similar regulated commercial interests and so-called welfare or social participation interests such as pensions, medical benefits and state subsidies. Foreign law indicates that the two categories have to be distinguished, despite regularly being lumped together under the misleading heading of “new property”; that some of these interests should be recognised as constitutional property, subject to contextual considerations and conditions, while other should not; and that recognition of these interests as constitutional property is jurisdiction-specific, based on the age and general tenor of the constitution involved, the structure and nature of the statutory framework, and other similar considerations.¹⁵⁷ Similar considerations may apply when the courts are confronted with the expansion of existing recognition of intellectual property rights to other, so far unrecognised forms of intellectual property or to other forms of technological property.

It seems that the tendency to distinguish between deprivation and expropriation cases and proceed directly to either section 25(1) or section 25(2)-(3), instead of the

¹⁵³ Some guidance on this point can be gleaned from foreign law; many aspects have been worked out in German constitutional case law: Van der Walt (n 24) 70-72.

¹⁵⁴ the *FNB* case (n 2) par 41-45.

¹⁵⁵ the *FNB* case (n 2) par 51.

¹⁵⁶ A good description for this category of constitutional property interests is perhaps “radically regulated property”, to indicate that the property interest as a category is regulated to its very roots.

¹⁵⁷ Cf generally Van der Walt “The constitutional property clause: striking a balance between guarantee and limitation” in MacLean (ed) *Property and the Constitution* (1999) 109-146; Van der Walt (n 86) 27-41; Van der Walt (n 24) 150-168.

FNB proposal that all cases should start with section 25(1), is set to continue. As the discussion in section 3 above indicates, this is not a bad thing since it avoids at least one vortex. On the other hand, though, it might be necessary at some stage to reconsider, on the basis of a proper and full contextual analysis, an issue that has been treated rather lightly by the constitutional court in the *Agri SA*, *Arun* and *City of Tshwane* cases, namely the fundamental distinction between deprivation and expropriation in cases where there is no formal expropriation, but one of the parties alleges that the interference with its property was or amounted to expropriation. The question is whether the parties to a section 25 challenge should be able to choose whether they want the case to be decided in terms of section 25(1) or 25(2)-(3). From first principles, this should not be allowed, and the question whether a particular case is a section 25(1) or a section 25(2)-(3) case is one that should also be decided on the basis of a proper and full contextual analysis. Broadly speaking, this issue can come up in three kinds of cases. The first is the regulatory regime changes that feature in the *Agri SA* and *Shoprite Checkers* cases: the state amends its regulatory scheme to such a degree that certain pre-existing rights are abolished and new ones are created in their place. The *Agri SA* decision indicates that state acquisition of the lost property is an issue in these cases,¹⁵⁸ but declined the opportunity to decide whether expropriation should have been the focus of the case at all simply because the parties agreed that there was no arbitrary deprivation. In the *Arun* case the court again seems to have decided the case on the basis of compensation for expropriation, but it is never clarified whether the acquisition of the excess land was really an expropriation. That highlights the second kind of case that deserves full contextual analysis: cases, again like *Agri SA* and *Arun*, that raise the question whether statutory expropriation – in other words, expropriation by the statute itself, without administrative or judicial action – is possible in South African law and what its scope and requirements are. To date it has been accepted rather easily that a law brings about an expropriation if it has the effect of acquiring property for the state without formal procedures, but that assumption is surely questionable, at least on the issue of authority. That brings to the fore the third kind of issue that deserves further inquiry: the question whether constructive expropriation is possible and desirable in South African law. The constitutional court has to date mostly avoided deciding the issue, but a decision like *City of Tshwane*,¹⁵⁹ where the court flirts with the idea that compulsory, *ex lege* creation of a right of way of necessity is “a kind of” expropriation, arguably opens Pandora’s box on this point. It is therefore arguably necessary that whenever it is not entirely clear whether a case involves section 25(1) deprivation or section 25(2)-(3) the courts should, regardless of what the parties argue, engage in a full contextual analysis to decide whether it is dealing with a deprivation or an expropriation before proceeding to the step where it considers compliance with the respective requirements.

The case law on the deprivation issue seems to have settled a constitutional baseline: as long as a deprivation is legally significant in the sense of not *de minimis*, there is a deprivation of the property interest involved. Once it has been established that the court is dealing with a deprivation of property, the only question that remains is compliance with the section 25(1) requirements. Since the law of general application requirement is common to the deprivation, expropriation and justification inquiries, and seeing that it is a formal requirement that does not involve much contextual

¹⁵⁸ the *Agri SA* case (n 111) par 59.

¹⁵⁹ the *City of Tshwane* case (n 62) par 149.

analysis, it should arguably be separated from the other requirements (in this case non-arbitrariness) that do require contextual analysis.

The expropriation inquiry should arguably also be separated into the formal law of general application requirement – which would deserve more attention once the court has engaged in a full contextual analysis to decide whether it is indeed dealing with an expropriation, for which proper statutory authority is required in South African law – and the contextual public-purpose/public-interest and compensation requirements.

Based on experience in case law, the list above suggests that the justification inquiry tends to focus on just two possibilities: a law that permits arbitrary deprivation, or a law that either authorises expropriation that is not for a public purpose or in the public interest or that does not provide for just and equitable compensation. As the analysis in section 3 above indicates, it remains unlikely that a law that permits arbitrary deprivation or that authorises expropriation that is not for a public purpose or in the public interest can be justified in terms of section 36, but the *Nhlabathi* decision suggests that a law that authorises expropriation without providing for just and equitable compensation might be justified. For that purpose, and in view of the constitutional court's insistence that section 36 makes no exceptions, the justification inquiry should be left open.

Section 25 cases will seldom be easy, but if they are decided on the basis of reflective contextual analysis, complemented by established constitutional or jurisprudential baselines and structured by an open but direction-giving angle of approach like the one suggested here, they should not result in a nightmare of confusing and contradictory case law. Given the lack of material it had to work with, the *FNB* decision admirably succeeded in providing a foundation for the way forward. However, it is perhaps time for a thorough rethink and a reflective, careful course adjustment.

SAMEVATTING

ARTIKEL 25-DRAAIKOLKE

Roux het voorspel dat die grondwetlike hof se *FNB*-beslissing moontlik 'n draaikolk-effek mag hê deurdat al sewe die vrae wat, volgens die beslissing, deur artikel 25 van die grondwet geopper word (is daar eiendom vir doeleindes van artikel 25; magtig die reg 'n ontneming van die eiendom; was die ontneming arbitrêr soos bedoel word in artikel 25(1); indien nie, is die inbreukmaking regverdigbaar ingevolge artikel 36(1); was daar 'n onteiening van die eiendom; was die onteiening in ooreenstemming met die vereistes in artikel 25(2)-(3); en indien nie, is die inbreukmaking regverdigbaar ingevolge artikel 36(1)?) deur die arbitrêre ontneming-vraag "opgesuig" sal word. Daarmee het Roux bedoel dat die kernvraag wat in artikel 25-sake aan die orde kom, naamlik of die gewenste balans tussen die beskerming van privaat regte in eiendom en die openbare belang in die regulering van daardie eiendom, bereik word, beantwoord word aan die hand van slegs een van die sewe moontlike vrae, terwyl dit in werklikheid ook met verwysing na enige van die ander vrae of in 'n kombinasie van die vrae beantwoord sou kon word.

Die tweede deel van die artikel analiseer die *FNB*-beslissing en kom tot die gevolgtrekking dat die grondwetlike hof, deur 'n kombinasie van 'n wydlopende konteksgerigte analise, normatiewe oordeel gegrond op die geheel van artikel 25, en ander grondwetlike regte en bepalinge, dit duidelik maak dat 'n eng benadering wat op iets soos Roux se draaikolk-effek uitloop grondwetlik ongewens sou wees. Die *FNB*-saak is nie suiwer op grond van die arbitrêre ontneming-vraagstuk beslis nie.

In die derde deel van die artikel word latere regspraak bespreek, en die algemene gevolgtrekking is weereens dat die hof inderdaad die draaikolk-effek grotendeels vermy aangesien die meeste sake nie suiwer op grond van die arbitrêre ontneming-vraagstuk beslis is nie. Roux se eie voorspelling dat hierdie effek in bepaalde gevalle vermy mag word as die hof in sake wat duidelik met onteiening te doen het direk op die onteiening-vraagstukke (soos billike vergoeding) sou fokus, eerder as om eers te vra of die moontlike gebreke in die onteiening op arbitrêre ontneming neerkom, word korrek bewys deur latere regspraak.

Die analise van latere regspraak wys egter ook uit dat enkele latere uitsprake self die moontlikheid skep van draaikolk-effekte deur die hele artikel 25-konflik suiwer met verwysing na een van die sewe *FNB*-vrae te probeer beslis. Die moontlikheid van só 'n draaikolk-effek rondom die definisie van ontneming, na aanleiding van die eng omskrywing van ontneming in die *Mkontwana*-beslissing, is skynbaar tot dusver in die daaropvolgende regspraak vermy. Dit lyk egter asof die onlangse *Shoprite Checkers*-beslissing weer die moontlikheid skep dat die hele artikel 25-konflik op die omskrywing van eiendom kan fokus, wat ook 'n draaikolk-effek tot gevolg mag hê.

In die laaste deel van die artikel word standpunt ingeneem teen enige benadering wat 'n draaikolk-effek mag hê in die sin dat dit 'n artikel 25-konflik suiwer met verwysing na een van die sewe *FNB*-vrae probeer beslis, pleks van om al die vrae in 'n kontekstuele, grondwetlik-georiënteerde geheel te oorweeg. 'n Effens aangepaste weergawe van die *FNB*-lys van vrae word aan die hand gedoen waarvolgens só 'n kontekstuele benadering moontlik sal wees.