Compensation for What? An Analysis of the Outcome in *Arun Property Development (PTY) LTD v Cape Town City*

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Abstract

In *Arun Property Development (Pty) Ltd v Cape Town City* the Constitutional Court awarded compensation for land that vested in the City of Cape Town in terms of a regulatory framework. The regulatory framework, sections 25 and 28 of the *Cape Land Use Planning Ordinance* of 1985 (*LUPO*), provides that land needed for public streets and places and indicated as such on a subdivision plan should vest in the local authority concerned, but without compensation if that land is based on the normal need of providing the particular development with such public streets and places. The appellant argued that since land in excess of the normal need also vested in the City, it had a right to be compensated for the excess land that vested in the City.

The Court, overturning two Supreme Court of Appeal decisions, awarded compensation. The Court hinted that the compensation was for the expropriation of the appellant's land that was excess to the normal need. In the absence of a formal expropriation procedure, this case note investigates whether the compensation could have been awarded for statutory expropriation or constructive expropriation.

Therefore, the question that is posed is whether the alleged expropriation for which the Court awarded compensation can be classified as either statutory expropriation or constructive expropriation. It is pointed out that the Court accepted that section 28 of the *LUPO* constitutes a development contribution for the land based on the normal need. In terms of the notion of development contributions, a developer has to donate land to the local authority concerned if that land is required to provide the particular development with public streets and places. A development contribution, as part of the administrative process of approving developments, is regulatory in nature and its validity is judged in terms of the requirements for a valid deprivation of property.

It is argued that since the Court interpreted section 28 of the *LUPO* to provide for development contributions, the alleged expropriation cannot be classified as statutory expropriation. Statutory expropriation occurs when legislation expropriates property directly through mere promulgation. In this case, the excess land vested in the City only after an administrative action was taken to approve a subdivision plan. It is also argued that statutory expropriation cannot be recognised in South African law, due to the constitutional requirements for a valid expropriation in section 25(2) of the *Constitution*.

Keywords

Expropriation; compensation; development contributions; statutory expropriation; constructive expropriation

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1 Introduction

In *Arun Property Development (Pty) Ltd v Cape Town City*[1] (hereafter *Arun*) the issue was whether

> ... a local authority that has acquired land, by operation of legislation, from a private owner in a planning approval process for a residential development, is obliged to pay compensation for the land so acquired.[2]

The local authority acquires land in terms of section 28 of the *Land Use and Planning Ordinance* 15 of 1985 (hereafter *LUPO*).[3] Section 28 provides that land in a development that is required for public streets and places will vest in the local authority without compensation "if the provision of the said public streets and public places is based on the normal need therefor arising from the said subdivision…". A distinction should accordingly be drawn between (i) land that is needed for the public streets and public places of the particular development (normal need), and (ii) land not required for public streets and places for the particular development, but still used for public streets and places (excess land). The appellant, a property development company, argued that section 28 vests all land – normal need and excess land – in the local authority. Furthermore, the appellant argued that section 28 excludes compensation for the normal need land only and not for excess land and that it therefore had the right to be compensated for the excess land acquired by the local authority.

The high court found that the relevant legislative provision vests excess land in the local authority, and that the appellant was entitled to be

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1 2015 2 SA 584 (CC).

2 *Arun* para 1.

3 The *LUPO* is set to be repealed by s 77 of the *Western Cape Land Use Planning Act* 3 of 2014. This Act was assented to on the 31st of March 2014, but to date has not yet been proclaimed. The *Spatial Planning and Land Use Management Act* 16 of 2013 necessitated the introduction of new planning legislation in the Western Cape. S 37 of the *Western Cape Land Use Planning Act* contains a provision that has an effect similar to that of s 28 of the *LUPO*. S 37(1) requires municipalities to ensure that land indicated in a subdivision plan as public places vests in the relevant municipality. Furthermore, s 37(2) states that no compensation is payable if the "provision of the public place is based on the normal need therefor arising from the subdivision".

compensated for the excess land that it had lost and the local authority (City of Cape Town Municipality) had acquired.[4] The high court did not specifically indicate whether the vesting of the excess land, for which compensation was awarded, amounted to an expropriation. The municipality appealed against the high court decision. The Supreme Court of Appeal held that the respondent (Arun Property Development) was unable to show that the alleged excess land was indeed additional to the normal need, rendering the issue of compensation moot.[5] Furthermore, the court held that the legislative provision does not enable the expropriation of excess land and therefore referred the appellant to its administrative remedies. Arun Property Development took the matter to the Constitutional Court. The Constitutional Court awarded compensation to the appellant, holding that the legislative provision vests all property indicated in the subdivision plan for public streets and places in the local authority; that such vesting of land in the local authority constitutes a legislative acquisition of the land that has the same effect as an expropriation; and that compensation must therefore be paid for the acquisition of the excess land. The regulatory provision, in as far as the Court interpreted it to vest the excess land in the local authority, was not subjected to analysis judged in terms of section 25(1) of the *Constitution of the Republic of South Africa*, 1996, (hereafter the *Constitution*), nor was any attention paid to the lawfulness of the decision of the administrator to approve the subdivision.

At the outset the Constitutional Court stated that the decision dealt with "a significant constitutional issue connected to the expropriation of land and compensation"[6] and also considered whether the vesting of the land amounted to an expropriation for which compensation was payable.[7] However, the Court did not clearly state that the compensation it awarded in the end was for the expropriation of the appellant's land. The Court merely held that the relevant legislative provision permits an *ex lege* transfer of ownership that has the same effect as an expropriation.[8]

In South African law, expropriation usually takes place on the basis of legislation such as the *Expropriation Act* 63 of 1975 (hereafter the *Expropriation Act*), which authorises a particular functionary to expropriate

4 *Arun Property Development (Pty) Ltd v City of Cape Town* 2012 ZAWCHC 399.
5 *City of Cape Town v Arun Property Developments (Pty) Ltd* 2014 JDR 0786 (SCA).
6 *Arun* para 1.
7 *Arun* paras 54-62.
8 *Arun* para 73.

property for public purposes.[9] Expropriation therefore usually occurs when an administrator, acting on the basis of authorising legislation, through an administrative action formally expropriates property. Approving the application to develop in terms of section 25 of the *LUPO* constitutes an administrative action. The vesting in terms of section 28 of the *LUPO* therefore occurs after an administrative decision to approve the development plan has been made.[10] However, in *Arun* there was no administrative action undertaken on the basis of legislation that formally expropriated the excess land. Neither section 25 nor section 28 authorises an administrator to expropriate land for town planning purposes. Therefore, the question that arises is whether the expropriation could have been effected in terms of a method other than administrative expropriation, since the legislative provision does not authorise an administrator to expropriate property.[11]

In the light of the Court's assertion that this decision deals with an issue relating to the expropriation of property and compensation, this note considers the type of expropriation that the Court awarded compensation for. One possibility is to view the legislative acquisition (the *ex lege* transfer of ownership) as statutory expropriation. Statutory expropriation is recognised in German law, and occurs when the state intends to expropriate property directly in legislation without any involvement of an administrator or the courts.[12] Another possible alternative is to view the Court's interpretation of the legislative provision as constructive expropriation (an excessive regulatory measure that has the same effect as an expropriation). Constructive expropriation is recognised in various foreign jurisdictions.[13] In terms of this notion, a deprivation (or regulatory measure) that is excessive – thereby making it impossible to justify the deprivation by the purpose of the regulation – is saved from invalidity due

9 For instance, in *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* 2011 ZASCA 246 the Minister of Public Works formally expropriated the appellant's property for a public purpose. See further Van der Walt *Constitutional Property Law* 453; Gildenhuys *Onteieningsreg* 49.

10 As shown below, the vesting of the normal need land constitutes a development contribution that is considered regulatory in nature. Therefore, the vesting in terms of the s 28 of the *LUPO* does not amount to an expropriation.

11 Section 28 of the *LUPO* authorises the transfer of the ownership of property required for the creation of streets and public places, and does not authorise the expropriation of any additional property.

12 Van der Walt *Constitutional Property Law* 457.

13 Constructive expropriation is known as regulatory takings in US law (Van der Walt *Constitutional Property Clauses* 423, 427-440) and as material expropriation in Swiss law (Van der Walt 2004 *Stell LR* 326-332).

to the importance of the regulation by treating it as an expropriation for which compensation is payable.[14]

Various factors weigh against classifying the vesting in terms of section 28 of the *LUPO* as an expropriation or something like an expropriation, irrespective of whether it may be classified as statutory expropriation or constructive expropriation. These will be highlighted in the discussion. The complex set of facts is dealt with in detail below. The Constitutional Court deviated from two Supreme Court of Appeal decisions as to whether the property developer is entitled to compensation in cases of this particular nature.[15] Consequently the Western Cape High Court and the Supreme Court of Appeal decisions are discussed together with the Constitutional Court's judgment to establish the type of expropriation for which compensation was awarded. The discussion of development contributions follows the discussion of the decisions, since the former has a bearing on the discussion as to whether the compensation was awarded for statutory or constructive expropriation.

The Constitutional Court's judgment in *Arun* is unclear about what exactly the compensation was awarded for. Therefore, this cursory analysis attempts to ask questions about the nature and the appropriateness of compensation as a remedy in this particular case. Although courts have a broad discretion to award a remedy, including compensation, that is just, equitable and appropriate in terms of sections 38 and 172 of the *Constitution*, it must be clear what the compensation is for. This contribution argues that it is not entirely clear what compensation was paid for in *Arun*. Therefore, it is questionable whether compensation was appropriate in the circumstances.

2 Arun Property Development v Cape Town City[16]

2.1 Facts

The appellant applied for the subdivision of its land for the purposes of township development. The local authority, in this instance the City of Cape Town Municipality (hereafter the City), duly approved the subdivision

14 See Van der Walt *Constitutional Property Law* 350. See further Mostert 2003 *SAJHR* 569.

15 *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2008 6 SA 12 (SCA); *City of Cape Town v Arun Property Developments (Pty) Ltd* 2014 JDR 0786 (SCA).

16 *Arun Property Development (Pty) Ltd v City of Cape Town* 2012 ZAWCHC 399; *City of Cape Town v Arun Property Developments (Pty) Ltd* 2014 JDR 0786 (SCA); *Arun Property Development (Pty) Ltd v Cape Town City* 2015 2 SA 584 (CC).

of the land in terms of section 25 of *LUPO*. In terms of the approved subdivision plan the developer had to set aside land for the creation of public streets and places required for the particular township (the land needed for this purpose only). However, in terms of the subdivision plan the developer also had to set aside additional land that was not needed for the creation of public streets and places required by the particular development, but that was earmarked for the creation of higher order roads that would eventually cut across the land. The higher order roads were demarcated in terms of a structural plan that had been approved in 1988 and it was clear that approval for subdivision would not have been granted by both the local and provincial authorities if provision had not been made for these higher order roads. The appellant's development plan therefore had to indicate and reserve land for the higher order roads.

The appellant claimed compensation for the loss of land that was set aside for the creation of the higher order roads, in other words in excess of land required for the creation of public streets and places for the particular development. The appellant relied on section 28 of the *LUPO*, which provides that "ownership of all public streets and public places" created by a particular development shall vest in the local authority without compensation if the assignment of the land to public streets and places "is based on the normal need … arising from the said subdivision". The appellant argued that section 28 excludes the payment of compensation for needed land only. Therefore, it automatically had a right to be compensated for the excess land that had been earmarked for the building of higher order roads according to the structural plan that also vested in the City.

2.2 High Court

The High Court held that section 28 vests ownership of the land earmarked for public streets and places in the local authority, even if it is in excess of the land required for the provision of public streets and places for the particular development.[17] However, section 28 permits the vesting of land in the local authority without compensation only if the land is required for the normal need of providing public streets and places for the particular development. The Court held that since section 28 automatically vests ownership in the local authority, and because no appeal and/or review procedures were available to the appellant, the appellant was entitled to compensation for the excess land. The City was therefore

[17] *Arun Property Development (Pty) Ltd v City of Cape Town* 2012 ZAWCHC 399.

ordered to pay compensation to the appellant, as determined in terms of the relevant provisions in the *Expropriation Act*.

The High Court distinguished this decision from the Supreme Court of Appeal's majority decision in *City of Cape Town v Helderberg Park Development (Pty) Ltd*[18] (hereafter *Helderberg Park Development*). As in Arun's claim, the developer in the *Helderberg Park Development* decision claimed compensation for excess land that vested in the local authority in terms of section 28 of *LUPO* after the subdivision for residential development had been approved. The facts in *Helderberg Park Development* were different, since an explicit condition was imposed on the appellant in terms of section 42(2) of the *LUPO*, according to which the developer had to cede additional land to the local authority that was in excess of the land required for the normal need of creating public streets and places, without compensation. The developer initially accepted the condition but later argued that it was entitled to compensation for the excess land. The Supreme Court of Appeal did not award compensation to the developer and held that the owner could have avoided the vesting of the land in the local authority by not proceeding with the subdivision. Alternatively, the developer could have relied on its internal appeal remedies in terms of section 44 of the *LUPO*. The Supreme Court of Appeal was of the view that what the developer sought was not compensation but constitutional damages.[19] The court therefore did not view the vesting of the excess land as an expropriation but possibly as a deprivation whose validity should have been attacked in terms of section 25(1) of the *Constitution*.[20] The Supreme Court of Appeal held that the appellant was not entitled to damages since it had to first resort to its administrative remedies. The majority therefore did not regard the vesting of the excess land as an expropriation for which compensation was payable.[21] However, Heher JA held in a minority judgment that the vesting of the land in terms of section 28 of the *LUPO* was "founded in a compulsory taking".[22] According to Heher JA, section 28 must be

18 2008 6 SA 12 (SCA).

19 On constitutional damages, see Bezuidenhout *Compensation for Excessive but Otherwise Lawful Regulatory State Action* 250-281.

20 Van der Walt *Constitutional Property Law* 271-272.

21 Van der Walt *Constitutional Property Law* 272 notes that the majority of the Supreme Court of Appeal effectively rejected the doctrine of regulatory takings (as it is known in US law) or constructive expropriation, but in effect adopted the German approach to regulation that is excessive, namely that it should be declared invalid.

22 *Helderberg Park Development* para 39. In South African law only two types of infringements with vested property rights are generally recognised, namely deprivation and expropriation. A "taking" as it is understood in US law refers to instances of formal expropriations (as in South African law) but also includes cases

"interpreted in the spirit of section 25(2) of the Constitution"[23] in as far as it effects the compulsory giving up of land of the developer to the local authority. Heher JA therefore argued that the developer was entitled to compensation for the excess land that vested in the local authority.

Furthermore, the high court distinguished the *Arun* case from the *Helderberg Park Development* decision on the basis that in the latter case a condition had been placed on the developer to cede additional land to the local authority without compensation. Since no condition had been placed on the developer in the *Arun* case, the high court found that it was not bound by the majority decision in the *Helderberg Park Development* case. Therefore, the high court followed the minority judgment of Heher JA in *Helderberg Park Development* and held that the excess land vested in the local authority in terms of section 28, and that the appellant was entitled to compensation in terms of the same section. The compensation was to be calculated in terms of the relevant provisions in the *Expropriation Act*.[24]

It is difficult to see how the presence of the explicit condition in the *Helderberg Park Development* decision distinguishes it from the *Arun* decision. In *Arun* it was clear that no approval for subdivision would have been granted without the developer having made provision for extra land for the higher order roads as required by the structural plan. This creates the impression that the developer had to sacrifice the excess land for the higher order roads if it wanted to obtain approval for the development, and that awarding compensation in this instance was probably a just and fair outcome. However, since it is not clear what exactly compensation was awarded for, the question that still needs to be addressed is whether the compensation was awarded for deprivation or for expropriation of the excess land.

The high court in *Arun* addressed neither the argument of the appellant that there was a taking of its land, nor the alternative argument that it had been constructively expropriated of its land in terms of section 26(1) of the

where a regulation that goes too far is treated as a regulatory taking for which compensation is payable: see Van der Walt *Constitutional Property Clauses* 423.

23 *Helderberg Park Development* para 41.

24 The High Court did not specifically state that compensation must be calculated in terms of s 12 of the *Expropriation Act* 63 of 1975, but since the appellant sought compensation as calculated in terms of s 12, it can be assumed that compensation was to be determined in terms of that section.

Expropriation Act.[25] The appellant argued that the vesting that occurred in terms of section 28 of *LUPO* constituted a taking, or alternatively allowed for constructive expropriation, in terms of section 26(1) of the *Expropriation Act*. However, section 26(1) applies only if a local authority exercises the right to expropriate property or takes the right to use property temporarily as contemplated by section 5 of the *Expropriation Act*. Section 5(1) refers to cases where a "local authority has the power to expropriate or to take the right to use property temporarily". Therefore, reliance on section 26(1) was misplaced and the court was probably correct in avoiding this issue.

The court held that since section 28 of the *LUPO* excludes compensation for the normal need land, compensation is automatically due if excess land vests in the local authority, since compensation is not specifically excluded in that instance. The court seems to find justification for this conclusion in the presumption that if land is confiscated from an owner, the owner is entitled to compensation unless the legislation specifically excludes compensation.[26] The court did not consider whether the vesting of excess land amounts to a justifiable limitation of the right not to be deprived of property arbitrarily in terms of section 25(1) of the *Constitution*. The court awarded compensation for the land that the appellant lost and for which section 28 of the *LUPO* did not specifically exclude compensation.

2.3 Supreme Court of Appeal

The City appealed and the Supreme Court of Appeal considered whether the respondent (Arun Property Development), on a particular interpretation of section 28 of the *LUPO*, was entitled to compensation for the excess land that vested in the City.[27] Given the high court's reliance on the minority judgment in *Helderberg Park Development*, the Court also considered whether section 28 of the *LUPO* constitutes an expropriation of property. The Court interpreted section 28 from the perspective that the purpose of the *LUPO* is to regulate orderly township development. According to the Supreme Court of Appeal, the primary purpose of section 28 is to make land available to the local authority for the creation of public streets and places to enable the local authority to fulfil its obligation in terms of the particular development that it has approved. This purpose

25 *Arun Property Development (Pty) Ltd v City of Cape Town* 2012 ZAWCHC 399 para 7.

26 See *Arun Property Development (Pty) Ltd v City of Cape Town* 2012 ZAWCHC 399 paras 9-10.

27 *City of Cape Town v Arun Property Developments (Pty) Ltd* 2014 JDR 0786 (SCA) 56.

adequately justifies the deprivation that this provision effects. Therefore, section 28 of the *LUPO* does not authorise the expropriation of land in excess of the normal need caused by the development; if it did, its constitutional validity would be questionable, since such an interpretation would fall foul of the prohibition against the arbitrary deprivation of property in section 25(1) of the *Constitution*.[28] However, it was unnecessary for the court to consider whether the vesting of the excess land in the local authority amounted to an arbitrary deprivation of property. The Court held that "there is no factual foundation to conclude that there is indeed excess land".'[29] Therefore, the appellant was not entitled to compensation, but had to resort to its administrative remedies to obtain appropriate relief for excess land that may have vested in the City.

The Court held that no compensation was payable, because it was not shown that there was any excess land. However, the Court indicated that if there were excess land, section 28 of the *LUPO* does not enable the expropriation of the excess land.[30] In this regard it can be said that section 28 does not authorise expropriation of any kind. It does not authorise an administrator to expropriate property by way of a formal expropriation procedure, which is arguably a requirement for the expropriation of property in South African law. Furthermore, this section does not authorise a court to order an expropriation in a case where the vesting of excess land occurs.

2.4 Constitutional Court

The appellant appealed to the Constitutional Court, which held that section 28 of the *LUPO* vests ownership of *all* public streets and public places indicated in the subdivision plan in the local authority. Therefore, land that

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28 *City of Cape Town v Arun Property Developments (Pty) Ltd* 2014 JDR 0786 (SCA) para 23.

29 *City of Cape Town v Arun Property Developments (Pty) Ltd* 2014 JDR 0786 (SCA) para 27.

30 *City of Cape Town v Arun Property Developments (Pty) Ltd* 2014 JDR 0786 (SCA) para 23. In this regard the position adopted by the Supreme Court of Appeal is comparable to the decision of the German Federal Constitutional Court in *BVerfGE 58, 300* 1981 (*Naßauskiesung*). In that decision the German Court held that a regulatory action that has a disproportionate effect on a property owner that cannot be justified by the purpose of the regulation, is invalid and cannot be transformed into an expropriation for which compensation is payable. The validity of the regulation must therefore be attacked and a claim for compensation does not arise since there was no authority for the expropriation. In terms of the *Junktim-Klausel* clause in German law, an expropriation is considered to be valid only if the expropriation is authorised by legislation which also sets out the manner in which compensation is to be determined: see Van der Walt *Constitutional Property Clauses* 142.

is required for the provision of public streets and places needed for the particular development as well as land earmarked for public streets and places not strictly required for the particular development but required for higher order roads vests in the local authority. The Court held that section 28 justifiably excludes compensation when the land that vests in the local authority relates to the provision of public streets and places arising from the normal need of the particular subdivision. In the Court's view, a developer that creates the need for public streets and places by applying for subdivision must sacrifice land free of charge for that purpose. The Court also stated that "it makes sense to expect the developer to bear the burden of providing the land, free of charge, for the purpose of public roads,'"[31] since "[t]hey are the developer's 'give' for the value-add a subdivision approval brings".[32]

The Court held that the vesting of the excess land in terms of section 28 of the *LUPO* can be seen as a "legislative acquisition of the developer's land without compensation".[33] According to the Court there is no relation between the "compulsory taking away"[34] of the excess land without compensation and the purpose of creating public streets and places for the particular development. Therefore, even though the excess land may be beneficial to the creation of regional roads, it is not an "adequate or compelling public consideration"[35] for the local authority to acquire the excess land free of charge. Therefore, if compensation is not paid in the event that excess land vests in the local authority, section 28 of the *LUPO* will be in conflict with section 25(2) of the *Constitution*.[36]

Given this approach, the Court considered whether the vesting of land in terms of section 28 of the *LUPO* constitutes an expropriation of property. The City's argument was that the reservation of public streets for future road networks constitutes a deprivation of property and not an expropriation. Even when the land that vests in the City exceeds the land strictly required for the creation of public streets and places for the particular development, this does not mean that the deprivation concerned is elevated to an expropriation. The City therefore maintained that the appellant had to show that the deprivation was arbitrary.

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31 *Arun* para 35.
32 *Arun* para 40.
33 *Arun* para 40.
34 *Arun* para 40.
35 *Arun* para 41.
36 *Arun* para 41.

The Court accepted, without deciding that an "expropriation occurs by state coercion and without the consent of the affected owner".[37] However, the loss of ownership in this instance was caused by legislation as soon as the approval for subdivision was granted and not by direct administrative action, which in the Constitutional Court's view did not assist the City's argument. The owner applying for subdivision would be aware of the fact that he has to sacrifice parts of the land for public streets and places, but not that he would have to sacrifice land unrelated to the normal need of the particular development. In this regard, the Court stated that the City had not forwarded any plausible reason or public interest why the vesting of the excess land was with the consent of the appellant.[38] As a result, the Court held that *if* section 28 of the *LUPO* vests land beyond the normal need arising from a particular subdivision, the owner is entitled to compensation. The City, relying on *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government*[39] (hereafter *Reflect-All*), also argued that legislation preventing development on land does not amount to an expropriation but rather amounts to a deprivation of property. The Court distinguished *Reflect-All* on the basis that in *Reflect-All* no land vested in the local authority; reliance on *Reflect-All* therefore did not prevent the appellant from claiming compensation for the expropriation of its property.[40] The Court therefore held that since section 28 constitutes an *ex lege* transfer of ownership, which has the same effect as an expropriation, compensation for the excess land calculated in terms of the *Expropriation Act* was payable to the appellant.[41]

3 The vesting of land without compensation: development contributions and the difference between deprivation and expropriation

37 *Arun* para 58, with reference to Van der Walt *Constitutional Property Law* 344.

38 The City also argued that the appellant should have exhausted the available remedies before claiming compensation. In this regard, the City suggested that Arun could have sought the amendment of the structure plan that provided for public roads in excess to those required for the specific development, or could have instituted review proceedings and requested that the decision to reserve excess land be set aside. The Court was of the view that since the transfer of ownership occurred by operation of law, and that since it was akin to an expropriation, the appellant had a statutory right to compensation and therefore could rely on this right directly.

39 2009 6 SA 391 (CC).

40 *Arun* para 62.

41 Even though the Court held that reliance on *Reflect-All* did not prevent the appellant from claiming compensation for the expropriation of its property, the Court did not clearly state that the compensation it eventually awarded was for the expropriation of the appellant's property.

The Constitutional Court held that section 28 of the *LUPO* vests *all* land required for public streets and places indicated in the subdivision plan in the local authority regardless of whether or not the land is strictly required for the establishment of public streets and places for the particular development. However, the Court distinguished between the vesting of land based on the normal need and the vesting of land in excess of the normal need, and also judged its validity in terms of different considerations.

With regard to the land based on the normal need, the Court held that it is legitimate to expect the developer to donate land free of charge for the establishment of public streets and places, since the developer created the need for such streets and places in the first place, and donating such land free of charge is considered to be the developer's contribution towards the value-add that the approval of the subdivision brings. The Court's argument in this regard is in line with the notion of development contributions (or "exactions", in terms of United States law) in constitutional property law.[42] In terms of this notion, a developer seeking permission to develop land must donate land to the local authority if that land is necessary for the provision of public streets.[43] This makes it possible for the local authority to fulfil its obligations with regard to providing public streets and places and therefore no compensation is payable for the land required for these public streets and places, which usually vest in the local authority. Without the possibility of acquiring land in this manner, the authority would either fail in its obligations with regard to the particular development or be forced to negotiate the purchase of the land to fulfil them. In terms of US law, requiring exactions in return for the approval of a development is a legitimate exercise of the state's regulatory powers only if there is an "essential nexus"[44] and "rough proportionality"[45] between the exaction and the impact of the development.[46] In this regard, the Constitutional Court's view that land use regulation that requires a developer to part with land free of charge is legitimate as long as it relates

42 For a discussion on development contributions, see Van der Walt *Constitutional Property Law* 290-292.

43 See Van der Walt *Constitutional Property Law* 290.

44 *Nollan v California Coastal Commission* 483 US 825 (1987). See also Singer *Introduction to Property* 736-737.

45 *Dolan v City of Tigard* 512 US 374 (1992). See also Singer *Introduction to Property* 736-737.

46 See Van der Walt *Constitutional Property Law* 290. In *South Peninsula Municipality v Malherbe* 1999 2 SA 966 (C) 984G-I the court held that a development contribution is *ultra vires* and therefore invalid if it does not relate to the expected impact of the particular development.

to the provision of public streets and places based on the normal need of the development as sanctioned by section 28 of the *LUPO* accords with the position in US law. The sacrifice of land required for the provision of public streets and places for the particular development that is not disproportionate or excessive would in all probability not constitute an arbitrary deprivation of property and is arguably a justifiable limitation of the developer's right to property. It must be emphasised that it is accepted that development contributions, as part of the administrative process of approving developments, are regulatory in nature and their validity should therefore be judged in terms of the requirements for a deprivation in terms of section 25(1) of the *Constitution*.

In this regard the Court correctly interpreted section 28 of the *LUPO*, which forms part of a bigger scheme that regulates orderly township development, as a development contribution requiring a developer to part with the needed land without compensation. It would therefore have been logical to also test the vesting of the excess land in the local authority in terms of the requirements for a valid deprivation in section 25(1) of the *Constitution*. This argument is underlined by the fact that there was no formal expropriation procedure and that the purpose of the *LUPO* is to regulate orderly township development.[47]

Section 25(1) of the *Constitution* states that "[n]o one may be deprived of property except in terms of law of general application". A deprivation in terms of section 25(1) must therefore be authorised by law of general application.[48] The Constitutional Court accepted that section 28 of the *LUPO* "does not authorise any deprivation beyond normal needs".[49] It is clear that if the Court had judged the deprivation of the excess land with reference to the requirements for a valid deprivation, the deprivation of the excess land would have been unlawful, since there was no authority for the deprivation of the excess land. In the event that a deprivation is not authorised in terms of a law of general application, such a deprivation will be in conflict with section 25(1) and therefore invalid.

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47 See Gildenhuys and Grobler "Expropriation" paras 28-35 for a description of the expropriation procedure in terms of the *Expropriation Act* 63 of 1975.

48 See Van der Walt *Constitutional Property Law* 232.

49 *Arun* para 60. The Court held that any deprivation beyond the normal need would be arbitrary due to a lack of authority. In this regard, the Court is not entirely correct. If s 28 of the *LUPO* does not authorise any deprivation beyond the normal need and excess property were to vest, it would not be *arbitrary* due to a lack of authority, but *invalid* due to a lack of authority. The question of arbitrariness does not arise in cases where there is no authority for the deprivation.

The fact that there is no authority for the deprivation of the excess land also has implications for viewing the vesting of the land as an expropriation and the appropriateness of awarding compensation. 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*[50] (hereafter *FNB*) the Court held that all expropriations are deprivations and that all expropriations must first be judged in terms of the requirements for a valid deprivation in terms of section 25(1). If the vesting of the excess land constitutes an expropriation, such an expropriation would also be invalid in that the deprivation of the excess land is not authorised, and therefore by extension the expropriation is also not authorised. However, it has been customary to go directly to section 25(2) of the *Constitution* if it is clear that expropriation is at hand and only the public purpose or public interest requirement or the amount of compensation is at stake.[51] In circumventing section 25(1) of the *Constitution* in this regard, the validity of any apparent expropriation must still be considered in terms of section 25(2) of the *Constitution*.[52]

Even if the Court accepted that section 28 of the *LUPO* authorises the vesting of land beyond the normal need, the vesting of the excess land would probably constitute an arbitrary deprivation of property and would be invalid on that basis. In terms of the arbitrariness test set out in *FNB*,[53] a deprivation will be arbitrary if there is insufficient reason for the deprivation or if it is procedurally unfair. Sufficient reason may in some cases be established by a rationality-type test and in others by a proportionality-type test. In *Arun* there was arguably no rational relationship between the sacrifice that the appellant had to make with regard to the excess land and the impact of the particular development. The excess land that was acquired was wholly unrelated to the provision of public streets and places for the particular development. The Court even accepted that there was no relation between the acquisition of the excess land without compensation and the purpose of creating public roads for the development, which is the main concern of the rationality enquiry.[54] The Court could therefore have invalidated the vesting of the

50 2002 4 SA 768 (CC) para 46.

51 See *Du Toit v Minister of Transport* 2006 1 SA 297 (CC); *Haffejee v Ethekwini Municipality* 2011 6 SA 134 (CC). Also see Slade "Less Invasive Means" para 3.3.

52 See *Erf 16 Bryntirion (Pty) Ltd v Minister of Public Works* 2011 ZASCA 246.

53 *FNB* para 46.

54 At para 40 the Court in *Arun* stated that "[t]he compulsory taking away of the excess land without compensation is not properly related to the purpose of developing a township development with adequate public roads and spaces".

excess land in the local authority on the basis that it amounted to an arbitrary deprivation of property.

The City also argued that the vesting of land in terms of section 28 of the *LUPO* does not constitute an expropriation but a deprivation, thereby urging the Court to apply the section 25(1) analysis. The City, as indicated above, relied on *Reflect-All,* where the Court held that the reservation of land for the creation of future road networks constitutes a deprivation and not an expropriation. The Court, however, distinguished the present matter from *Reflect-All* on the basis that in *Reflect-All* the land that was reserved for future road networks did not vest in the City. Since the Court had already indicated that section 28 of the *LUPO* vests all land earmarked for public streets and places in the local authority, it stated that the arguments raised by the City in this regard were "no bar to the appellant claiming compensation for the expropriation of its land".[55] According to the Court's logic, the appellant was able to claim compensation from the local authority because the excess land vested in the City. If the excess land had not vested in the local authority, the Court would in all probability have followed *Reflect-All* and held that the appellant had been deprived of property, and judged the deprivation's validity in terms of the requirements for a valid deprivation in section 25(1). However, just because the excess land vested in the local authority does not necessarily mean that the interference with the appellant's property rights cannot still be regarded as a deprivation and judged in terms of section 25(1).

In relation to the argument of the City that the vesting of land in terms of section 28 of the *LUPO* constitutes a deprivation and not an expropriation, the Court noted that arguments with regard to the difference between deprivation and expropriation were not placed before it, nor had the lower courts discussed this issue. The Constitutional Court also refrained from engaging thoroughly with this issue, but incidentally considered whether the vesting of the land in terms of section 28 of the *LUPO* constituted an expropriation.

The difference between a deprivation and an expropriation is not entirely clear. Deprivation is usually defined "by contrasting it in some way with expropriation".[56] In the *FNB* decision the Constitutional Court held that expropriation is a subset of deprivation; all expropriations are also

55 *Arun* para 62.
56 Van der Walt *Constitutional Property Law* 196.

deprivations, but not all deprivations will necessarily be expropriations.[57] With regard to the difference between deprivation and expropriation, the Constitutional Court in *Agri South Africa v Minister for Minerals and Energy*[58] (hereafter *Agri SA*) held that "more is required to establish expropriation".[59] In *Agri SA* the Court held that there can be no expropriation where a deprivation does not also result in the state acquiring the property.[60] Therefore, an expropriation entails that the state acquires the property concerned, while a deprivation entails the regulation of property – presumably placing a limitation on one of the entitlements relating to property – without the state's necessarily acquiring any property.[61]

According to the Court's jurisprudence, state acquisition sets deprivation apart from expropriation. In *Arun*, the Court interpreted section 28 of the *LUPO* to cause all land indicated in the subdivision plan for public streets and places, irrespective of whether it was required for the particular development or for higher order roads, to vest in the local authority. The Court also refrained from evaluating the vesting of the excess land in the local authority in terms of section 25(1). Therefore, the legislative acquisition of the appellant's land, in as far as it related to the excess land, arguably constituted an expropriation for which compensation had to be paid. However, even if acquisition of property sets expropriation apart from deprivation since there can be no expropriation where the state does not acquire property,[62] it does not mean that all instances of state acquisition can be seen as an expropriation. In some instances, state actions that result in the state's acquiring property are not treated as expropriation but as a deprivation that must comply with the requirements in section 25(1) of the *Constitution*. For instance, the confiscation and forfeiture of property in terms of legislation is judged against the requirements for deprivation

57 The Court also held that the distinguishing feature between a deprivation and an expropriation is that expropriation is compensated, while deprivation is not.

58 *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) (hereafter *Agri SA*).

59 *Agri SA* para 48.

60 *Agri SA* para 59.

61 See Van der Walt *Constitutional Property Law* 196. The state, in exercising its regulatory powers, may in some cases destroy property when regulating property, but generally through regulation the state restricts the use, enjoyment and exploitation of property in some form or another, but leaves the property substantively intact: Van der Walt *Constitutional Property Law* 196.

62 *Agri SA* para 59.

found in section 25(1) of the *Constitution*.[63] Furthermore, in terms of the notion of development contributions discussed above, the state acquires the land, but the acquisition is not viewed as an expropriation and its legitimacy is judged against the requirements for a valid deprivation in terms of section 25(1) of the *Constitution*. This was also accepted by the Court. However, the Court elected not to test the validity of the vesting of the excess land on the basis of the requirements for the deprivation of property in section 25(1) of the *Constitution*.

The Court therefore did not evaluate the vesting of the excess land in the local authority in terms of section 25(1) of the *Constitution*, but instead awarded compensation for the legislative acquisition of the appellant's land. It is clear that the compensation was not awarded for a deprivation of the appellant's land. The question then remains whether the compensation was awarded for expropriation and if so for what type of expropriation.

4 Compensation for statutory expropriation

The Court held that the vesting of the excess land in the local authority in terms of section 28 constituted a legislative acquisition of property and that it had the same effect as an expropriation. Furthermore, the Court indicated that compensation would save the provision from being declared invalid in terms of section 25(2) of the *Constitution*.[64] However, the Court neither explicitly confirmed that the appellant had been expropriated of land nor explicitly stated that the compensation it awarded was for the expropriation of such land. In the absence of a formal expropriation procedure, where an administrator – empowered by legislation – expropriates property, it can be asked whether the compensation was awarded for statutory expropriation.

Certain foreign jurisdictions, like Germany, recognise statutory expropriation,[65] which occurs when the state intends to expropriate property directly in legislation without any involvement of an administrator or the courts.[66] The property concerned is expropriated for a public purpose through the mere promulgation of the particular legislation.[67] The

63 See *Director of Public Prosecutions: Cape of Good Hope v Bathgate* 2000 2 SA 535 (C); *National Director of Public Prosecutions v Prophet* 2003 6 SA 154 (C). See further Van der Walt *Constitutional Property Law* 314-333.

64 *Arun* para 41.

65 See Van der Walt *Constitutional Property Clauses* 147.

66 Van der Walt *Constitutional Property Law* 457.

67 Van der Walt *Constitutional Property Law* 457. See further Gildenhuys and Grobler "Expropriation" para 3.

Supreme Court of Appeal in *Minister of Minerals and Energy v Agri SA*[68] held that it had not been suggested that expropriation cannot be effected through statutory expropriation. Gildenhuys and Grobler[69] also suggest that "legislative" expropriation is accepted in South African law.[70] However, recognising the apparent expropriation in the *Arun* decision as statutory expropriation poses difficulties on two counts.

Firstly, it is questionable whether statutory expropriation can be recognised in South African law due to the constitutional requirement that an expropriation must be "in terms of law of general application". According to Van der Walt, this formulation does not provide for the expropriation to take place "*by* law of general application" but only "*in* terms of law of general application".[71] This makes the acceptance of statutory expropriation unlikely in South African law. It would probably be in conflict with section 25(2) of the *Constitution*. If legislation, through mere promulgation, expropriates specific property, a constitutional challenge on the basis that expropriation may occur only in terms of a law of general application and not by a law of general application may be successful.

Secondly, assuming that statutory expropriation can be recognised in South African law, the alleged expropriation in the present case does not fit the mould of statutory expropriation. Statutory expropriation entails the direct expropriation of identified properties for public purposes by legislation clearly and explicitly tailored for that purpose.[72] It is clear that the legislature must intend to expropriate specified properties and must do so explicitly through the promulgation of legislation. In the present case, section 28 of the *LUPO* contains no provision to that effect. The section provides for the vesting of land without compensation only if that land relates to the normal need of creating public streets and places. Furthermore, the acquisition in terms of section 28 was/is not caused by the promulgation of legislation. The acquisition in the present case was caused by an administrative decision, not to expropriate, but to approve a subdivision plan.

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68 *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) para 15.

69 Gildenhuys and Grobler "Expropriation" para 3.

70 Gildenhuys and Grobler "Expropriation" para 3 refer to *FNB* paras 57-59 and state that this "concept [legislative expropriation] is discussed in the context of the Customs and Excise Act 91 of 1964". However, in the relevant paragraphs of the *FNB* judgment no mention is made of the concept of legislative or statutory expropriation. Furthermore, the *FNB* decision dealt with the deprivation of property and not the expropriation of property, making any possible pronouncement on legislative expropriation *obiter*.

71 Van der Walt *Constitutional Property Law* 434. Own emphasis.

72 Van der Walt *Constitutional Property Law* 434.

Upon further analysis it appears that there is a another factor that weighs against statutory expropriation in the present case. The Court accepted that section 28 of the *LUPO* legitimately requires an owner applying for subdivision to donate land to the local authority for the creation of public streets and places. The contribution that the owner has to make is considered an acceptable limitation in terms of the notion of development contributions or exactions, as discussed above. The Court accepted that section 28 of the *LUPO* constitutes a development contribution for the land required for creating public streets and places for the particular development. Section 28 cannot also provide for expropriation through the promulgation of legislation. Consequently section 28 of the *LUPO* does not constitute statutory expropriation.

5 Compensation: constructive expropriation

In the analysis above it is pointed out that the Court evaluated the vesting of the land based on the normal need in terms of the notion of development contributions, which are understood to fall under the state's regulatory powers and are therefore judged in terms of the requirements for a valid deprivation. However, the Court did not evaluate the vesting of the excess land in the City in terms of the deprivation analysis. In this regard, the Court may have effectively sidestepped the issue of constructive expropriation.

Constructive expropriation relates to a grey area that may exist between deprivation and expropriation.[73] In terms of this notion, a deprivation (or regulatory measure) that is excessive – thereby making it impossible to justify the deprivation by the purpose of the regulation – is saved from invalidity due to the importance of the regulation by treating it as an expropriation for which compensation is payable.[74] In terms of this doctrine, the regulation imposes a severe or excessive regulatory

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73 Van der Walt *Constitutional Property Law* 350. The question whether constructive expropriation is recognised in South African law is contested. In *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA), the Supreme Court of Appeal raised the idea of recognising constructive expropriation, but it was not necessary for the court to pronounce on this issue. Van der Walt *Constitutional Property Law* 377 and Gildenhuys and Grobler "Expropriation" para 4 argue against recognising constructive expropriation. In an earlier work, Gildenhuys *Onteieningsreg* 140 left the question open whether or not constructive expropriation forms part of South African law. See further Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 553-557; Mostert 2003 *SAJHR*.

74 See Van der Walt *Constitutional Property Law* 350. See also Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's Law of Property* 553-554.

limitation on a particular owner.[75] The court transforms the deprivation into an expropriation for which compensation is payable.[76] It is therefore clear that in terms of the doctrine of constructive expropriation a court considers whether the regulatory action imposes a severe or excessive burden on a particular owner and, instead of declaring it invalid, awards compensation.

Therefore, constructive expropriation would be recognised only in cases where a court has considered whether a regulatory measure imposes a severe or excessive burden on a particular owner, and instead of declaring it invalid, awards compensation. The Court in *Arun* accepted that section 28 of the *LUPO* vests all land identified for the use of public streets and places in the local authority. However, with regard to the vesting of the excess land the Court never considered whether the regulatory measure that caused the vesting imposed an excessive burden on the appellant. The Court held that the excess land vested in the local authority by means of a legislative acquisition. The fact that the Court in *Arun* never regarded the vesting of the excess land in the local authority as a regulatory measure counts against the recognition of constructive expropriation in this particular instance.

Furthermore, if the Court had considered whether the vesting of the excess land in terms of a regulatory measure constituted a deprivation of property, the first question to ask would be whether there was any authority for the deprivation. The Court, as pointed out above, stated that section 28 of the *LUPO* does not authorise the deprivation of land beyond the normal need. If the Court had judged the vesting of the excess land in terms of section 25(1) of the *Constitution*, it would probably have held that the deprivation was invalid due to a lack of authority. If a deprivation is not authorised by a law of general application it is invalid, and compensation cannot render the deprivation valid. Therefore, since the Court never considered the vesting of the excess land in the local authority in terms of the requirements for a valid deprivation, but interpreted the legislative acquisition of land as analogous to an expropriation, the issue regarding constructive expropriation remains moot.

6 Conclusion

In the *Arun* decision the Constitutional Court framed the issue as being concerned with the expropriation of land and compensation. However, in this case there was no formal expropriation procedure whereby an

75 Van der Walt *Constitutional Property Law* 351-353.
76 Van der Walt *Constitutional Property Law* 351-353.

administrator expropriated property on the basis of authorising legislation by serving an expropriation notice on the property owner. The Court nevertheless awarded compensation for a regulatory measure that it interpreted to effect a vesting of excess land in the City, that it constituted an *ex lege* transfer of ownership (that has the same effect as an expropriation) and that the owner had to be compensated for the vesting of the excess land.

In the absence of a formal expropriation procedure, this case note considered whether the compensation that the Constitutional Court awarded could have been for statutory expropriation or constructive expropriation. It was argued that it is unlikely that the compensation was awarded for the statutory expropriation of the excess land, in that the legislation does not provide for or effect the expropriation of any land, but merely allows for the vesting of land based on the normal need without any compensation. Although the outcome of the decision appears to point towards the recognition of constructive expropriation, it was argued that the compensation could not have been for a constructive expropriation because the Court did not consider the vesting of the excess land to be a regulatory measure that may have had a disproportionate effect on the particular owner. By extension this also implies that the compensation could not have been awarded for a regulatory measure that would have been invalid but for the payment of compensation.

Therefore, the compensation was not awarded for a formal expropriation, since there was no formal expropriation procedure. It is also argued that the compensation could not have been awarded for a statutory expropriation or for constructive expropriation. In this regard it remains unclear for what type of infringement the Court awarded compensation. This decision therefore creates uncertainty with regard to when a claimant is entitled to compensation for an expropriation in the absence of a formal expropriation procedure or the authority to expropriate.

It is trite that the state can regulate the use, enjoyment and exploitation of property in terms of enabling legislation, and that such regulation must comply with the requirements set out in section 25(1) of the *Constitution*. The state may also expropriate property on the basis of authorising legislation and the expropriation must also comply with the requirements set out in section 25(2) of the *Constitution*.[77] The authority to regulate and

[77] A deprivation and expropriation that is effected through an administrative action is also reviewable in terms of the *Promotion of Access to Administrative Justice Act* 3

expropriate must therefore flow from specific legislation that authorises the particular action. It is imperative that the legislation must be specific as to the type of action that is authorised. For instance, the *South African National Roads Agency Limited and National Roads Act*,[78] amongst others, specifically authorises the minister of transport to expropriate property for the construction of national roads. The *LUPO*, on the other hand, regulates orderly township development and is not specifically intended to expropriate property. In certain instances the municipality may, through regulation, acquire land that is required to provide the development it has approved with public streets and places, but the acquisition of this normal land should occur strictly in terms of a regulatory framework. The *LUPO*, as a regulatory measure, does therefore not authorise the City (or the state) to expropriate property. As a result, the award of compensation in the *Arun* decision for an alleged expropriation seems to have been misplaced.

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List of Abbreviations

SAJHR	South African Journal on Human Rights
Stell LR	Stellenbosch Law Review