

# Re-examining the Constitutional Court's Approach to the Property Question Since *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)



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## Abstract

The *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) (*FNB*) decision led to the development of several questions that need to be answered when deciding whether there had been a deprivation of property for the purposes of section 25(1) of the *Constitution of the Republic of South Africa*, 1996 (the *Constitution*). The first question that needs to be asked when deciding whether there has been deprivation is whether that which was taken away from the property holder qualified as property for the purposes of section 25(1).

It appears that the Court in post-*FNB* case law fails to decide the first question in a principled manner. In some cases the Court simply assumed that the interests at issue were property for the purposes of section 25 without a thorough investigation or clear guidelines regarding whether such interests were indeed property. Analysis of post-*FNB* case law also indicates that there are seemingly two approaches that may need to be followed to decide complicated categories of property interest. The Court has not made it clear which approach should be followed.

In this article, I examine the Constitutional Court's approach to deciding what property is for section 25(1) purposes. The purpose is to determine how and to what extent the Court has decided what constitutes property for constitutional purposes. After an examination of the *FNB* decision and post-*FNB* case law, as well as analysing academic criticism, I suggest guidelines that the Court may follow to decide what constitutes property for section 25(1) purposes in future cases.

## Keywords

Property; deprivation; constitutional property law; property question.

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## 1 Introduction

The decision of the Constitutional Court (the Court) in the *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*<sup>1</sup> (hereafter *FNB*) led to the development of several questions that need to be answered when deciding whether there had been a deprivation of property for the purposes of section 25(1) of the Constitution.<sup>2</sup> Roux<sup>3</sup> lists the questions as follows:

- (a) Does that which is taken away from [the property holder] by the operation of [the law in question] amount to property for purpose of s 25?
- (b) Has there been a deprivation of such property by the [organ of state concerned]? ...
- (f) If so, does the [expropriation] comply with the requirements of s 25(2)(a) and (b)?
- (g) If not, is the expropriation justified under s 36?

In this article I examine how the Court in the *FNB* case and post-*FNB* case law decided the first question, namely whether the interest that is affected could be deemed property for the purposes of section 25. I will refer to this first question as the "property question". As observed in the questions above, the investigation into whether there has been a deprivation would proceed to the other questions if the first question is answered in the affirmative. If the interest at issue is not property for constitutional purposes, that will be the end of the matter. There would be no further investigation into the constitutionality of the deprivation challenged.

As discussed below, post-*FNB* case law indicates that the Court fails to answer what constitutes property for the purposes of section 25(1) in a principled manner. The Court sometimes simply assumes that there is property for constitutional purposes without any contextual analysis as to whether the interests at issue are indeed property. Post-*FNB* case law also

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<sup>1</sup> *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) (hereafter *FNB*).

<sup>2</sup> *The Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution).

<sup>3</sup> Roux "Property" 46-3.

indicates that there are two approaches that may be followed when deciding the cases, particularly where the category of interest in question is difficult to decide.<sup>4</sup> The first approach seems to be that deciding what constitutes property for constitutional purposes should be sought from the normative framework of the fundamental values and individual rights in the Constitution. According to the second approach, property interest deserves protection and should be a "stand-alone" right and not be linked with other rights such as dignity, freedom of trade, occupation and profession, as the first approach suggests.<sup>5</sup> The Court has not made it clear which approach should be followed. As will be seen below, the manner and extent to which the Court has decided what constitutes property for constitutional purposes has since been criticised by academic commentators.<sup>6</sup> In this article the Court's approach to the property question will be analysed to determine how and to what extent has the Court decided what constitutes property. It will further be determined which of the two approaches described above should be adopted and guidelines for deciding the property question in future cases will be suggested.

Sections 2.1 and 2.2 of this contribution discuss how the Court decided the property question in *FNB* and post-*FNB* case law respectively. In section 3 the article evaluates academic criticism of the Court's approach to the property question. Based on the *FNB* decision, post-*FNB* case law and an analysis of academic criticism, in section 4 I propose how the Court should determine what constitutes property for the purposes of section 25 in future cases.

## 2 The property question

### 2.1 *The approach in FNB*

FNB, a financial institution, financed a Volkswagen Jetta to Lauray Manufacturers CC in 1994 and a Volkswagen Golf to Airpark Cold Halaal Storage CC in 1995.<sup>7</sup> FNB also financed a Mercedes Benz to Airpark in 1996 under a credit agreement. FNB remained the owner of all three

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<sup>4</sup> *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Eastern Cape* 2015 6 SA 125 (CC) paras 36-46, 138-142 (hereafter *Shoprite*). Also see *South African Diamond Producers Organisation v Minister of Minerals and Energy* 2017 6 SA 331 (CC) paras 57-59 (hereafter *Diamond*).

<sup>5</sup> *Shoprite* paras 138-142.

<sup>6</sup> Marais 2018 *SAJHR* 167-190; Du Plessis and Palmer 2018 *Stell LR* 73-89; Swemmer 2017 *SAJHR* 286-301; Badenhorst and Young 2017 *Stell LR* 26-46; Van der Walt 2016 *TSAR* (Part 2) 597-621; Marais 2016 *TSAR* 576-592; Rautenbach 2015 *TSAR* 822-827.

<sup>7</sup> *FNB* paras 7-9.

vehicles in terms of a reservation-of-ownership condition in the respective agreements. The South African Revenue Services detained and established a lien over some of these vehicles as security for customs-related debts owed by Lauray and Airpark.<sup>8</sup> The lien over the vehicles was established by detaining the vehicles in terms of the provisions of section 114 of the *Customs and Excise Act*.<sup>9</sup>

FNB challenged the constitutional validity of section 114 of the Act and argued that section 114 of the Act provided for the extrajudicial attachment and sale in execution of its property to satisfy another party's tax debt. According to FNB, by allowing the commissioner to detain and sell its goods to satisfy another party's tax debt without the need for a prior judgement or other authorisation by a court, the section infringed its constitutional right to the protection of its property.<sup>10</sup>

Prior to deciding whether there was a deprivation of property, the Court pointed out that constitutional property clauses are notoriously difficult to interpret.<sup>11</sup> Significant to the discussion in this article, the Court indicated that the subsection, which required interpretation to resolve the specific dispute in this case, could not be construed in isolation, but had to be considered in the context of the other provisions of section 25 in their historical context<sup>12</sup> as well as in the wider constitutional context.<sup>13</sup> The Court indicated that subsections 25(4) to (9) underscore the need for and aim to redress one of the enduring legacies of racial discrimination in the past, which is the grossly unequal distribution of land in South Africa.<sup>14</sup> These sections were not directly relevant to this case, but the Court indicated that they ought to be borne in mind whenever section 25 is interpreted. Moreover, subsections 25(4) to (9) indicate that the protection of property as an individual right is not "absolute" but is subject to societal considerations.<sup>15</sup> The Court further indicated that the preamble to the Constitution specifies that one of the aspirations of the Constitution is to

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<sup>8</sup> FNB paras 7-9.

<sup>9</sup> *Customs and Excise Act* 91 of 1994.

<sup>10</sup> FNB paras 5, 26.

<sup>11</sup> FNB para 47.

<sup>12</sup> Considering the historical context seems relevant because one of the purposes of the property clause is to provide for redress; see Van der Walt *Property and Constitution* 1-3; Van der Walt *Constitutional Property Law* 29-31.

<sup>13</sup> FNB para 49. Also see Van der Walt 2004 SALJ 866; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) (hereinafter *PE Municipality*).

<sup>14</sup> FNB para 49.

<sup>15</sup> FNB para 49. Also see Van der Walt *Constitutional Property Law* 31.

construct a society that is based on democratic values, fundamental rights, and social justice.<sup>16</sup>

The Court concluded that section 25 must be seen as both safeguarding existing private property rights and serving the public interest, mainly in the sphere of land reform. Furthermore, section 25 should also be seen as striking a proportionate balance between the land reform goals and the protection of private property rights.<sup>17</sup> From the Court's interpretation of section 25, it seems apparent that the historical, socio-economic and constitutional context should be considered when interpreting section 25. This method of interpretation further implies that it would not be possible to have "a single, abstract" interpretation of section 25.<sup>18</sup> Therefore, interpreting section 25 would always be based on the context and would depend on the characteristics and the needs of each case.<sup>19</sup>

In *FNB* the Court had to decide a set of questions (the *FNB* questions) in the context of section 25 and the Constitution as a whole, which given the analysis above is mainly aimed at striking a proportionate balance between the protection of private property rights and the broader public interest. Therefore, the Court had to answer first whether that which had been taken from *FNB* amounted to "property" for the purposes of section 25 of the Constitution. The Court indicated that it would be "practically impossible" and "judicially unwise" to give a formal definition of property for constitutional purpose.<sup>20</sup> Nevertheless, since the property in question consisted of corporeal movables in the *FNB* case, the Court seems to have found it easy to decide that corporeal movables such as vehicles are property for constitutional purposes. As indicated by the Court, ownership of a corporeal movable and land must lie at the heart of the constitutional property concept, "both as regards the nature of the right involved as well as the object of the right."<sup>21</sup> This, according to Court, must in principle enjoy the protection of section 25.

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<sup>16</sup> *FNB* para 50.

<sup>17</sup> *FNB* para 50.

<sup>18</sup> Van der Walt 2004 SALJ 866.

<sup>19</sup> Van der Walt 2004 SALJ 866.

<sup>20</sup> *FNB* para 51. Also see *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) para 72, where the court held that "there is no universally recognised formulation of the right to property [that] exists."

<sup>21</sup> *FNB* para 51.

The above decision is in conformity with the common-law concept of "property", which embraces both the object of real rights<sup>22</sup> and real rights on their own as property.<sup>23</sup> Therefore, it can be said that the meaning of "property" in section 25 at least refers to objects of property rights and rights in the property. Nevertheless, it seems that legal scholars approve a relatively wide or accommodating notion of property when interpreting section 25.<sup>24</sup> A relatively wide notion of property safeguards economically significant intangible property interests that are also regarded as property in private law.<sup>25</sup>

Referring to Van der Walt with approval, the Court stated that when considering the purpose and content of the property clause, it is necessary to move away from the private-law conceptualist view to a "dynamic" typical public-law view of property.<sup>26</sup> According to the Court the idea that property should also serve public good is "by no means foreign to pre-constitutional property concepts."<sup>27</sup> According to Roux,<sup>28</sup> the Court's commendation of Van der Walt's work in this regard suggests that the Court would probably adopt a wide notion of property that includes incorporeal property. Moreover, it seems that the court left open (as will be seen later below) the likelihood of recognising the constitutional protection of incorporeal or intangible interests in South African law.

It was contended by the respondents that the ownership of the vehicles by FNB was nothing more than a contractual device that reserved ownership of the vehicles and that the constitutional concept of property was not dependent on the use of the property by the holder of the rights.<sup>29</sup> This contention was rejected by the Court on two grounds. Firstly, the Court considered the use argument as irrelevant. According to the Court the fact that an owner of a corporeal movable does not or makes no limited use of the object in question is irrelevant to the categorisation of the object as constitutional property.<sup>30</sup> However, the Court indicated that although the usefulness or value of an object is irrelevant to classifying whether an object

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<sup>22</sup> Corporeal and incorporeal things.

<sup>23</sup> Roux and Davis "Property" 20-16.

<sup>24</sup> Van der Walt *Constitutional Property Law* 114. Also see Roux and Davis "Property" 20-16.

<sup>25</sup> Roux "Property" 46-12.

<sup>26</sup> *FNB* para 52. Also see Van der Walt *Constitutional Property Clause* 11.

<sup>27</sup> *FNB* para 52.

<sup>28</sup> Roux "Property" 46-10, 46-11.

<sup>29</sup> *FNB* para 53.

<sup>30</sup> *FNB* para 54.

is a property, it is still relevant to ascertain whether a deprivation is arbitrary.<sup>31</sup>

Secondly, the Court found that the legal right and the commercial interests that FNB had in vehicles were incorrectly combined in the respondents' argument.<sup>32</sup> FNB was the owner of all the vehicles when it concluded the contract in question and the reservation of ownership of the vehicles should not be the focus of the inquiry. Furthermore, the "subjective interest" of the owner in his property or the "economic value of his right of ownership" cannot ascertain the manner through which the right must be categorised.<sup>33</sup> It appears that the focus should be on the legal nature of the right, rather than the subjective interest of the owner in the thing owned or the economic value of his ownership right. Nevertheless, as will be seen below, the Court seems to have not adhered to this approach in subsequent case law and it has sometimes considered the subjective intention of the owner of the property and the economic value of the property to answer the property question.<sup>34</sup>

It can be concluded from the *FNB* decision that deciding what property is for constitutional purposes will be dependent on the context of each case. Significantly, when deciding what constitutes property for constitutional purposes, the Court's interpretive framework should be borne in mind. One of the most significant justifications for considering the context outlined above is to expand the private-law notion of property to facilitate the protection of a wide range of property-related interests, which are crucial to transformation.<sup>35</sup> Therefore, even though the Court in *FNB* did not formulate a comprehensive definition of property for the purposes of section 25, it appears that the context of each case and the constitutional interpretive framework outlined by the Court should inform the analysis of the Court's approach to the property question.

## **2.2 The approach in post-*FNB* case law**

In some post-*FNB* cases, it appears that when the property interest in issue is ownership of land or corporeal movable as objects of deprivation, the Court does not concern itself much with the property question by embarking on constitutional and contextual factors as was the case in *FNB*.<sup>36</sup> It seems

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<sup>31</sup> *FNB* para 54.

<sup>32</sup> *FNB* para 55.

<sup>33</sup> *FNB* para 56.

<sup>34</sup> *Shoprite* para 64.

<sup>35</sup> Van der Walt 2016 *TSAR* (Part 2) 602.

<sup>36</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bissett v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC, Local Government and*

that since the ownership of land and corporeal movables is recognised and protected as property in traditional private law, it should therefore be protected under the Constitution as well.<sup>37</sup> The Court also tends to accept that limited real rights over land or corporeal movables constitute property.<sup>38</sup> The Court also accepts that the right to sterilise minerals is property with economic value.<sup>39</sup> Restrictive conditions that have the characteristics of registered praedial servitudes are real rights and are also said to qualify as property for constitutional purposes.<sup>40</sup> It is important to note that the Court in these cases did not embark on an in-depth analysis of various factors as was the case in *FNB*, probably because these interests are recognised and protected as property in traditional private law.

Although the Court did not spend too much time in deciding the legal nature of above interests, academic literature supports the view that servitudes and mineral rights should qualify for protection under section 25 because they are limited real rights recognised at common law and statute.<sup>41</sup> It appears that all limited real rights such as registered long-term leases, registered mortgage bonds, pledges and liens, which are recognised at common law, should be protected under section 25.<sup>42</sup> The fact that specific categories of limited real rights are already recognised as property interests in private law and according to statute justifies their recognition as property for constitutional purposes.

Trademarks were also simply recognised as constitutional property by the Court.<sup>43</sup> Academic literature also supports the view that since trademarks are protected as property in private law and legislation, they should find protection under the property clause.<sup>44</sup> Therefore, since trademarks are a type of intellectual property and protected by section 34 of the *Trade Marks*

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*Housing, Gauteng, (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 1 SA 530 (CC); *Du Toit v Minister of Transport* 2006 1 SA 297 (CC); *Arun Property Development (Pty) Ltd v Cape Town City* 2015 2 SA 544 (CC); *Tshwane City v Link Africa (Pty) Ltd* 2015 6 SA 440 (CC).

<sup>37</sup> Van der Walt *Constitutional Property Law* 114; Roux "Property" 46-13.

<sup>38</sup> *Ex parte Optimal Property Solutions* CC 2003 2 SA 136 (C) paras 4-6, 19 (hereafter *Ex parte Optimal*); *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) (hereafter *Agri SA*).

<sup>39</sup> *Agri SA* para 44.

<sup>40</sup> *Ex parte Optimal* paras 4-6, 19.

<sup>41</sup> Roux "Property" 46-13; Van der Walt *Constitutional Property Law* 114.

<sup>42</sup> Roux "Property" 46-13.

<sup>43</sup> *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International* 2006 1 SA 144 (CC).

<sup>44</sup> Kellerman *Constitutional Property Clause* 1, 42; Smith 2004 *JBL* 199; Dean 2005 *De Rebus* 19.

*Act 194 of 1993*, they should in principle qualify as property for constitutional purposes. It appears that traditional intellectual property interests such as patents, copyright and designs that are protected as property in private law and legislation should in all respects be considered property interests for constitutional purposes.<sup>45</sup> These traditional intellectual property interests are *sui generis* forms of property in private law.<sup>46</sup> Accordingly, when the Court is confronted with these traditional intellectual property interests in future cases, it may be needless to embark on a contextual analysis as proposed in the *FNB* decision.

In *Phumelela Gaming and Leisure Ltd v Gründlingh*,<sup>47</sup> the Court also seems to have simply accepted that goodwill (which is incorporeal commercial property) is property without an extensive investigation that it is indeed property for constitutional purposes. This decision is considered as authority for the point that property for the purposes of section 25 includes incorporeal property interests such as goodwill.<sup>48</sup> Nevertheless, it seems that goodwill falls under a category of incorporeal commercial property interests and must arguably enjoy protection under the property clause. Therefore, the fact that goodwill is a category of incorporeal commercial property interest and the fact that academic literature supports its recognition justifies the Court's simple acceptance that goodwill is property for constitutional purposes. It appears settled now that goodwill is property for constitutional purposes and the consideration of other contextual factors to decide whether it is indeed property should arguably be avoided.

In *Law Society of South Africa v Minister for Transport*,<sup>49</sup> the Court found it unnecessary to resolve the debate whether a delictual claim for loss of earning capacity or support constitutes property.<sup>50</sup> In this case the Court also merely assumed without deciding that a claim for loss of earning capacity or of support is "property".<sup>51</sup> Nevertheless, academic literature and foreign law seem to endorse the notion that delictual claims are constitutional property.<sup>52</sup> This arguably makes the Court's decision acceptable. Therefore, it can be concluded that certain interests such as a delictual claim for loss of earning capacity or support, which are not

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<sup>45</sup> Van der Walt *Constitutional Property Law* 146.

<sup>46</sup> Kellerman *Constitutional Property Clause* 43.

<sup>47</sup> *Phumelela Gaming and Leisure Ltd v Gründlingh* 2007 6 SA 350 (CC).

<sup>48</sup> Van der Walt *Constitutional Property Law* 155-157.

<sup>49</sup> *Law Society of South Africa v Minister for Transport* 2011 1 SA 400 (CC) (hereafter *Law Society*).

<sup>50</sup> *Law Society* para 84.

<sup>51</sup> *Law Society* para 84.

<sup>52</sup> Van der Walt *Constitutional Property Law* 160.

recognised as property in traditional private law, should be considered as property for constitutional purposes.

In some cases the Court seems to have paid attention to deciding the property question. For instance, in *National Credit Regulator v Opperman*<sup>53</sup> (hereafter *Opperman*) the Court held that a right to claim the restitution of money based on unjustified enrichment is property for constitutional purposes. The basis of this finding was that this claim has monetary value, can be disposed of and transferred, can be counted as an asset in one's estate, and is enforceable against a specific party (personal right).<sup>54</sup> According to the Court there is a wide acceptance that claims like restitution of money based on unjustified enrichment are constitutional property.<sup>55</sup> Academic literature also supports the view that claims such as restitution of money based on unjustified enrichment are property for constitutional purposes.<sup>56</sup> It seems settled that claims for restitution of money based on unjustified enrichment should qualify as property for constitutional purposes. Moreover, the Court should in future cases, consider the factors set out by the Court in *Opperman* to decide whether claims analogous to restitution of money based on unjustified enrichment should qualify as constitutional property. For instance, the Court in *Cool Ideas 1186 CC v Hubbard*<sup>57</sup> had to decide whether a claim based on unjustified enrichment was property for constitutional purposes. The Court simply followed the *Opperman* decision without further discussion. To simply accept that an enrichment claim is property for constitutional purposes should not be problematic since the Court in *Opperman* had already decided that a right to restitution of money paid based on unjustified enrichment is constitutional property. Therefore, this decision merely confirmed that an enrichment claim is property for the purpose of section 25.

Money in hand was also said to constitute property for constitutional purposes in *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport* (hereafter *Chevron*).<sup>58</sup> In this case the Court held that since money in hand is property for constitutional purposes it should therefore find protection against

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<sup>53</sup> *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) paras 57-63 (hereafter *Opperman*).

<sup>54</sup> *Opperman* paras 57-62.

<sup>55</sup> *Opperman* para 63. Also see Van der Walt *Constitutional Property Law* 157; Roux and Davis "Property" 20-17; Marais 2016 *TSAR* 581; Marais 2014 *SALJ* 220.

<sup>56</sup> Marais 2014 *SALJ* 222.

<sup>57</sup> *Cool Ideas 1186 CC v Hubbard* 2014 4 SA 474 (CC) para 38.

<sup>58</sup> *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport* 2015 10 BCLR 1158 (CC) (hereafter *Chevron*).

arbitrary deprivation.<sup>59</sup> The *Chevron* decision is said to be crucial for constitutional property law since it confirms that money in hand (an object) is property for the purposes of section 25 of the Constitution.<sup>60</sup> The Court did not embark on an in-depth contextual analysis regarding whether money in hand is property, probably because money is an object that should arguably be protected under section 25(1).<sup>61</sup>

Although the interests analysed above were sometimes simply accepted as property for the purposes of section 25(1) of the Constitution, they are nevertheless uncontroversial and seem to be widely accepted as such. The Court's decision to accept the above interests as property for constitutional purposes with ease is arguably justifiable because these interests are uncontroversial and have been widely accepted. Nevertheless, as will be seen below, the Court seems to indicate that if it is faced with deciding complex categories of interests it is willing to embark on contextual analysis, as was suggested in the *FNB* decision. Interestingly, in this line of case law the Court seems to rely on the constitutional interpretive framework as suggested in the *FNB* decision and has also further developed it.

The Court dealt with the property question in detail in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape*<sup>62</sup> (hereafter *Shoprite*). The Court had to decide whether a commercial trading licence that allows the licence holder to sell wine in a grocery store constitutes property under section 25 of the Constitution.<sup>63</sup> Writing for the majority,<sup>64</sup> Froneman J approached the property question by developing a so-called normative constitutional-framework approach. In terms of this approach, the understanding of property should be informed by constitutional values and rights and not restricted to the private-law notions of property.<sup>65</sup> According to Froneman J, the property clause should not obstruct the transformation of society if the concepts of property are extended outside the scope of private common law, but the key to the attainment of societal

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<sup>59</sup> *Chevron* para 16.

<sup>60</sup> Van der Walt 2015 ASSAL 214. Also see Brits 2018 PELJ 16-18.

<sup>61</sup> Badenhorst 2016 CLR 113.

<sup>62</sup> *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape* 2015 6 SA 125 (CC).

<sup>63</sup> *Shoprite* para 1.

<sup>64</sup> In the *Shoprite* decision, Froneman J (with Cameron J, Jappie AJ and Nkabinde J) and Madlanga, J (with Tshiqi J) accepted that a liquor licence is property. Although Madlanga J accepts that Shoprite's licence to sell liquor is property, he disagrees with Froneman J's constitutional-normative framework approach and argues that the right to property is worthy of protection as a "stand-alone" right that does not need to be linked closely with another right.

<sup>65</sup> *Shoprite* para 46.

transformation.<sup>66</sup> Therefore, the fundamental values of dignity, equality and freedom should play a pivotal role in deciding the property question. Moreover, according to Froneman J our concept of property must be derived from the Constitution.

In investigating whether a liquor licence is property, Froneman J stated, amongst other things, that a liquor licence is an entitlement to do business dependent on the state's approval. Moreover, for this kind of licence to continue to exist will be dependent on the powers of the state to amend, cancel and regulate it.<sup>67</sup> This kind of licence originates from a state grant, like social and welfare rights. According to Froneman J, the public-law origin of these interests is often relied upon to argue that they should not be protected as property.<sup>68</sup> This is because they do not "easily fit into a private law conception of rights and property".<sup>69</sup> These kinds of interests were accepted for protection only once vested under pre-constitutional law. Therefore, this would mean that Shoprite's permission to sell food and wine in its stores could qualify for protection under section 25 once vested.<sup>70</sup> However, according to Froneman J, to "use pre-constitutional notions of vesting to determine the ambit of property" that requires protection under the Constitution would be "retrogressive".<sup>71</sup>

All property is subject to the law and regulation.<sup>72</sup> The degree of regulating such property is dependent on the purpose for which such property is held and the purpose of the regulation. The purpose for which the property is held may have a close relationship with the fundamental rights of a person holding such property.<sup>73</sup> Therefore, if it is found that there is a close correlation between the holding of a liquor licence and the fundamental right to choose one's trade or vocation, a decision that it is property under section 25(1) should be likely. According to Froneman J a liquor licence should be recognised as property if it serves individual self-fulfilment and not for purposes of "mere commercial well-being", but with the essence of operating a business as work that forms part of "one's identity and [is] constitutive of one's dignity".<sup>74</sup> Besides the fundamental constitutional

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<sup>66</sup> *Shoprite* para 46.

<sup>67</sup> *Shoprite* para 58.

<sup>68</sup> *Shoprite* para 58.

<sup>69</sup> *Shoprite* para 59.

<sup>70</sup> *Shoprite* para 59.

<sup>71</sup> *Shoprite* para 59.

<sup>72</sup> *Shoprite* para 60.

<sup>73</sup> *Shoprite* para 60.

<sup>74</sup> *Shoprite* para 61.

values that he considered, Froneman J also relied upon the following factors to conceptualise a liquor licence as constitutional property:

- (i) a grocer's wine licence entitles its holder to carry on business of selling;
- (ii) the "licence remained in force for an indefinite period";
- (iii) it can be withdrawn under prescribed conditions;
- (iv) it can be transferred subject to approval;
- (v) the licence "gave rise to a personal legal claim for its enforcement";
- (vi) once granted, an "enforceable personal incorporeal right is vested" in the holder;
- (vii) the right to sell liquor is "clearly definable and identifiable";
- (viii) it has value.<sup>75</sup>

According to Froneman J, these factors are similar to the factors used to determine the property question in private law. For instance, some of the factors seems to be close to factors attributed to characterise a "thing". In this regard, a thing must be of use or value to the legal subject. After having considered the above factors, he held that the holding of a liquor licence by Shoprite should be protected under section 25.

Although the majority agreed that a liquor licence is property for constitutional purposes, it seems that the majority were not in support of Froneman J's approach to the question of property. For instance, Madlanga J concurred with the main judgment on the holding that a liquor licence is property. He disagreed, however, with Froneman J's link of the fundamental values when deciding whether a liquor licence was property for constitutional purposes.<sup>76</sup> According to Madlanga J, Froneman J's approach "waters down potency of the right to property" to the extent that it does not do much more than ride on the "coat-tails" of rights such as human dignity and freedom of trade, occupation and profession.<sup>77</sup> According to Madlanga J, the right to property should – like the other rights in the Bill of Rights – be protected as a "stand-alone" right.<sup>78</sup> In his view, this does not mean that the right to property cannot be closely linked to another right, but defining whether a liquor licence can be protected as property for constitutional purposes should not be linked with other rights in this case.<sup>79</sup> The rationale behind Madlanga J's argument was probably that Shoprite

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<sup>75</sup> *Shoprite* paras 67, 68.

<sup>76</sup> *Shoprite* para 133.

<sup>77</sup> *Shoprite* para 139.

<sup>78</sup> *Shoprite* para 139.

<sup>79</sup> *Shoprite* para 139.

was a juristic person and not a natural person. Therefore, an investigation as to whether Shoprite's liquor licence could be protected as property for constitutional purposes should not be linked closely with other rights such as human dignity and freedom of trade, occupation and profession, which primarily apply to natural persons.

When investigating whether a liquor licence was property, Madlanga J referred to the decision in *Opperman*, where the Court held that an enrichment claim is property for constitutional purposes.<sup>80</sup> According to Madlanga J, an enrichment claim was said to be property without any reluctance. This is even though an enrichment claim amounted to a mere personal right and significantly removed from a "readily acceptable property" right.<sup>81</sup> In the *Opperman* decision an action based on an enrichment claim was also accepted as property. This is even though it might be enforceable only against a specific party and could be defended successfully when brought to court. Therefore, according to Madlanga J, since the Court in *Opperman* held that an enrichment claim was property, a liquor licence should also qualify for protection. The following factors were considered by Madlanga J to determine whether a liquor licence should be recognised as property for constitutional purposes:<sup>82</sup>

- (i) a liquor licence is "something in hand", that entitles its holder to sell wine under specified circumstance;
- (ii) it may endure indefinitely;
- (iii) it may be suspended or cancelled in accordance with the law;<sup>83</sup>
- (iv) it holds an objective commercial value;<sup>84</sup>
- (v) it is transferable only with the approval of authorities and against a valuable consideration;
- (vi) it enhances the value of its holder (of Shoprite as a commercial entity).

The factors considered by Madlanga J are similar to those relied upon by Froneman J. Moreover, these factors are also arguably linked to the characterisation of property within the ambit of private law. Thus far it can

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<sup>80</sup> *Shoprite* para 142. Madlanga J further referred to the *Law Society* decision where a delictual claim for loss of earning capacity or support was held to constitute property for constitutional purposes.

<sup>81</sup> *Shoprite* para 142.

<sup>82</sup> *Shoprite* para 143.

<sup>83</sup> *Shoprite* para 97.

<sup>84</sup> *Shoprite* para 144. Madlanga J took note of the concurring judgment of Moseneke DCJ that since the core nature of a liquor licence is permission, a subjective interest like economic and commercial value should not play a role in determining whether it is property. According to Madlanga J, objective commercial value should come into the "equation".

be argued that Froneman J and Madlanga J relied on similar factors to decide the property question in *Shoprite*. Moreover, both of the justices seem to agree that the historical, social and constitutional context must be considered when deciding what constitutes property for the purposes of section 25.<sup>85</sup> However, although both justices found that the above context is relevant, they differed on the weight that should be attached to it. For instance, as seen above, it seems that Froneman J relied too much on this context while Madlanga J set it as a brief "crucial preface" to decide if a liquor licence is property. Therefore, there are different approaches for deciding whether a licence is property for constitutional purposes. The existence of these approaches is also confirmed by the court in *South African Diamond Producers Organisation v Minister of Minerals and Energy* (hereafter *Diamond*).<sup>86</sup>

In the *Diamond* case the Court had to decide amongst other issues whether the licences of the diamond dealers were property for the purposes of section 25. Instead of deciding, the Court indicated that it was not necessary in this case to consider the question of whether the licences constitute property, because even if it had assumed that they were, there was no deprivation present.<sup>87</sup> The Court further indicated that to decide whether the dealer's licences were property would require an analysis of whether the conditions (as set out in *Shoprite*) that must be considered when recognising whether licences are property were met.<sup>88</sup> Moreover, the Court indicated that there seemed to be two approaches to determining whether licences qualify as property for the purposes of section 25, namely Froneman J's approach and Madlanga J's approach. In the *Diamond* decision the Court did not decide which approach should be followed. Moreover, because of these conflicting approaches to the notion of property regarding licences, the Court in the *Diamond* case found it unnecessary to decide on an appropriate approach that could be followed in deciding whether diamond licences qualify as property for purposes of section 25.<sup>89</sup> After analysis of the academic criticism against the *Shoprite* decision, in section 4 below I suggest which approach would be preferable to decide whether licences qualify as property for constitutional purposes.

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<sup>85</sup> *Shoprite* para 103, where Moseneke DCJ concurred.

<sup>86</sup> *South African Diamond Producers Organisation v Minister of Minerals and Energy* 2017 6 SA 331 (CC).

<sup>87</sup> *Diamond* para 57.

<sup>88</sup> *Diamond* para 57 fn. 51.

<sup>89</sup> *Diamond* para 57.

### 3 Criticisms against the approach to the property question in *Shoprite*

Although it is accepted that some of the interests discussed in this article are property for constitutional purposes and therefore appear to be uncontroversial, an analysis of the case law above indicates that there is no clarity in deciding whether or not licences are property for the purposes section 25. For instance, the manner in which the Court in *Shoprite* determined whether a liquor licence was property for constitutional purposes has received criticism from academics. Rautenbach<sup>90</sup> criticises Froneman J's approach for linking a grocer's wine licence as property with the right to choose a vocation in section 22<sup>91</sup> of the Constitution and the right to human dignity to decide. According to Rautenbach<sup>92</sup> a juristic person could not be entitled to the section 22 right and the right to human dignity. Rautenbach<sup>93</sup> further argues that it is not clear whether Froneman J intended the existence of a link with other constitutional rights and values to be crucial for the recognition of constitutional property. According to Rautenbach,<sup>94</sup> it also appears that Froneman J linked the liquor licence with other rights in the context of determining the level of judicial scrutiny or the level of constitutional protection. Rautenbach<sup>95</sup> argues that the level of protection to be afforded pertains to the strictness or otherwise of the requirements for the limitation of a right, and this is determined by considering the nature of the right and the nature and extent of the limitation involved (amongst other things). Rautenbach is correct in this regard, and his argument is supported by Marais,<sup>96</sup> who argues that to decide the property question by linking it with other fundamental rights is "unattractive" because it "unnecessarily complicates" the property question. Marais<sup>97</sup> argues that the "linking approach" collapses the threshold issue and the justification analysis into one stage. In other words, the linking approach collapses the question regarding property and the question of whether the deprivation in issue satisfies the requirements under section 25(1) of the Constitution into one phase.

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<sup>90</sup> Rautenbach 2015 *TSAR* 826.

<sup>91</sup> Section 22 of the Constitution provides that "[e]very citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

<sup>92</sup> Rautenbach 2015 *TSAR* 826.

<sup>93</sup> Rautenbach 2015 *TSAR* 826.

<sup>94</sup> Rautenbach 2015 *TSAR* 826-827.

<sup>95</sup> Rautenbach 2015 *TSAR* 827.

<sup>96</sup> Marais 2016 *TSAR* 583.

<sup>97</sup> Marais 2016 *TSAR* 583.

Similarly, Van der Walt<sup>98</sup> argues that to consider the factors that should be taken into account to determine if a deprivation is arbitrary creates a "property vortex". He argues that Froneman J created this vortex by developing a "normative-constitutional approach" to the interpretation of the property clause as a whole, where the property question seems to assume the form of a "deserving-property" inquiry.<sup>99</sup> Van der Walt<sup>100</sup> further argues that the property vortex created by Froneman J seems to "suck" all other aspects of the section 25 challenge, including the arbitrariness test, into the property inquiry. It is in the property question that it would be prefigured whether a limitation is arbitrary or whether there is deprivation of property.

According to Van der Walt<sup>101</sup> it seems that the balancing of individual interests and public interest will now be conducted in the property question. He argues that an applicant would have to prove that her property interest deserves protection under section 25 if it serves normative-constitutional goals such as "socially-situated individual self-fulfilment."<sup>102</sup> According to Van der Walt<sup>103</sup> it is unlikely that the commercial property interests of corporate juristic persons could serve "socially-situated individual self-fulfilment." This is so because the fundamental values informing the concept of property that allows for individual self-fulfilment in the holding of property apply to citizens only. Froneman J avoided this dilemma by imagining an individual natural person in the position of Shoprite, who would have been similarly affected by the statutory amendment that terminated the use of the liquor licence.<sup>104</sup> Such an individual/natural person would have been able to satisfy the requirement that his or her property interest in the liquor licence served "socially-situated individual self-fulfilment".<sup>105</sup>

The consideration of fundamental values above, especially the right to choose one's vocation freely, which will allow individual self-fulfilment, has raised interesting questions in the academic literature. The main question is whether Froneman J deviated from the earlier decision of *FNB*.<sup>106</sup> In *FNB* the Court stated that neither the subjective interest of the owner in the thing owned, nor the economic value of the right of ownership can characterise

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<sup>98</sup> Van der Walt 2016 *TSAR* (Part 2) 601.

<sup>99</sup> Van der Walt 2016 *TSAR* (Part 2) 601.

<sup>100</sup> Van der Walt 2016 *TSAR* (Part 2) 603.

<sup>101</sup> Van der Walt 2016 *TSAR* (Part 2) 603.

<sup>102</sup> Van der Walt 2016 *TSAR* (Part 2) 603.

<sup>103</sup> Van der Walt 2016 *TSAR* (Part 2) 603.

<sup>104</sup> *Shoprite* para 64.

<sup>105</sup> *Shoprite* para 65.

<sup>106</sup> Marais 2016 *TSAR* 583; Swemmer 2017 *SAJHR* 292.

the determination of a right.<sup>107</sup> Froneman J approves this dictum only to rely later on fundamental values, specifically the right to choose one's vocation freely, which will enable the holder to secure individual self-fulfilment and a life of dignity. To consider fundamental values, particularly the right to choose one's vocation freely, to achieve individual self-fulfilment and a dignified life, is said to suggest the adoption of a subjective approach.<sup>108</sup> According to Marais<sup>109</sup> an investigation that pivots on the subjective interest of the holder of the property, where the holding of such property will contribute to the realisation of fundamental rights, will differ from property to property. Marais<sup>110</sup> is of the view that some types of property will contribute more than other types of property to realising the holder's fundamental right. Therefore, according to Marais,<sup>111</sup> the inquiry should focus on investigating whether there are sufficient similarities between the interest in question and the interests that are already recognised as property in section 25(1).

Because of the problems associated with the linking approach, Marais<sup>112</sup> suggests an approach for deciding future cases that concern new interests. The approach involves the assessment of the nature of the right and the object of the right, the three criteria set out in the *Opperman* case,<sup>113</sup> and the purpose of protecting property in constitutional property law. According to Marais<sup>114</sup> the nature of the right in the context of a wine licence is that such a licence would amount to a personal right that can be enforced only between the parties. The object of the right is the state's duty not to interfere with Shoprite's entitlement to sell wine.<sup>115</sup> After determining the nature and object of the right, Marais<sup>116</sup> suggests that the factors considered in *Opperman's* case, namely vesting, the objective monetary value of the interest and transferability, must be considered. In support of these factors, Marais<sup>117</sup> argues that these factors broadly correspond with the requirements for property in traditional private law, in particular the use and value characteristics. According to Marais,<sup>118</sup> these factors further play a significant role in foreign law when new interests are recognised as

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<sup>107</sup> *FNB* para 56.

<sup>108</sup> Marais 2016 *TSAR* 583.

<sup>109</sup> Marais 2016 *TSAR* 583.

<sup>110</sup> Marais 2016 *TSAR* 583.

<sup>111</sup> Marais 2016 *TSAR* 584.

<sup>112</sup> Marais 2016 *TSAR* 589-590.

<sup>113</sup> *Opperman* paras 57-63.

<sup>114</sup> Marais 2016 *TSAR* 589.

<sup>115</sup> Marais 2016 *TSAR* 589.

<sup>116</sup> Marais 2016 *TSAR* 589. Also see *Opperman* paras 57-63.

<sup>117</sup> Marais 2016 *TSAR* 589-590.

<sup>118</sup> Marais 2016 *TSAR* 589-590.

constitutional property. After considering these factors, Marais<sup>119</sup> further argues that the Court must consider the core object of protecting property, which allows individuals "to lead a self-fulfilling lives in the social and economic spheres". Therefore, this provides a basis for concluding that a wine licence deserves protection under section 25.<sup>120</sup>

Similarly, Swemmer<sup>121</sup> criticises Froneman J for denouncing the subjective test to determine constitutional property and professing to adopt an objective test, only to "tacitly" rely on the subjective test. She argues that if Froneman J was trying to pursue a subjective or both an objective and subjective approach, this would be a deviation from the Court's jurisprudence and it must be made clear in future decisions.<sup>122</sup> Swemmer<sup>123</sup> argues that Froneman J's argument that a liquor licence constitutes constitutional property can only be described as being based on the subjective commercial value of the property to the owner. According to Swemmer,<sup>124</sup> to unduly refer to one's right to trade, occupation, or profession freely is a subjective approach. Therefore, the Court's instinctive reliance on the commercial value of the property while professing to be basing the investigation on an objective approach amounts to a deviation of the Court's jurisprudence. This, according to Swemmer, may create confusion regarding the correct interpretation of what constitutes property for constitutional purposes.<sup>125</sup> Nonetheless, she argues that values and rights should be viewed as subjective elements in a test. Therefore, the assessment for determining constitutional property should be regarded as considering both objective and subjective elements.<sup>126</sup> On this point she differs from Marais,<sup>127</sup> who is in favour of the objective approach for the reasons advanced above.

It appears that the subjective test is not commendable, probably because the Court has denounced it. However, because the Court's constitutional interpretive framework for deciding section 25(1) considers subjective factors, it is arguable that subjective factors should form part of deciding the

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<sup>119</sup> Marais 2016 *TSAR* 590-591.

<sup>120</sup> I suggest below that the Court must decide the question regarding property while considering the core object of protecting such property as a backdrop. This backdrop should not do too much work to the extent that it solely decides the property question.

<sup>121</sup> Swemmer 2017 *SAJHR* 288.

<sup>122</sup> Swemmer 2017 *SAJHR* 292.

<sup>123</sup> Swemmer 2017 *SAJHR* 293.

<sup>124</sup> Swemmer 2017 *SAJHR* 293.

<sup>125</sup> Swemmer 2017 *SAJHR* 290.

<sup>126</sup> Swemmer 2017 *SAJHR* 290.

<sup>127</sup> Marais 2016 *TSAR* 589-590.

property question. The consideration of such factors is not necessarily inappropriate because it gives effect to the Court's constitutional interpretive framework briefly discussed above. It is suggested that the Court may consider subjective factors as a backdrop for deciding the property questions. Such a backdrop should be relevant to the case and must not solely determine the property question without considering other objective factors.

Despite the unfortunate effect of Froneman J's approach, Van der Walt<sup>128</sup> argues that the justice was striving to interpret section 25 within a normative, contextual framework that considers the constitutional, historical and economic context relevant to the constitutional purpose and meaning of section 25, as was also the case in *FNB*. This approach seems to aim at expanding the private-law notion of property to facilitate the protection of a wide range of property-related interests, which are crucial to transformation.<sup>129</sup> Moreover, it seems that Froneman J's approach further echoes section 39(1) and (2) of the Constitution, which explicitly provides that the Bill of Rights and other legislation must be interpreted in a manner that promotes the values that "underlie an open and democratic society based on human dignity, equality and freedom" and the "spirit, purport and objects" of the Constitution respectively.

Badenhorst and Young<sup>130</sup> evaluated the various approaches adopted by the three justices in *Shoprite*,<sup>131</sup> and suggest the key features used by the Court which they think will be useful to determine whether a right falls within the notion of constitutional property. For instance, they propose that a court must adopt a right analysis approach, which is how property analysis is conducted in private law.<sup>132</sup> According to Badenhorst and Young,<sup>133</sup> the doctrine of rights, which defines rights with reference to objects, is relatively easy. Therefore, according to these authors, this process should be adopted when analysing and identifying constitutional property. They argue that the first stage of the inquiry should be the determination of the rights in question.<sup>134</sup> For instance, they indicate that in the *Shoprite* decision the right in question was a statutory right afforded to Shoprite by the holding of the licence. The content of the right was Shoprite's entitlement to carry on the

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<sup>128</sup> Van der Walt 2016 *TSAR* (Part 2) 602.

<sup>129</sup> Van der Walt 2016 *TSAR* (Part 2) 602.

<sup>130</sup> Badenhorst and Young 2017 *Stell LR* 27.

<sup>131</sup> Froneman J, Madlanga J and Moseneke J.

<sup>132</sup> Badenhorst and Young 2017 *Stell LR* 40.

<sup>133</sup> Badenhorst and Young 2017 *Stell LR* 40.

<sup>134</sup> Badenhorst and Young 2017 *Stell LR* 40.

business of selling wine alongside groceries on the same premises.<sup>135</sup> Badenhorst and Young's argument may seem to attract the notion of "conceptual severance". Conceptual severance is described as:

... a rhetorical practice by which claimants construct constitutional compensation claims for state interferences that destroy or take one aspect of their property holdings, while leaving the rest intact.<sup>136</sup>

A landowner can use the argument of conceptual severance to claim compensation because he was prevented from building a commercially viable development on his land in a certain way.<sup>137</sup> In this instance, a right that accompanies ownership, namely the right to develop the land in a certain way, can be said to have been expropriated and was therefore severed from ownership. The right to develop the land in a certain way is consequently treated as an independent and separate property right.<sup>138</sup> Accordingly, conceptual severance can be used to argue that regulatory "denial" of the right to develop the land in a certain way amounts to an expropriation that requires compensation.<sup>139</sup> It is argued that the notion of conceptual severance will have serious threats for a transformative context in that it can be utilised to insulate existing property interests against state intervention and can subject the state to impossible compensation duties.<sup>140</sup>

However, even though Badenhorst and Young argue that a court should adopt a rights analysis approach, this does not necessarily support the notion of conceptual severance. These authors seem to rely only on a "rights analysis" to characterise whether an interest in question qualifies for protection and not whether each right/entitlement is property *per se*. Therefore, their rights analysis approach seems not to treat individual entitlements as subjects for deprivation or expropriation. Nevertheless, deprivation and expropriation involve the regulation of the existence of rights or the taking away those rights, use and benefits from the owner.<sup>141</sup> Accordingly, the nature of the right, use and benefit to the owner's estate can be relied upon to characterise whether a particular interest can be recognised as property for constitutional purposes. Moreover, the limitation of these entitlements can be relied upon to determine the scope and impact of the deprivation in the arbitrariness stage and not to consider single-entitlement limitations as independent or separate deprivations of

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<sup>135</sup> Badenhorst and Young 2017 *Stell LR* 40.

<sup>136</sup> Van der Walt *Constitutional Property Law* 97.

<sup>137</sup> Van der Walt *Constitutional Property Law* 97.

<sup>138</sup> Van der Walt *Constitutional Property Law* 97.

<sup>139</sup> Van der Walt *Constitutional Property Law* 97.

<sup>140</sup> Van der Walt *Constitutional Property Law* 97-98; Marais 2018 *SAJHR* 174.

<sup>141</sup> Badenhorst and Young 2017 *Stell LR* 40.

property.<sup>142</sup> Seemingly, far from being problematic, Badenhorst and Young<sup>143</sup> suggest that determining the right in question should be the first stage of establishing what constitutes constitutional property.

The majority and minority in the *Shoprite* decision focussed on different features of the right when determining whether the object of the interest qualifies as property.<sup>144</sup> Accordingly, Badenhorst and Young suggest the consideration of some of the features raised in both the majority and minority decisions when deciding the property question. Although the list suggested is not definitive, they argue that the presence of most features points towards recognition as constitutional property.<sup>145</sup> The features that these authors suggest can be summarised as follows:

- (i) the acquisition and vesting of the right in question;
- (ii) the identifiability and definability of the right;
- (iii) the nature and content of the right;
- (iv) the objective nature of the right;
- (v) the enforceability of the right;
- (vi) the transferability and suspension or termination of the right; and
- (vii) the ability of the right to form an asset in the estate of the holder of the right.<sup>146</sup>

Badenhorst and Young<sup>147</sup> suggest that the above factors can contribute to an "evolving conversation" on the notion of constitutional property in future cases. The factors listed above are arguably linked to the characterisation of property in the ambit of private law. To suggest that the Court should rely on them seems to contradict Van der Walt's view that when considering the goal and content of the property clause, we must depart from the "private-law conceptualist" view and move to a "dynamic typical public-law" view of property.<sup>148</sup> However, this is not necessarily a contradiction. When looking at the "nature of the right" as a factor for determining whether a liquor licence

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<sup>142</sup> Van der Walt *Constitutional Property Law* 100.

<sup>143</sup> Badenhorst and Young 2017 *Stell LR* 40.

<sup>144</sup> Badenhorst and Young 2017 *Stell LR* 41. Also see Roux and Davis "Property" 20-15, who suggests that an enquiry into the property question should begin by asking whether the interest in question is recognised as a property right at common law, customary law and in terms of legislation. This approach seems like that suggested by Badenhorst and Young since it focusses on whether an interest is a property right (the right analysis approach).

<sup>145</sup> Badenhorst and Young 2017 *Stell LR* 41-42.

<sup>146</sup> Badenhorst and Young 2017 *Stell LR* 42-44.

<sup>147</sup> Badenhorst and Young 2017 *Stell LR* 46.

<sup>148</sup> Van der Walt *Constitutional Property Clause* 11.

is property, the question of whether the nature of a right is private or public is relevant.<sup>149</sup> Therefore, looking at the nature of the right and considering whether the right is private or public will still allow the Court to shift away from a private-law conceptualist view of the right and investigate the public nature of such a right. In *Shoprite* the nature of the licence in question was a public-law right. Hence, Froneman J indicated that this fact should not be used to deny a finding that a liquor licence is indeed constitutional property.<sup>150</sup> Accordingly, the fact that the nature of the right that Shoprite held over a liquor licence could not be considered as a right in traditional private property law did not result in its being excluded from consideration as property for constitutional purposes.

After commencing with the rights analysis, Badenhorst and Young<sup>151</sup> further suggest that a court should consider the interpretive framework suggested in *Shoprite* to contextualise and evaluate the undefined notion of constitutional property. In that regard a court will have to contextualise and evaluate the notion of property in the normative framework of the fundamental values and individual rights in the Constitution.<sup>152</sup> This should be done with awareness of the history of dispossession of property before the constitutional era.<sup>153</sup> Although Badenhorst and Young do not indicate how this should be done, I suggest that this context should be the basis for deciding a section 25 inquiry as a whole and should also serve as the basis for determining the property question.<sup>154</sup> This differs from the suggestion that the context must be considered after deciding whether the interest in question is property. However, even if the consideration of the framework should be a basis for determining property disputes, it should arguably not play such a great role that it alone decides the property question. This approach is arguably in line with the views of the majority in *Shoprite*, where it was suggested that regard must be had to the historical, social and constitutional context.<sup>155</sup> Therefore, the context should at least be borne in mind and serve to highlight the tensions that characterise the constitutional, legal function and character of section 25. This should be considered, bearing in mind the protection of individual property rights and the promotion of public interest in the regulation of the use and the enjoyment of property.

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<sup>149</sup> See *Shoprite* paras 40-41.

<sup>150</sup> *Shoprite* paras 58-59.

<sup>151</sup> Badenhorst and Young 2017 *Stell LR* 40.

<sup>152</sup> Badenhorst and Young 2017 *Stell LR* 40.

<sup>153</sup> Badenhorst and Young 2017 *Stell LR* 40.

<sup>154</sup> I expand on this suggested approach below.

<sup>155</sup> Madlanga J and Moseneke DCJ agreed with Froneman J that context is important in *Shoprite* paras 137, 103.

Therefore, to seek to decide whether the entitlement in question is property for the purposes of section 25(1) should not be seen as safeguarding the use and the enjoyment of such property against legitimate state regulation. With this context in mind, I suggest that the question of whether an interest in question is property for constitutional purposes should be decided using the factors suggested by Marais, Badenhorst and Young, which appear to have been sourced from the *Shoprite* decision and the criteria considered in *Opperman*. These factors can be summarised as follows:

- (i) the acquisition and vesting of the right;
- (ii) the identifiability and definability of the right;
- (iii) the nature and content of the right;
- (iv) the objective nature of the right;
- (v) the enforceability of the right;
- (vi) the transferability and suspension or termination of the right; and
- (vii) the ability of a right to form an asset in the estate of the holder of the right.

Arguably, the factors suggested above could be used in cases like *Diamond*. As was indicated in section 2.2 above, the Court in the *Diamond* decision indicated that there appears to be two approaches to determine whether licences qualify as property for the purposes of section 25. However, the Court found it unnecessary to decide on an appropriate approach that could be followed. Therefore, in view of the analysis in this section, I suggest an approach to decide whether licences such as diamond licences (or any new categories of interest) are property for constitutional purposes below.

#### **4 Conclusion: A proposed approach**

From the analysis above, it is evident that there are no clear guidelines for deciding the property question, particularly when the Court is faced with deciding whether licences or new categories of interests in property should be considered as property for constitutional purposes. I suggest that to determine whether licences are property for constitutional purposes, a court should first consider the constitutional interpretive context explained above.<sup>156</sup> The Court should highlight the tensions that characterise the

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<sup>156</sup> Van der Walt 2016 *TSAR* (Part 2) 616 argues that there could be cases where this context is not relevant or sometimes tenuous or far fetched.

constitutional and legal function and character of section 25, between the protection of individual property rights and the promotion of public interest in the regulation of the use and the enjoyment of the property. This can be done by considering subsections 25(4) to (9) of the Constitution that highlight the need to redress one of the enduring legacies of racial discrimination in the past, which is the grossly unequal distribution of land in South Africa.<sup>157</sup> In this regard, an awareness of the South African history regarding land and the mineral resources which were in the "hands of the 13 percent of the population" would be another aspect to consider.<sup>158</sup> The economic power that white South Africans had concerning mineral resources and the consideration of the history of black South Africans who were unable to benefit from the exploitation of mineral resources because of landlessness must be considered.<sup>159</sup> Moreover, the manner in which the state is dealing with the facilitation of equitable access to opportunities in the mining industry to address economic inequality should also be considered. For instance, the object of the *Diamond Act* 56 of 1986 (hereafter the *Diamond Act*), which is to control the possession, purchase, sale, processing, local beneficiation and export of diamonds could be borne in mind.<sup>160</sup> With some of this context in mind, the Court should therefore determine whether diamond licences should be considered property for constitutional purposes. This can be done by considering the factors sourced from the Court in *Shoprite* and the criteria in *Opperman*, which Marais, Badenhorst and Young suggest above. Below I briefly indicate how some of the proposed factors above could have been applied in by the Court in the *Diamond* decision to decide whether diamond licences qualify as property for purposes of section 25.<sup>161</sup>

Accordingly, it must be established first whether there is a vested and acquired right. For instance, it may need to be determined whether a right in question was acquired and vested in the owner according to the relevant statutory or regulatory requirements. A right to "produce and deal" in diamonds is acquired and vested (upon registration) to the owner in terms of the *Mineral and Petroleum Resources Development Act* 28 of 2002<sup>162</sup> and *Diamonds Act* respectively.<sup>163</sup>

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<sup>157</sup> *FNB* para 49.

<sup>158</sup> See the contextual consideration in *Agri SA* para 1.

<sup>159</sup> *Agri SA* para 1.

<sup>160</sup> Sections 14 and 15 of the *Diamond Act* 56 of 1986 (hereafter *Diamond Act*).

<sup>161</sup> The elements suggested in this section are not an exhaustive list.

<sup>162</sup> Section 5(1) read with section 19(2)(a) of the *Mineral and Petroleum Resources Development Act* 28 of 2002.

<sup>163</sup> Section 26(a) of *Diamond Act*.

The second element that may need to be considered is whether a right in question can be definable and identifiable. In *Shoprite*, Froneman J held that the right to sell liquor is definable and recognisable by persons other than the holder.<sup>164</sup> This element is arguably comparable to diamond licences because they allow the holders to produce and deal in diamonds. Therefore, it appears that the right to produce and deal in diamonds can be definable and identifiable by persons other than the holder. This is because the right to produce and deal in diamonds has value; and it is capable of being transferred and is sufficiently permanent, by the reason that the holder is protected against arbitrary revocation by the issuing authority in terms of relevant administrative law.<sup>165</sup>

The third element is the nature and content of the right. The nature of the right of ownership of diamond licences is a public-law right.<sup>166</sup> The content of the right is the entitlement to engage in the business of producing and dealing in diamonds. The objective nature of the right should also be considered. In this regard, the inquiry should focus on the objective commercial value of the right and not its subjective commercial value. This is because the Court has repeatedly indicated that the commercial value of the right is not determinative of whether it is constitutional property. Therefore, diamond licences can be said to have objective commercial value because they allow the holders to produce and sell the diamonds, which could only be performed by such members by being licence holders. Other elements that can be considered are whether a right can be enforced against others in society, the transferability and suspension or termination of such right and whether the right can form an asset in the holder's estate. Concerning the latter element, it is clear that the objective commercial value of the licence can be an asset in the estate because it allows the holders to produce and sell the diamonds.

The approach suggested above would, as a point of departure, reflect the constitutional context that Froneman J relied on and then moves along the line of Madlanga J's approach, who preferred to decide the property question through the lenses of private law. Moreover, this approach should arguably not allow the property question to be decided based solely on the fundamental values of the Constitution.

Although the fundamental values and the subjective interests of the owner are essential, it seems that too much reliance on them may unnecessarily

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<sup>164</sup> *Shoprite* para 68.

<sup>165</sup> *Shoprite* paras 59, 68.

<sup>166</sup> *Shoprite* paras 58-59.

complicate the property inquiry. To allow these fundamental values to do too much work would result in collapsing the other stages of constitutional inquiry into the property inquiry stage. The Court risks prefiguring a decision as to whether there has been deprivation and whether the deprivation of such an entitlement is arbitrary during the property stage inquiry.

Importantly, the Court must be wary of relying on fundamental values and rights in the Bill of Rights to decide whether a property interest held by juristic persons qualifies for protection under section 25(1). This is because juristic persons may not be the beneficiaries of these rights. Rights such as dignity, freedom of trade, occupation and profession seem to apply only to natural persons and not juristic persons. Therefore, if the Court is dealing with complicated categories of interests, the fundamental values and subjective interests of the holder should be considered arguably when the interests in question are held by natural persons.

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*Constitution of the Republic of South Africa*, 1996

*Customs and Excise Act* 91 of 1994

*Diamond Act* 56 of 1986

*Mineral and Petroleum Resources Development Act* 28 of 2002

### **List of Abbreviations**

ASSAL	Annual Survey of South African Law
CLR	Canterbury Law Review
JBL	Juta's Business Law
PELJ	Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
TSAR	Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg