

PROCEDURALLY ARBITRARY DEPRIVATION OF PROPERTY

AJ van der Walt

B Jur et Art Honns (BA) LLB LLM LLD

Professor, Faculty of Law, and South African Research Chair in Property Law, Stellenbosch University*

1 Introduction

Section 25(1) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) provides that no one may be deprived of property except in terms of law of general application and that no law may permit arbitrary deprivation of property. The subsection does not distinguish between substantive and procedural reasons for a deprivation being arbitrary. However, in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*¹ (“FNB”) the Constitutional Court concluded that “a deprivation of property is ‘arbitrary’ as meant in s 25 when the ‘law’ referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question *or is procedurally unfair*”. The rest of the FNB decision proceeds to analyse how substantive non-arbitrariness, in the sense of sufficient reason for the deprivation, is to be established, without saying anything about the meaning of the phrase “or is procedurally unfair”. However, from the phrasing of the passage cited earlier it must be concluded that a deprivation could be arbitrary in terms of section 25(1) either because it was substantively arbitrary in the sense that there is insufficient reason for it, as set out in the decision, or because it was procedurally unfair. Although procedural unfairness is not defined or even discussed further in FNB, it therefore apparently constitutes an independent ground for finding that a deprivation of property is arbitrary.

Although the court did not expand in FNB on procedural unfairness as an independent ground for a finding that a deprivation is arbitrary, this point was picked up in later case law. In *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and*

* This article was written as a presentation at the *Annual Conference of the South African Property Law Teachers*, hosted by the University of Namibia, Windhoek, 27-28 October 2011. It is based more or less directly on sections from AJ van der Walt *Constitutional Property Law* 3 ed (2011) ch 4. Thanks to Sue-Mari Maass and Bradley Slade for assistance with the research for the book and for valuable comments and to Geo Quinot, Janke Strydom and Carolien Koch for discussions and comments. Geo Quinot was particularly helpful in unravelling the possible meanings of the notion of procedural arbitrariness in its relation to the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).

¹ 2002 4 SA 768 (CC) para 100 (emphasis added)

*Housing, Gauteng*² (“*Mkontwana*”) it was said that procedural arbitrariness under section 25(1), just like the notion of procedural fairness in other contexts, was a flexible concept that had to be determined with reference to all the circumstances. On the basis of that finding the Constitutional Court held that every municipality is obliged to provide the owner of the property, upon written request, with copies of outstanding accounts for water and electricity services delivered to occupiers of their property.³ This decision creates the impression that procedural fairness, for purposes of section 25(1), will be assessed on the same basis as the test for just administrative action under section 33 of the Constitution and the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”).

In *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government*⁴ (“*Reflect-All*”) the applicants argued that the relevant sections of the Gauteng Transport Infrastructure Act 8 of 2001 were procedurally unfair and therefore arbitrary because they did not provide a procedural mechanism by which the applicants’ rights could be protected. The Constitutional Court referred to the definition of procedurally unfair deprivation in *Mkontwana*,⁵ without adding anything to it, and proceeded to test the deprivation in question against the general standard set out in the earlier decision. The procedural attack on section 10(1) failed in this case because the court concluded that the consultative processes that did take place in terms of the old ordinance must be regarded as having been sufficient; further consultation was not necessary.⁶ Furthermore, the court found it “unrealistic, impractical and not in the public interest” to revisit the considerable number of road network designs published under section 10(3) and concluded that the procedures provided for in the Act were not procedurally arbitrary.⁷ O’Regan J argued in her dissenting opinion that a procedure should have been provided to review long-standing plans, but she explicitly agreed with the majority that the deprivation brought about by the road determinations was not arbitrary for being procedurally unfair and focused her dissent on the substantive arbitrariness of the deprivation.⁸ In *Offit Enterprises (Pty) Ltd*

² 2005 1 SA 530 (CC) para 65, citing *Premier, Mpumalanga v Executive Committee, Association of State-Aided Schools, Eastern Transvaal* 1999 2 SA 91 (CC) para 39; *President of the Republic of South Africa v South African Rugby Football Union* 2000 1 SA 1 (CC) para 216; *Janse Van Rensburg NO v Minister of Trade and Industry and Another NNO* 2001 1 SA 29 (CC) para 24; *Permanent Secretary, Department of Education and Welfare, Eastern Cape v Ed-U-College (PE) (Section 21) Inc* 2001 2 SA 1 (CC) para 19; *Minister of Public Works v Kyalami Ridge Environmental Association (Mukhwevho Intervening)* 2001 3 SA 1151 (CC) para 101

³ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 1 SA 530 (CC) para 66

⁴ 2009 6 SA 391 (CC) The applicants complained about the freezing effect that long-standing road design plans had on the use of their properties, particularly because the Act had come into operation after they had bought the properties and imposed heavier restrictions on their use of the properties than was the case under the preceding legislation. See paras 6-7, 16 and onwards on the facts and the legislation involved

⁵ Para 40, referring to *Mkontwana*

⁶ Para 43

⁷ Paras 46, 47

⁸ Para 97

*v Coega Development Corporation (Pty) Ltd*⁹ (“*Offit*”) the Constitutional Court did not expand on its earlier findings in *Mkontwana* and *Reflect-All* because it decided that the action complained of in *Offit* did not constitute a deprivation of property for purposes of section 25(1).

Judging from these decisions, one might ask whether the notion of procedural fairness, as an indication of arbitrariness in the context of section 25(1), has any meaning at all. From the little that was said in *FNB* and *Mkontwana* it appears that limitations on the use and enjoyment of property would be assessed according to exactly the same principles that are relied on, outside of the sphere of section 25(1), to determine whether administrative action was procedurally fair. Apparently, procedural arbitrariness must therefore be adjudicated in terms of section 25(1), but according to administrative justice principles. However, this result is problematic. In a series of recent decisions, the Constitutional Court has formulated a principle to the effect that litigants who aver that a right protected by the Constitution had been infringed must rely on legislation enacted to protect that right and not on the underlying constitutional provision when bringing action to protect the right, unless they want to attack the constitutional validity or efficacy of the legislation.¹⁰ PAJA was clearly promulgated to give effect to the right to just administrative action (including procedural fairness) and thus action to protect that right should primarily be brought in terms of PAJA rather than either section 33 or section 25(1). This principle suggests that deprivation of property that is allegedly procedurally unfair (in the sense of arbitrary) should be adjudicated in terms of PAJA rather than section 25(1) (or section 33). This conclusion, in turn, would imply that section 25(1) analysis should be restricted to substantively arbitrary deprivation of property. It therefore seems odd that the possibility was even raised in *FNB* (and followed up in *Mkontwana* and *Reflect-All*) that deprivations imposed on the use of property should be reviewed, to determine whether they were procedurally unfair, in terms of the non-arbitrariness requirement in section 25(1).

The remaining question is whether any meaning could be assigned to the notion of procedural arbitrariness in terms of section 25(1) that would not be in conflict with the subsidiarity principle referred to earlier. In other words, are there instances where the alleged procedural unfairness of deprivations of property should, for sound constitutional reasons, be adjudicated in terms of section 25(1) rather than PAJA?

⁹ 2011 1 SA 293 (CC) The case concerned the Development Corporation’s efforts to obtain ownership of the land in question, in accordance with the legislation involved. There was never any real expropriation issue; see n 12 below

¹⁰ This principle is discussed in AJ van der Walt “Normative Pluralism and Anarchy: Reflections on the 2007 Term” (2008) 1 *CCR* 77 100-103, referring to *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) paras 51-52; *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) paras 39-40; *Chirwa v Transnet Ltd* 2008 2 SA 24 (CC) paras 59 (Skweyiya J), 69 (Ngcobo J) The principle has been confirmed in *Walele v City of Cape Town* 2008 6 SA 129 (CC) paras 29-30; *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 4 BCLR 312 (CC) paras 47-49

2 Procedural arbitrariness in terms of section 25(1)

The solution to this conundrum might appear from the differences between the cases in which the Constitutional Court has said something about procedural arbitrariness. To begin with, the context in *FNB* and *Mkontwana* was different from that in *Reflect-All* and *Offit*¹¹ to the extent that the deprivation in the first two cases was imposed directly by the legislation in question and not by administrative action. If a deprivation of property is caused by administrative action, as was the case in *Reflect-All* and *Offit*, any procedural fairness challenge should be directed against the administrative action and therefore the procedural fairness question has to be assessed and answered in terms of PAJA and not section 25(1).¹² Such an outcome would be consistent with the principle, referred to earlier, set out by the Constitutional Court.¹³ PAJA is clearly legislation that was promulgated to give effect to the right to just administrative action (including the right to procedural fairness) in section 33 and therefore any dispute involving allegedly procedurally unfair administrative action has to be decided in terms of PAJA. Section 25(1) should then not feature at all. Section 25(1) does not explicitly guarantee procedural fairness and therefore it seems unjustified to ground any decision involving procedurally unfair administrative action on section 25(1) when the principles regarding procedural fairness are derived from and applied in terms of PAJA. In so far as administrative action is allegedly procedurally unfair, the matter should therefore be decided in terms of PAJA, with section 33 as the underlying constitutional provision for purposes of interpretation or constitutional challenge – section 25(1) has no function if administrative action results in arbitrary deprivation of property.

However, review of procedural fairness in terms of PAJA would not have been possible in *FNB* or *Mkontwana* because there was no administrative action involved and therefore it was necessary in those cases, at least in principle, to determine whether the limitation was imposed in a procedurally fair manner *by legislation*.¹⁴ This review cannot be decided in terms of PAJA because PAJA does not find application in the absence of administrative action. If a deprivation is imposed directly by legislation, the question whether the deprivation is procedurally arbitrary can only be asked in terms of section

¹¹ The Supreme Court of Appeal decided that there was no administrative action involved in the case because there was no act of expropriation yet; see *Offit Enterprises (Pty) Ltd v Coega Development Corporation* 2010 4 SA 242 (SCA) (“*Offit SCA*”) para 44. A different question, which was not at stake in *Offit SCA*, is whether a failure to act, in a situation where an administrative body is obliged to act, would in itself constitute administrative action. On that point see J de Ville *Judicial Review of Administrative Action in South Africa* (2003) 109-111, 184-186.

¹² The issue did not come up in *Offit SCA* because it was decided that there was no deprivation of property in that case.

¹³ See n 11 above.

¹⁴ S 25(1) of the Constitution specifies that “[n]o law may permit arbitrary deprivation of property”, without saying anything about administrative action. Deprivation caused by executive action may also not be adjudicable under PAJA; see De Ville *Judicial Review of Administrative Action* 109-111, 184-186; C Hoexter *Administrative Law in South Africa* 2 ed (2012) 177-178. Those cases might also be adjudicated in terms of procedural unfairness in terms of s 25(1), but because of the wording of s 25(1) (“no law may permit” (emphasis added)) the attack has to be focused on the authorising legislation and not the executive action as such.

25(1), which proscribes law that permits arbitrary deprivation. In all likelihood the question whether the deprivation was imposed in a procedurally unfair manner would in these cases be judged according to the same principles that apply in administrative law under PAJA, but the review takes place in terms of section 25(1).

If a deprivation caused by procedurally unfair administrative action might be substantively arbitrary as well as procedurally arbitrary, the plaintiff may have a choice between a procedural fairness remedy based on PAJA and a substantive arbitrariness remedy based on section 25(1). However, logically speaking the deprivation would be authorised either by legislation or by the common law and the authorising law might indicate which remedy would be preferable. If the substantive arbitrariness is caused by the exercise of administrative discretion or procedure, PAJA might be the preferred basis for litigation; if the deprivation is substantively arbitrary because of the impact it has on the affected property holder, a section 25(1) attack might be better. In either case it might be problematic to prove a procedural arbitrariness case on the basis of PAJA because section 3 of PAJA requires proof of a negative, material impact on the plaintiff's rights. Requiring strong proof that administrative action had a negative, material impact on the plaintiff's rights might practically equal requiring proof of substantive arbitrariness, which would render the notion of procedural arbitrariness in terms of PAJA redundant, at least as far as deprivations caused by administrative action are concerned.¹⁵

The explanation of the meaning of procedural arbitrariness above, according to which procedural arbitrariness should be restricted to deprivations caused by legislation directly, is clouded by the decision in *Reflect-All*.¹⁶ In this case the deprivation was brought about by the administrative action involved in the publication of the road design and not directly by the legislation. According to the argument above, the procedural fairness aspect of the case should therefore have been decided with reference to PAJA and not section 25(1). The decision does not make the matter clearer, because the issue of procedural fairness is considered with reference to PAJA and the procedural-fairness obligations of the administration, but the conclusion in each instance refers to the procedural arbitrariness (referring to section 25(1)) of the sections of the legislation involved. In the end, the court decided that the relevant sections of the Gauteng Transport Infrastructure Act were not procedurally unfair and that the deprivation they brought about was not arbitrary. Consequently, it remains unclear whether a finding of procedural arbitrariness would have rendered the relevant sections (rather than the administrative action involved in publishing the road designs) invalid. This leaves one with the impression that procedural unfairness that results in a deprivation might be arbitrary and therefore invalid in terms of section 25(1), even when the deprivation was caused by administrative action. From first principles this appears to be an unfortunate conclusion that should be avoided, especially given the ambiguity of the decision on this particular point. When administrative action in terms

¹⁵ I am indebted to Geo Quinot for pointing this problem out to me

¹⁶ Compare nn 11 and 14 above

of legislation is challenged, the challenge should be based on PAJA. When the authorising legislation (in this case the relevant sections of the Gauteng Transport Infrastructure Act) is challenged for permitting administrative deprivation of property that is procedurally unfair, the challenge should be based on section 33 of the Constitution.¹⁷ Procedural arbitrariness in terms of section 25(1) should only feature when PAJA does not apply for some reason. From that perspective it seems as if the procedural fairness aspect in *Reflect-All* should simply have been decided with reference to PAJA and not on the basis of section 25(1).

3 Conclusion

In the absence of clearer indications from case law one might therefore assume that a deprivation of property would be arbitrary in terms of section 25(1) either when there was insufficient reason for it, as set out in the *FNB* decision, or when the deprivation was procedurally unfair in terms of the principles that apply in administrative law, but not caused by administrative action. Presumably, this would apply mainly to instances where the deprivation was caused directly by legislation. In cases where procedurally unfair administrative action results in deprivation of property, the challenge should be brought on the basis of PAJA and section 33 and not section 25(1).

Even if the deprivation was not brought about by administrative action and procedural arbitrariness is decided in terms of section 25(1), procedural fairness should probably in any event be adjudicated on the basis of the procedural fairness principles developed in administrative law, simply because other suitable principles do not exist outside of administrative law. Of course, these principles may have to be adapted to the context within which section 25(1) challenges will take place. In administrative law, the right to procedurally fair administrative action is said to involve the possibility to influence the outcome of an administrative decision that might have a negative effect on a person's rights.¹⁸ According to Klaaren and Penfold, this principle firstly entitles a person to be heard during the decision-making process and secondly it proscribes bias.¹⁹ In the absence of administrative action, in other words when the deprivation is caused directly by legislation, the rule against bias is possibly already embodied in the requirement that deprivation must be authorised by law of general application. This particular aspect of the general principle of procedural fairness might therefore not find much application in the context of section 25(1) challenges against legislation that directly causes deprivation of property, without administrative action.

As far as being heard is concerned, procedural fairness could probably only have two applications in cases where deprivation of property is caused

¹⁷ See n 11 above and compare further *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) paras 99-102

¹⁸ J Klaaren & G Penfold "Just Administrative Action" in S Woolman, T Roux & M Bishop (eds) *Constitutional Law of South Africa* 4 2 ed (OS 2008) ch 63-81 See further De Ville *Judicial Review of Administrative Action* 224-228; Hoexter *Administrative Law* 363

¹⁹ Klaaren & Penfold "Just Administrative Action" in *CLOSA* ch 63-81 See further De Ville *Judicial Review of Administrative Action* 218, 217-286; Hoexter *Administrative Law* 397-398

directly by legislation. One possibility is cases where the deprivation would only be procedurally fair if the legislation provides for judicial oversight, as illustrated by a number of cases that were not decided with reference to section 25(1).²⁰ A second possibility is cases where the deprivation would only be procedurally fair if the legislative scheme causing the deprivation provides for an occasional review procedure to ensure that the deprivation does not become arbitrary purely because of its duration. This possibility might have found application in the *Reflect-All* case, especially as far as the dissenting judgment of O'Regan J is concerned,²¹ but unfortunately neither the majority nor O'Regan J clearly distinguished between PAJA review and section 25(1) review of the legislation in question.

The interpretation of the notion of procedural arbitrariness proposed in this article results in two interlinked conclusions. Firstly, the general principle should be that the question whether deprivation of property caused by administrative action is procedurally unfair must be decided in terms of PAJA and not in terms of section 25(1). Secondly, deprivation of property could apparently be procedurally arbitrary in terms of section 25(1) when the deprivation is not brought about by administrative action. This would mostly be the case when the deprivation is caused directly by legislation. In this case, statutory deprivation of property could probably be procedurally arbitrary and therefore unconstitutional if the legislation reasonably should, but in fact does not provide for either judicial oversight or periodic review of the legislative framework that allows or brings about the deprivation.

SUMMARY

Section 25(1) of the Constitution of the Republic of South Africa, 1996 provides that no one may be deprived of property except in terms of law of general application and that no law may permit arbitrary deprivation. In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC), the Constitutional Court explained that a deprivation of property will fall foul of section 25(1) either when there is insufficient reason for the deprivation (as further explained in that decision) or if the deprivation is procedurally unfair. Nothing further is said in that decision about procedurally unfair deprivation. In subsequent case law the Constitutional Court picked up on the distinction between substantively and procedurally arbitrary deprivation, without making it clear when a deprivation will be procedurally unfair or how procedural unfairness in terms of section 25(1) should be distinguished from procedural unfairness in terms of section 33 or PAJA. The author argues that the notion of procedurally unfair deprivation of property in terms of section 25(1) only makes sense to the extent that it refers to deprivation of property that does not result from administrative action. Consequently, deprivation of property brought about by administrative action should in the first place be adjudicated in terms of PAJA and not in terms of section 25(1) and only deprivation of property that occurs outside of the sphere of PAJA should be adjudicated in terms of section 25(1). However, as the author argues, the test for section 25(1) procedural unfairness will in any event probably resemble the PAJA test.

²⁰ See for example *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) (decided with reference to s 26); *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* 2005 3 SA 589 (CC) (decided with reference to s 34)

²¹ One could understand the minority opinion of O'Regan J in *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) in this spirit, although the judge explicitly agreed with the majority that the deprivation brought about by the road determinations were not arbitrary for being procedurally unfair and related her objection to the absence of a review procedure to the substantive arbitrariness of the deprivation