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AMOUNT TO EXPROPRIATION? AN ANALYSIS OF THE *Agri SA*  
COURT'S STATE ACQUISITION REQUIREMENT (PART I)**

ISSN 1727-3781



**2015 VOLUME 18 No 1**

<http://dx.doi.org/10.4314/pej.v18i1.02>

**WHEN DOES STATE INTERFERENCE WITH PROPERTY (NOW) AMOUNT TO  
EXPROPRIATION? AN ANALYSIS OF THE *Agri SA* COURT'S STATE  
ACQUISITION REQUIREMENT (PART I)\***

**EJ Marais\*\***

## **1 Introduction**

Section 25 of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*) provides two ways in which the state may interfere with property rights, namely deprivation (section 25(1)) and expropriation (section 25(2)). According to section 25(1) property may only be deprived in terms of law of general application, which law may not permit arbitrary deprivation. Section 25(2), in turn, stipulates that property may only be expropriated in terms of law of general application for a public purpose or in the public interest against payment of compensation. In its most basic form, deprivation entails limitations on the use, enjoyment and exploitation of property in the public interest – well-known examples include zoning laws, nuisance laws and fire regulations.<sup>1</sup> The public interest in this regard mostly relates to the protection of public health and safety or the state's role in resolving civil disputes.<sup>2</sup> Deprivation is sourced in the state's regulatory police power and usually affects large groups of people in society more or less equally.<sup>3</sup> For these reasons deprivations are normally not compensated.<sup>4</sup> Expropriation, on the other hand, derives from the state's power of

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\* Part II follows in the same edition of this journal.

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<sup>1</sup> Sax 1964 *Yale LJ* 36-37, 62-63; Van der Walt *Constitutional Property Law* 195-197; Allen *Commonwealth Constitutions* 174-175, 179-180; Van der Walt *Constitutional Property Clauses* 333-334. See also *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) para 100; *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) para 63.

<sup>2</sup> See the sources in the previous fn. See further s 2.3 of Part II of this article.

<sup>3</sup> See the sources referred to in fn 1 above.

<sup>4</sup> See, for instance, *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) para 63 (South African law); *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) 413 and *Mugler v Kansas* 123 US 623 (1887) 665 (both United States law), which confirm that the state may legitimately interfere with property rights – even drastically – through its regulatory police power without having to pay compensation for every infringement which diminishes established property values.

eminent domain and typically involves situations where the state acquires property from one person – or a small group of persons – for a public purpose or in the public interest, such as building roads or airports, upon which the affected owner(s) receives compensation.<sup>5</sup>

Distinguishing between these two forms of state interference is easy in the examples mentioned. However, it becomes difficult when cases move into the "grey area" where deprivation starts to blur into expropriation.<sup>6</sup> Indeed, taxation and criminal forfeiture are but two examples of property interferences which (based on their effects) seem to be more akin to expropriation than deprivation, since both entail involuntary losses of property to the state.<sup>7</sup> Yet it would be pointless to regard them as expropriation which requires compensation.<sup>8</sup> Properly classifying infringements that fall into this grey area is what presents challenges to constitutional property scholars. As only expropriation carries the obligation to pay compensation, there is an incentive for property holders to label any interference with their property as expropriation. For this reason it is crucial to have a principled distinction between these forms of limitation, especially in view of the dangers that uncertainty in this regard could hold for land reform initiatives in the South African context, where legitimate (but burdensome) regulatory measures could be challenged as amounting to expropriation which requires compensation.

In the leading decision on the property clause, namely *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>9</sup> (FNB), the Constitutional Court laid down a

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<sup>5</sup> See the sources in fn 1 above. See further s 2.3 of Part II of this article.

<sup>6</sup> Van der Walt *Constitutional Property Law* 196-199. See also Allen *Commonwealth Constitutions* 162-163. The distinction between deprivation and expropriation, in terms of their respective effects, is not always clear, hence the grey area. Deprivation is said to usually involve non-acquisitive interference with property, although it can in some instances result in the states acquiring property, while expropriation mostly entails state acquisition of property, though this (again) need not always be the case: see Van der Walt *Constitutional Property Law* 198-200. See further in this regard the discussions in ss 1.2-1.3 of Part II of this article. I expand on how this grey area may be understood in view of recent case law in fn 54 below.

<sup>7</sup> Sax 1964 *Yale LJ* 75-76; Van der Walt *Constitutional Property Law* 347-349; Allen *Commonwealth Constitutions* 162-163.

<sup>8</sup> Sax 1964 *Yale LJ* 75-76; Van der Walt *Constitutional Property Law* 335, 347-348; Allen *Commonwealth Constitutions* 163.

<sup>9</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) para 46. The

methodology for deciding section 25 disputes. A central aspect of this methodology is the way in which the Court approached the distinction between deprivation and expropriation. Ackermann J distinguished between them by setting up expropriation as a smaller category that falls within the larger category of deprivation. According to this approach expropriation forms a subset of deprivation, which means that all expropriations are also deprivations though only some deprivations will amount to expropriations. For this reason the adjudication of all property disputes must start with section 25(1). If the infringement at hand does not satisfy the requirements for a valid deprivation<sup>10</sup> and cannot be justified in terms of section 36(1), then that will be the end of the matter. The impugned law will be declared unconstitutional. The question whether or not the interference amounts to expropriation under section 25(2) will therefore not arise under these circumstances.<sup>11</sup> Consequently, whether a property infringement amounts to either deprivation or expropriation has lost much of its significance in the wake of *FNB*, since distinguishing between them became relevant only at a later stage of the inquiry.<sup>12</sup>

However, in subsequent cases<sup>13</sup> the Constitutional Court indicated it will not always follow the *FNB* methodology strictly and that it is willing to go straight to the section 25(2) question, should parties focus on the expropriation requirements. This approach underscores the importance of having a proper distinction between deprivation and expropriation, as such a distinction might now very well be the decisive factor in section 25 disputes. Indeed, this distinction is now even more prominent in view of

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authority of *FNB* has been confirmed in a number of subsequent decisions of the Constitutional Court. See, for example, *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC); *National Credit Regulator v Opperman* 2013 2 SA 1 (CC); *Haffejee v eThekweni Municipality* 2011 6 SA 134 (CC); *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC); *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bissett v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng* 2005 1 SA 530 (CC).

<sup>10</sup> In other words, if the deprivation is not authorised by law of general application or if the authorising statute permits arbitrary deprivation of property: see s 25(1) of the *Constitution of the Republic of South Africa*, 1996.

<sup>11</sup> According to Roux "Property" 46-2-46-3, 46-19-46-20, 46-32 the "telescoping" effect of the non-arbitrariness test in s 25(1) will prevent most (if not all) expropriation cases from ever reaching the s 25(2) stage of the inquiry.

<sup>12</sup> Roux "Property" 46-29; Van der Walt 2004 *SALJ* 867-869. See also Iles "Property" 534-535.

<sup>13</sup> Such as *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC); *Haffejee v eThekweni Municipality* 2011 6 SA 134 (CC); *Du Toit v Minister of Transport* 2006 1 SA 297 (CC).

the Court's recent decision in *Agri South Africa v Minister for Minerals and Energy*<sup>14</sup> (*Agri SA*). The applicant in this case argued that the *Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA; the Act)*, upon its commencement, effectively expropriated all mineral right holders of their pre-2002 mineral rights. As the parties to the case accepted that the deprivation caused by the Act amounted to non-arbitrary deprivation of property, the Court only had to decide if there was an expropriation of the applicant's mineral rights. Mogoeng CJ, writing for the majority, rejected this assertion by holding that the key characteristic that differentiates deprivation from expropriation is state acquisition of property.<sup>15</sup> The fact that the state did not acquire "ownership" of (or at least the right to exploit) the affected mineral rights led the Court to conclude that there was no acquisition and hence no expropriation.

Two aspects of this judgment require attention. Firstly, the Court decided there cannot be expropriation if the state does not acquire the substance or core content of the affected property. It is worth emphasising that most expropriations indeed result in the state acquiring property. However, the fact that acquisition is a general consequence of expropriation does not necessarily mean it is also an indispensable requirement for it.<sup>16</sup> The Constitutional Court's emphasis on this "requirement" therefore makes it necessary to clarify its meaning and role in our law. Secondly, the effect-centred nature of the Court's test<sup>17</sup> to determine whether state acquisition (and therefore expropriation) took place or not appears incapable of coherently categorising property infringements that fall within the grey area mentioned earlier. It follows that there must be other reasons – besides the fact that acquisition occurred – why these interferences do not amount to expropriation.

To address these two questions this article is divided into two parts. Part I investigates the meaning and role of state acquisition. It begins (in section 2) by setting out the changes introduced to the minerals regime by the *MPRDA*, after which the focus turns to the Constitutional Court's *Agri SA* decision and how it formulated the state

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<sup>14</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC).

<sup>15</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 58-59.

<sup>16</sup> Van der Walt *Constitutional Property Law* 197, 345. See also the discussion in s 1.2 of Part II of this article.

<sup>17</sup> I expand on this test in s 2.3 below.

acquisition requirement. Against this background section 3 analyses South African expropriation law up until *Agri SA* for the purposes of comparing how state acquisition (during that time) relates to the position in Mogoeng CJ's judgment. This investigation reveals that state acquisition, as formulated in *Agri SA*, probably has the same meaning as in pre-constitutional law, although it appears that it was never an absolute requirement for expropriation during that era. In this regard both pre- and (at least some) post-constitutional judgments – as well as Australian constitutional property law – reveal that merely inquiring whether or not the state acquired property for distinguishing between deprivation and expropriation is unable to produce reliable results in all instances.

Part II of the article explains the shortcomings of only relying on state acquisition in the expropriation context. Section 1 (of that article) considers three scenarios which indicate why the acquisition of property by the state, on its own, is unable to properly distinguish between deprivation and expropriation. Against this background Part II proposes (in section 2) an alternative approach to Mogoeng CJ's approach, one which focuses on the purpose, as opposed to the effect, of the impugned statute to answer the expropriation question. To this end I rely on *Harksen v Lane*<sup>18</sup> (*Harksen*) and also on Australian constitutional property law as influenced by the work of Sax.<sup>19</sup> Section 3 then summarises the conclusions drawn in the sections referred to.

## 2 The *Agri SA* judgment

### 2.1 *Changes to the minerals regime*

It is necessary to first discuss developments surrounding the enactment of the *MPRDA* and the facts of the *Agri SA* case so as to understand Mogoeng CJ's judgment.<sup>20</sup> This Act came into operation on 1 May 2004 and brought about a major "institutional

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<sup>18</sup> *Harksen v Lane* 1998 1 SA 300 (CC).

<sup>19</sup> I rely on Allen's view (Allen *Commonwealth Constitutions* 174-179) of how the theory developed by Sax 1964 *Yale LJ* 36-76 influenced the expropriation jurisprudence of the Australian High Court. See further s 2.3 of Part II of this article.

<sup>20</sup> A detailed discussion of the changes introduced by this Act, as well as the previous minerals regime, is beyond the scope of this article. For a more comprehensive discussion on this topic, see Mostert *Mineral Law*, especially ch 4-7.

regime change" in South Africa's mineral and petroleum law.<sup>21</sup> The *MPRDA* was enacted in view of sections 24<sup>22</sup> and 25<sup>23</sup> of the *Constitution*, which mandate the state to realise certain reforms in the mineral sector.<sup>24</sup>

The primary objectives of the *MPRDA* include bringing about "equitable access to and sustainable development of the nation's mineral and petroleum resources" and ensuring that "the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development".<sup>25</sup> To realise these purposes the Act introduced fundamental changes to the ways in which rights in mineral and petroleum resources may be acquired, held and exploited. Under the pre-2002<sup>26</sup> minerals regime these rights were traditionally held in private ownership, although even during this time they were subject to extensive state regulation.<sup>27</sup> One of the central changes brought about by the *MPRDA* in this context is that it replaced the existing rights-based regime with a licence-based one.<sup>28</sup> The Act affected this change by providing a process whereby holders of pre-existing mineral rights could convert these rights into so-called "new order" rights. In terms of Schedule II to the *MPRDA* pre-existing prospecting and mining rights, as well as unused mineral rights, remained in force after the

<sup>21</sup> Van der Walt *Constitutional Property Law* 418. See also Mostert *Mineral Law* 78.

<sup>22</sup> See especially s 24(b)(iii) of the *Mineral and Petroleum Resources Development Act* 28 of 2002 (the *MPRDA*): "Everyone has the right– (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that– (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development".

<sup>23</sup> See especially s 25(4)(a) of the *Constitution*: "For the purposes of this section the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources".

<sup>24</sup> The purposes behind the Act are *inter alia* to give effect to the South African state's custodianship of the country's mineral and petroleum resources, to ensure ecologically sustainable development of these resources, to promote economic growth and mineral and petroleum resources development, to ensure that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development and to promote equitable access to these resources to all South Africans – especially those belonging to historically disadvantaged groups: see the preamble as well as s 2 of the *MPRDA*. These reformative goals must be understood against the backdrop of the social injustices that occurred in the mineral sector during apartheid, when non-white persons were excluded from partaking in and benefiting from the exploitation of South Africa's mineral wealth.

<sup>25</sup> See the preamble of the *MPRDA* as well as s 2(c) and 2(h) of the Act.

<sup>26</sup> I use the year in which the *MPRDA* was promulgated – as opposed to the year of its commencement – for the purposes of referring to the pre- and post-*MPRDA* minerals regimes.

<sup>27</sup> Van der Walt *Constitutional Property Law* 403-404; Mostert *Mineral Law* 78, 93-94, 113-115, 136, 140; Badenhorst and Mostert 2003 *Stell LR* 384-393.

<sup>28</sup> Van der Walt *Constitutional Property Law* 404. See also Mostert *Mineral Law* 113-115, 129.

commencement of the Act for certain periods of time.<sup>29</sup> During these periods the holders of pre-existing mineral rights (which are referred to as "old order rights" under the post-2002 regime) were granted the opportunity to convert them into new order rights via a conversion process. If the holders of old order rights did not – or could not – apply for conversion before the expiration of the relevant deadline, the rights in question ceased to exist on that date.<sup>30</sup>

Section 5(1) of the Act stipulates that new order prospecting and mining rights are limited real rights in respect of the mineral or petroleum and the land to which they relate. Yet, despite the real character of these rights they are generally understood to be weaker and "lesser" in content than their old order counterparts.<sup>31</sup> Firstly, new order rights are – unlike old order rights – not perpetual in nature,<sup>32</sup> since the *MPRDA* limits both their period of existence as well as the periods for which they may subsequently be renewed.<sup>33</sup> While holders of unused old order mineral rights could freely transfer or encumber them during the pre-2002 regime (the *ius disponendi*),<sup>34</sup> new order prospecting and mining rights may be transferred or encumbered only with the written consent of the Minister.<sup>35</sup> Furthermore, holders of unused old order rights lost the entitlement to sterilise the minerals to which these rights pertained by opting to leave them in the ground unexploited (the *ius abutendi*).<sup>36</sup> In terms of Item 8(1) of

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<sup>29</sup> See Items 6-8 of Schedule II to the *MPRDA*. Old order prospecting rights remained in force for two years after the commencement of the *MPRDA*, old order mining rights for a period not exceeding five years, and unused old order rights for a period not exceeding one year.

<sup>30</sup> Item 8(4) of Schedule II to the *MPRDA*.

<sup>31</sup> Badenhorst and Mostert 2003 *Stell LR* 397; Mostert *Mineral Law* 104-105, 113-115; Van der Walt *Constitutional Property Law* 407-408.

<sup>32</sup> Badenhorst and Mostert 2003 *Stell LR* 385, 397; Van der Walt *Constitutional Property Law* 407. See also Badenhorst 2013 *THRHR* 484-485.

<sup>33</sup> See ss 17-18 of the *MPRDA* for new order prospecting rights. Prospecting rights, once granted, are valid for up to five years. The holder of the prospecting right is allowed to apply for renewal at the expiration of this period. However, a renewed prospecting right may not exceed a period of three years. Ss 23-24 govern the position of new order mineral rights. A mineral right granted under the *MPRDA* is valid for up to 30 years. Mineral rights may be renewed for further periods, each of which may not exceed 30 years at a time. Prospecting and mining right holders obtain the exclusive right to apply for renewal of that right: see ss 19(1)(b) and 25(1) of the *MPRDA* respectively. For a more detailed discussion, see Mostert *Mineral Law* 82-84.

<sup>34</sup> Badenhorst and Mostert 2003 *Stell LR* 397; Van der Walt *Constitutional Property Law* 407-408; Mostert *Mineral Law* 93, 140. See also Badenhorst 2013 *THRHR* 484-485.

<sup>35</sup> Section 11(1) of the *MPRDA*. Mostert *Mineral Law* 138, 141 thinks that when the *MPRDA* came into operation the holders of unused old order rights were from that moment unable to dispose of these rights before the completion of the conversion process.

<sup>36</sup> Mostert *Mineral Law* 93, 138-140, 142. See also Badenhorst 2013 *THRHR* 484-485 and Van der Vyver 2012 *De Jure* 135-136.



Schedule II to the *MPRDA*, holders of unused old order rights retained those rights for a maximum period of one year after the commencement of the Act. During this period the holders of these rights had the exclusive right to apply for the conversion of their rights into either new order prospecting or mining rights under the Act against payment of a non-refundable application fee.<sup>37</sup> In the event of the holder of unused old order rights failing or being unable to make the necessary application before the expiration of the one-year period, those rights ceased to exist.<sup>38</sup> Consequently, the holders of such old order rights no longer had the *ius abutendi* and therefore had to activate these rights within the allotted time or risk losing them.

The effects that the *MPRDA* had on the mineral rights enjoyed by mineral right holders under the pre-2002 minerals regime, especially concerning the *ius abutendi*, could aptly be described as far-reaching. For these reasons Agri South Africa regarded the impact of the Act as amounting to an expropriation of old order mineral rights, especially in view of Item 12(1) of Schedule II to the Act, which stipulates that any person who can prove that his or her property has been expropriated in terms of the *MPRDA* may claim compensation from the state. Agri South Africa subsequently identified a "test case" to challenge the constitutionality of the Act, namely the facts surrounding Sebenza Mining (Pty) Ltd (Sebenza).

## **2.2 The facts**

Sebenza was the holder of unused coal rights which it acquired in 2001 for an amount of R1 048 800. As stated in the preceding section, the previous minerals regime not only permitted mineral right holders to use, transfer or encumber their unactivated mineral rights as they saw fit but also to leave them unexploited if they preferred to do so. When the *MPRDA* came into effect Sebenza became the holder of unused old order coal rights on that date. According to Item 8(2) of Schedule II to the *MPRDA* Sebenza had the exclusive right to convert its old order coal rights into either new order prospecting or mining rights via the conversion process. Until Sebenza converted

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<sup>37</sup> Item 8(2) of Schedule II to the *MPRDA* read with ss 16(1)(c) (prospecting right) and 22(1)(c) (mining right). See also Mostert *Mineral Law* 139-140 for the requirements of the application process.

<sup>38</sup> See fn 30 above.

these rights into new order rights its old order rights effectively remained "in limbo". Sebenza was no longer entitled to leave its mineral rights unexploited as before nor was it allowed to transfer or encumber these rights until after they had been converted.<sup>39</sup> In what followed Sebenza was – for reasons irrelevant to this discussion – placed under liquidation and could thus not lodge the application to convert its old order coal rights into new order rights. Sebenza's liquidators eventually attempted to sell its coal rights to another company. However, the sale was cancelled after it became apparent that Sebenza's mineral rights had ceased to exist upon expiration of the one-year period provided in the *MPRDA*.<sup>40</sup> Agri South Africa subsequently took session of Sebenza's rights and claims for the purpose of challenging the constitutionality of the Act.

Agri South Africa instituted proceedings in the North Gauteng High Court because of the alleged expropriation of Sebenza's coal rights after its claim for compensation was rejected by the Department of Mineral Resources. When the case came up for decision on the merits,<sup>41</sup> the court *a quo* held that the *MPRDA* resulted in the expropriation of Sebenza's mineral rights and that it was therefore entitled to compensation.<sup>42</sup> The Minister of Minerals and Energy, dissatisfied with this result, took the matter on appeal. In the Supreme Court of Appeal Agri South Africa changed its line of attack by arguing that the very enactment of the *MPRDA* – as opposed to the mere extinguishment of Sebenza's rights upon the expiration of the one-year period – resulted in the expropriation of all pre-2002 mineral rights in South Africa.<sup>43</sup> Wallis AJ (on behalf of the majority) overturned the decision of the court *a quo* by holding that the Act did not result in expropriation, since Sebenza was not deprived of any "property" upon

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<sup>39</sup> According to s 11(1) of the *MPRDA* a new order prospecting or mining right cannot be encumbered, sold or transferred without the written consent of the Minister of Minerals and Energy.

<sup>40</sup> Section 8(4) of Schedule II to the *MPRDA*.

<sup>41</sup> *Agri South Africa v Minister of Minerals and Energy* 2012 1 SA 171 (GNP). The first case on the matter, namely *Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* 2010 1 SA 104 (GNP), was decided on exception.

<sup>42</sup> *Agri South Africa v Minister of Minerals and Energy* 2012 1 SA 171 (GNP). A discussion of this decision, as well as the one decided on exception, is beyond the scope of this article. For an analysis of these judgments see Van Niekerk and Mostert 2010 *Stell LR* 158-171; Mostert *Mineral Law* 126-154; Badenhorst and Olivier 2012 *THRHR* 329-343; Van der Walt *Constitutional Property Law* 430-451.

<sup>43</sup> *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) para 4.

the commencement of the *MPRDA*.<sup>44</sup> Agri South Africa, in turn, appealed to the Constitutional Court.

### **2.3 The Constitutional Court judgment**

In the Constitutional Court Agri South Africa maintained the position it had adopted in the Supreme Court of Appeal and argued that even though the state – through enacting the *MPRDA* – had not acquired the exact mineral rights or entitlements lost by Sebenza, the Act extinguished Sebenza's rights so as to release them for allocation by the state to third parties.<sup>45</sup> Against this background they regarded the extinguishment of entitlements enjoyed by pre-2002 mineral right holders as amounting to expropriation.

To decide the section 25 dispute the Constitutional Court confirmed the *FNB* methodology by first considering if the affected interest amounted to constitutional property. Mogoeng CJ held that Sebenza's unactivated mineral rights<sup>46</sup> indeed constituted property for purposes of the property clause.<sup>47</sup> However, the Court then went straight to the fifth phase of the methodology, namely whether the interference at hand amounted to the expropriation of property in terms of section 25(2), instead of first ascertaining whether the infringement amounted to a deprivation of property.<sup>48</sup> Indeed, Mogoeng CJ did not decide the section 25(1) question at all and merely assumed that the impact which the *MPRDA* had on Sebenza's mineral rights amounted to a non-arbitrary deprivation of property, as accepted by the parties in the case before him.<sup>49</sup>

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<sup>44</sup> *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) para 85. For an analysis of this judgment see Badenhorst 2013 *THRHR* 472-490.

<sup>45</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 56.

<sup>46</sup> Which included the entitlement not to exploit the minerals to which these rights relate.

<sup>47</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 32-46. This finding is contrary to the ruling of Wallis AJ in *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) para 85.

<sup>48</sup> Ascertaining whether the property interference amounts to deprivation in terms of s 25(1) constitutes the second phase in the *FNB* methodology: See *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) para 46. As said in the introduction, this deviation from the *FNB* methodology is not new and corresponds to decisions such as *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) and *Haffejee v eThekweni Municipality* 2011 6 SA 134 (CC), where the Constitutional Court also went straight to the s 25(2) question for similar reasons.

<sup>49</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 50-53, 67-68.

Thus, the central question that confronted the Constitutional Court was whether or not the *MPRDA* resulted in a blanket expropriation of all pre-2002 mineral rights upon its commencement. Reliance was placed on the subset or sub-species approach laid down in *FNB* for the purpose of distinguishing between deprivation and expropriation.<sup>50</sup> This dichotomy implies that there are elements which these two forms of state interference have in common, although certain characteristics apply to expropriation only. Against this background Mogoeng CJ identified three characteristics which – in his view – set expropriation apart from deprivation, namely (i) compulsory acquisition of property by the state, (ii) for a public purpose or in the public interest and (iii) against payment of compensation. The latter two points are uncontroversial, as they merely confirm the requirements in section 25(2).<sup>51</sup> It is interesting, though, that the Court "returned"<sup>52</sup> to state acquisition (as laid down in *Harksen*) as a requirement which applies to expropriation only, especially since Ackermann J's way of distinguishing between deprivation and expropriation seems to have watered down such a categorical distinction.<sup>53</sup> Nevertheless, it must be

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<sup>50</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) para 57, cited with approval in *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 48. In this paragraph Mogoeng CJ found there is an overlap between deprivation and expropriation and that no bold line of demarcation exists between them. As stated in the introduction, this view regards expropriation as a subset of the larger category of deprivation – in other words all expropriations are also deprivations, though only some deprivations will be expropriations.

<sup>51</sup> When comparing s 25(1) and 25(2) it appears as if the only requirements that do not apply to deprivation are the public purpose or public interest requirement as well as the compensation requirement. However, Van der Walt *Constitutional Property Law* 225-232 convincingly argues that the non-arbitrariness requirement in s 25(1) entails an implicit public purpose or public interest requirement. For a contrary view that does not regard the non-arbitrariness requirement in s 25(1) as being similar to the public purpose or public interest requirement in s 25(2), see Van der Vyver 2012 *De Jure* 130. Van der Vyver's argument is unattractive, though. Firstly, it is overly formalistic in that it relies on a literalist interpretation (see Du Plessis *Re-interpretation of Statutes* 93-94, 102-103) of the difference between the words "arbitrary" in s 25(1) and "public purpose" and "public interest" in s 25(2), especially when considering the meaning attributed to "arbitrary" in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100: see Van der Walt *Constitutional Property Law* 228 and fn 108. Secondly, it disregards the position in foreign law discussed by Van der Walt *Constitutional Property Law* 225-227, which shows that a valid public purpose is mostly required for regulatory deprivations even when a country's property clause might not mention this requirement at all (such as US law). See further *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) para 63.

<sup>52</sup> The Constitutional Court first laid down state acquisition as an essential requirement for expropriation in *Harksen v Lane* 1998 1 SA 300 (CC).

<sup>53</sup> Van der Walt 2004 *SALJ* 867-869. After *FNB* it was uncertain whether state acquisition was required for purposes of expropriation, as no explicit mention is made of it in s 25: see Van der Vyver 2012

emphasised that *FNB's* subset approach does not contradict the distinction in *Harksen* – it was therefore still possible for the Constitutional Court to regard state acquisition as one of the essential differences between deprivation and expropriation.<sup>54</sup> Mogoeng CJ confirmed this view by ruling that even though deprivation encapsulates the extinguishment of a right, the same is "not necessarily true"<sup>55</sup> for expropriation.<sup>56</sup>

The fact that the Constitutional Court now regards state acquisition as the key distinction between deprivation and expropriation makes it necessary to ascertain the meaning of this requirement. Mogoeng CJ defined it as follows:

[A] claimant must establish that the state has acquired the substance or core content of what it was deprived of. In other words, the rights acquired by the state do not have to be exactly the same as the rights that were lost. There would, however, have to be sufficient congruence or substantial similarity between what was lost and what was acquired. Exact correlation is not required. ... *There can be no expropriation in circumstances where deprivation does not result in property being acquired by the state.*<sup>57</sup> (Own emphasis.)

In support of this finding the Court referred to section 25's reformatory and protective roles and emphasised that the tension which exists between these two interests must be considered when interpreting the property clause.<sup>58</sup> It specifically highlighted the public interest as including the nation's commitment to providing equitable access to

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*De Jure* 131-133; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 542; Van der Walt 2002 *THRHR* 464-465.

<sup>54</sup> Van der Walt 2004 *SALJ* 867. According to Van der Walt (867) both *Harksen* and *FNB* seem to exclude any overlaps or grey areas in between deprivation and expropriation. Nevertheless, the distinction between these two forms of interference becomes blurred the moment when the difference between them pivots on the effect of the infringement rather than the authorising source: see Van der Walt *Constitutional Property Law* 198-200. The fact that the *Agri SA* court regards the effect of the property interference (ie whether or not state acquisition occurred) as the defining characteristic of expropriation therefore confirms the existence of a grey area in between these two infringement forms, since there are certain property interferences – such as taxation and criminal forfeiture – which are simply not easily categorised as either deprivation or expropriation based solely on their effects. See further the discussion in fn 6 above as well as s 1.3 of Part II of this article. Compare *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 48, where Mogoeng CJ held that there is an overlap [or grey area] between deprivation and expropriation and that no bold line of demarcation exists between them.

<sup>55</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 48.

<sup>56</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 48 and 58, relying on *Harksen v Lane* 1998 1 SA 300 (CC) paras 31-33 and *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) para 64.

<sup>57</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 58-59.

<sup>58</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 60-63, citing *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) paras 49-50.

South Africa's natural resources – as espoused in section 25(4)(a) – and that one must be cautious not to over-emphasise private property rights at the expense of the state's social responsibilities. Mogoeng CJ held that while a too narrow meaning of acquisition might undermine the constitutional protection of property in terms of section 25(2), an "overly liberal" interpretation of this requirement could blur the line between deprivation and expropriation.<sup>59</sup> Such a blurring, so the argument goes, poses a threat to the state's legitimate reform initiatives (such as the *MPRDA*) in that they may potentially be struck down for resulting in expropriation without compensation.

For these reasons the Court found it necessary to attribute a so-called "proper meaning" to state acquisition when deciding section 25(2) cases, which meaning must be established on an *ad hoc* or case-by-case basis.<sup>60</sup> In this respect Mogoeng CJ opted for a context-based inquiry to establish the meaning of acquisition, which inquiry depends on an interplay between various factors, namely

- (i) the source of the affected right;
- (ii) the nature of the right;
- (iii) the content of the right;
- (iv) the measures taken to interfere with or preserve the essence of the affected right; and
- (v) balancing individual property rights with the purpose behind the interference.<sup>61</sup>

In terms of the latter factor it appears that "acquisition" will be interpreted more narrowly in cases concerning transformation-oriented legislation (such as the present one) than what might otherwise be the case.<sup>62</sup> Indeed, the *Agri SA* court attached significant weight to this factor by finding that the state had to acquire *ownership* of

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<sup>59</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 63, relying on the *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) paras 23-24.

<sup>60</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 60-72, citing *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) paras 23-24. Mogoeng CJ (para 64) specifically ruled against a "one-size-fits-all" approach for determining what acquisition entails. See Van der Walt *Constitutional Property Law* 342-344 for criticism of using such an *ad hoc* approach.

<sup>61</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 64-65, citing *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) paras 23-24. The first factor is analogous to one of the factors used in Australian law to establish whether there was an "acquisition" of property as meant in s 51(xxxi) of the *Commonwealth Constitution* (1900): see the discussion in s 3.4 below.

<sup>62</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 65.

the mineral rights lost by Sebenza for the interference to amount to expropriation. The Court regarded the fact that the state was not entitled to exploit Sebenza's rights (ie did not have "ownership" of them) as central to why acquisition had not taken place.<sup>63</sup> In this regard Mogoeng CJ drew a distinction between what happens when the state acquires "ownership" of mineral rights and when it acquires ownership of land for purposes such as building railways or hospitals. In other words, for there to be an expropriation the state must acquire ownership of or the right to exploit the affected property, at least when the purpose behind the deprivation is of a transformative nature.

The Constitutional Court concentrated on the effect<sup>64</sup> the *MPRDA* had on Sebenza's mineral rights to ascertain if acquisition – and therefore expropriation – took place.<sup>65</sup> The Court's context-sensitive inquiry was therefore essentially effect-centred, as it seems that it would have been satisfied in the present context if the *MPRDA* had the effect of vesting the right to exploit Sebenza's minerals in the state. Allen<sup>66</sup> describes such an approach as the "legalist view of interpretation" in that courts – when deciding whether or not expropriation took place – will "not ask *why* the state acquire[d] the property, but merely *whether* the state has acquired the property". Mogoeng CJ concluded that even though the state was now the custodian of the country's mineral wealth, this had not resulted in it acquiring the substance of pre-2002 mineral rights from holders such as Sebenza.<sup>67</sup> When the *MPRDA* came into operation it merely abrogated the entitlement to sterilise unused old order mineral rights as well as the

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<sup>63</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 68-71.

<sup>64</sup> The effect that an infringement has on property already played an important role in categorising it as either deprivation or expropriation before *Agri SA* was decided: see Iles "Property" 538, who cites *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) para 100; *Offit Enterprises (Pty) Ltd v Coega Development Corporation (Pty) Ltd* 2011 1 SA 293 (CC) para 41; *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bissett v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng* 2005 1 SA 530 (CC) para 45.

<sup>65</sup> Interestingly, Mogoeng CJ made scant reference to Item 12(1) of Schedule II to the *MPRDA* in his judgment and did not consider s 55 of the Act at all. This underscores the effect-based nature of the Court's approach to establish whether or not expropriation occurred.

<sup>66</sup> Allen *Commonwealth Constitutions* 163-164 (own emphasis). It is due to this interpretation of the difference between deprivation and expropriation that there is probably now (after the *Agri SA* judgment) a grey area between these two forms of state interference: compare Van der Walt *Constitutional Property Law* 198-200 as well as the discussions in fns 6 and 54 above.

<sup>67</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 71.

ability to freely dispose of those rights; it did not transfer those entitlements to the state. The Court reasoned that mineral right holders were still able to exercise other entitlements concerning the mineral rights, and that the abolition of the specified entitlements had not led to their acquisition by the state or anyone else.<sup>68</sup> The *MPRDA*, so it was maintained, did not enable the state to exploit the affected rights. Against this background the *Agri SA* court ruled that the *MPRDA* had not resulted in the expropriation of Sebenza's mineral rights.

### 3 The meaning and role of state acquisition

#### 3.1 Introduction

In the wake of *Agri SA* there can (now) be no expropriation if the state does not acquire ownership of or the right to exploit the affected property, at least in cases where the impugned statute has a transformative purpose. It is therefore necessary to clarify the meaning and role of this requirement for future expropriation cases, especially since no express mention of it is made in section 25 of the *Constitution*.

Mogoeng CJ relied on two decisions for the purposes of construing the acquisition requirement, namely *Harksen* and *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government*<sup>69</sup> (*Reflect-All*). The Court's indirect reliance on pre-constitutional case law through *Harksen* makes it necessary to analyse these cases along with South African expropriation law prior to the coming into operation of the *Constitution of the Republic of South Africa 200 of 1993 (Interim Constitution)* and the final *Constitution*. After this discussion I briefly turn to how the Constitutional Court viewed state acquisition in *Harksen* and *Reflect-All* before examining how these judgments – as well as pre-constitutional law – relate to Mogoeng CJ's interpretation of this requirement. From this investigation it appears that how the *Agri SA* court interpreted state acquisition broadly relates to how it was

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<sup>68</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 71: "But for sterilisation, the core right was left intact and capable of full enjoyment by those who wished to and were able to exploit it. Neither the state nor other entities or people acquired the rights to sterilise, monopolise the exploitation of minerals or sell, lease or cede Sebenza's old order rights on 1 May 2004."

<sup>69</sup> *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC).



construed in pre-constitutional law. Against this background I rely on Australian constitutional property law to help establish the meaning of state acquisition. Interestingly, pre-constitutional law reveals that state acquisition (though a helpful indicator for deciding whether or not expropriation occurred) was never an absolute requirement for expropriation – a conclusion which is similar to the position in Australian law. In this sense acquisition now fulfils a more prominent role in South African law than was the case before the *Agri SA* judgment was handed down.

### **3.2 Pre-constitutional expropriation law<sup>70</sup>**

To determine the meaning and role of state acquisition in the pre-constitutional era it is first necessary to establish the meaning of "expropriation" during this period. Expropriation has always been described as an original method of acquisition of ownership in South African law.<sup>71</sup> The expropriated property vests in the state *ex lege* on the date of expropriation and without the co-operation of the previous owner. The state does not derive its title from that of the previous owner and therefore registration of ownership in the Deeds Office is not a requirement.<sup>72</sup> The power to expropriate accrues to the state and it can be exercised only in terms of legislation which specifically authorises expropriation.<sup>73</sup> In this regard it is said that every expropriation must rest upon a "legislative foundation,"<sup>74</sup> which means that expropriation cannot

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<sup>70</sup> It must be emphasised that pre-constitutional decisions pertaining to the meaning of expropriation must be approached with circumspection when ascertaining the meaning of "expropriation" for purposes of s 25(2): see Van der Walt 2002 *THRHR* 469; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 542. See also *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) para 59.

<sup>71</sup> Section 8(1) of the *Expropriation Act* 63 of 1975 (the *Expropriation Act*) (see similarly s 10(1)(a) of the *Expropriation Bill* of 15 March 2013); *Pretoria City Council v Modimola* 1966 3 SA 250 (A) 258; *Beckenstrater v Sand River Irrigation Board* 1964 4 SA 510 (T) 515; *Stellenbosch Divisional Council v Shapiro* 1953 3 SA 418 (C) 422-423; *Kent v South African Railways* 1946 AD 398 405-406. See also Van der Walt *Constitutional Property Law* 344-345; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 173, 559; Gildenhuis *Onteieningsreg* 11, 64-65, 119; Van der Merwe *Sakereg* 294-295; Gildenhuis *Onteieningsreg* LLD-thesis 6-7, 52. This position was confirmed in *Harksen v Lane* 1998 1 SA 300 (CC) paras 32-33. Sonnekus and Pleyzier 2011 *TSAR* 603-607, however, are critical of describing expropriation as an original method of acquisition of ownership.

<sup>72</sup> Section 8(1) of the *Expropriation Act*; *Government of the Republic of South Africa v Motsuenyane* 1963 2 SA 484 (T) 488; *Stellenbosch Divisional Council v Shapiro* 1953 3 SA 418 (C) 422-423; *Kent v South African Railways* 1946 AD 398 405-406.

<sup>73</sup> *Pretoria City Council v Modimola* 1966 3 SA 250 (A) 258; *Joyce & McGregor Ltd v Cape Provincial Administration* 1946 AD 658 671. See also Gildenhuis *Onteieningsreg* 9-10, 49, 93 and Van der Walt *Constitutional Property Law* 343-344.

<sup>74</sup> *Joyce & McGregor Ltd v Cape Provincial Administration* 1946 AD 658 671.

take place in terms of the common law.<sup>75</sup> The empowering statute must set out the circumstances, procedures and conditions under which expropriation may take place.<sup>76</sup> An act of expropriation which is not based on such legislation is void.<sup>77</sup> The *Expropriation Act* 63 of 1975 (the *Expropriation Act*; the Act) is the main authority in this regard and applies to most expropriations,<sup>78</sup> although it does not codify this field of law.<sup>79</sup>

Most courts and academic commentators simply define expropriation as when an owner is deprived of property, which property then vests in the state or a juristic person on whose behalf the property was expropriated.<sup>80</sup> The *Expropriation Act* does not provide a definition for "expropriation" and merely stipulates (in section 2(1)) that the relevant Minister may expropriate any property or take the right to temporarily use property for public purposes.<sup>81</sup> The fact that the expropriatee loses rights in the property and that the expropriator subsequently acquires them was therefore regarded from early on as a general hallmark of expropriation.<sup>82</sup> Defining expropriation

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<sup>75</sup> *Harvey v Umhlatuze Municipality* 2011 1 SA 601 (KZP) para 81; *Joyce & McGregor Ltd v Cape Provincial Administration* 1946 AD 658 671. See also Gildenhuis *Onteieningsreg* 49-50, 75; Van der Walt and Marais 2012 *LitNet Akademies* 304-305; Sonnekus and Pleysier 2011 *TSAR* 602-607.

<sup>76</sup> Gildenhuis *Onteieningsreg* 9-10; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 559.

<sup>77</sup> Gildenhuis *Onteieningsreg* 49.

<sup>78</sup> Gildenhuis *Onteieningsreg* 44-46, 51, 75; Van der Merwe *Sakereg* 292.

<sup>79</sup> Section 26(1) of the *Expropriation Act*, which provides that expropriation in accordance with other acts which authorise it is still possible. See similarly s 2 of the *Expropriation Bill* of 15 March 2013.

<sup>80</sup> Sections 8(1), 8(7) and 3(3) of the *Expropriation Act* (see similarly s 10(1)(a) of the *Expropriation Bill* of 15 March 2013); *Tongaat Group Ltd v Minister of Agriculture* 1977 2 SA 961 (A) 972; *Pretoria City Council v Modimola* 1966 3 SA 250 (A) 258; *Wallis v Johannesburg City Council* 1981 3 SA 905 (W) 908-909; *Beckenstrater v Sand River Irrigation Board* 1964 4 SA 510 (T) 515; *Minister van Waterwese v Mostert* 1964 2 SA 656 (A) 667; *Stellenbosch Divisional Council v Shapiro* 1953 3 SA 418 (C) 422-423; *Fitchat v Colonial Secretary and Central South African Railways* 1910 ORC 46 48. See also *Harksen v Lane* 1998 1 SA 300 (CC) paras 31-32. See further Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 102, 541, 563; Mostert 2003 *SAJHR* 572-573; Hopkins and Hofmeyr 2003 *SALJ* 51; Gildenhuis *Onteieningsreg* 61; Van der Merwe *Sakereg* 291; Southwood *Compulsory Acquisition* 14; Kleyn 1996 *SAPL* 437; Chaskalson and Lewis "Property" 31-14-31-15; Badenhorst 1989 *THRHR* 137; Gildenhuis *Onteieningsreg* LLD-thesis 51-52, 66-67. However, Sonnekus and Pleysier 2011 *TSAR* 603-607 disagree with this view. According to these authors the act of expropriation entails the reclassification of the expropriated object from a *res in commercio* to a *res publicae*, which is *res extra commercium* and therefore not susceptible for private ownership. The authors therefore think it is incorrect to describe expropriation as "state acquisition of property", as the expropriated object is no longer "property" from the moment when the state expropriates it.

<sup>81</sup> The *Expropriation Bill* of 15 March 2013 defines "expropriation" as including the taking of a right to use a property temporarily and also states that "expropriate" has a corresponding meaning.

<sup>82</sup> Compare *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 77-78 (Cameron J's minority judgment).

as state acquisition of property where the object of expropriation is ownership of land is understandable in view of the fact that expropriation is an original method of acquisition of ownership, since that which is lost by the expropriatee will normally be more or less similar to what is acquired by the expropriator. This position is exemplified by *Tongaat Group Ltd v Minister of Agriculture*<sup>83</sup> (*Tongaat*), which is one of the most cited decisions regarding the meaning of expropriation.

*Tongaat* concerned an appellant/expropriatee who wanted to claim additional compensation for losses he would suffer in future (after the expropriation took place) when the state eventually realised the purpose for which his property was expropriated.<sup>84</sup> The Appellate Division of the Supreme Court (as it then still was) therefore had to decide whether the meaning of "expropriation"<sup>85</sup> in terms of the *Expropriation Act* 55 of 1965 extends to losses incurred by the expropriatee under these circumstances. Rumpff CJ rejected the appellant's argument and held that the "ordinary meaning" of expropriation applies in the present instance, which entails "*n handling deur die Staat (of ander bevoegde instansie) waardeur o.a. grond van die eienaar ontnem word en die eiendom van die Staat word, en nie ... gebruik ná onteiening nie*".<sup>86</sup> Consequently, expropriation entails situations where the state or someone else acquires the affected property and does not extend to the use of the property by the state *after* the expropriation took place.

Even though expropriation mostly concerns the ownership of land, it must be emphasised that the state can also expropriate rights in land other than ownership. The *Expropriation Act* is somewhat misleading in this regard in that it defines "property" as meaning both movable and immovable property, which creates the

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<sup>83</sup> *Tongaat Group Ltd v Minister of Agriculture* 1977 2 SA 961 (A). Goldstone J relied on his decision to define expropriation: see *Harksen v Lane* 1998 1 SA 300 (CC) para 31 fn 16. See further the discussion of the *Harksen* judgment in s 3.3 below.

<sup>84</sup> The purpose behind the expropriation was to build an international airport. The appellant, whose land was expropriated, still owned properties adjacent to the expropriated land and feared that the value of these properties would depreciate once the airport became operational. He also feared that it would frustrate his efforts to develop these properties in future.

<sup>85</sup> In the context of loss "caused by the expropriation" in terms of s 8(1)(a)(ii) of the *Expropriation Act* 55 of 1965.

<sup>86</sup> *Tongaat Group Ltd v Minister of Agriculture* 1977 2 SA 961 (A) 972: "[A]n act by the State (or other competent authority) whereby the owner is deprived of *inter alia* land and it then becomes the property of the State, and ... not use of the property *after* expropriation". (Own translation, original emphasis.)

mistaken impression that the objects of expropriation are limited to tangible things. Nevertheless, it is well established that property in this context includes ownership, limited real rights, and certain personal rights.<sup>87</sup> The *Expropriation Act* expressly stipulates that upon expropriation of ownership in land all registered rights – except mortgage bonds – in that land remain in force until such time that these rights are also expropriated.<sup>88</sup> Limited real rights, such as registered long-term leases<sup>89</sup> and servitudes,<sup>90</sup> thus remain in force after expropriation and have to be expropriated separately if the state wishes to have unburdened use of the land.<sup>91</sup> The state is not confined to expropriating existing limited real rights in land; it can also appropriate for itself new limited real rights in land (such as servitudes) by way of expropriation.<sup>92</sup> It is trite that expropriation also includes the power to take the right to use property temporarily.<sup>93</sup>

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<sup>87</sup> *Wallis v Johannesburg City Council* 1981 3 SA 905 (W) 910; *Stellenbosch Divisional Council v Shapiro* 1953 3 SA 418 (C) 422-423; *Fitchat v Colonial Secretary and Central South African Railways* 1910 ORC 46 48. See also Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 103 fn 131, 559-560; Gildenhuis *Onteieningsreg* 63, 71-72; Southwood *Compulsory Acquisition* 47-48; Badenhorst 1989 *THRHR* 134-135. As ownership is a real right it follows that "what is expropriated in a given situation is, strictly speaking, not the land itself but the right of ownership or a limited real right in respect thereof": see Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 103 fn 131. The *Expropriation Bill* of 15 March 2013 addresses this inaccuracy by defining "property" as not being limited to land and that it includes a right in or to such property.

<sup>88</sup> Section 8(1) of the *Expropriation Act*. See similarly s 10(1)(d) of the *Expropriation Bill* of 15 March 2013.

<sup>89</sup> *eThekweni Municipality v Spetsiotis* 2009 JOL 24536 (KZD).

<sup>90</sup> *Fitchat v Colonial Secretary and Central South African Railways* 1910 ORC 46.

<sup>91</sup> According to s 22 of the *Expropriation Act* unregistered rights in land come to an end when the ownership in the land to which they relate is expropriated. Yet, s 13(1) of the Act specifically protects the interests of an unregistered lessee by providing that he is "entitled to the payment of compensation as if his right ... were a registered right ... which was also expropriated on the date of expropriation". Consequently, the holder of an unregistered lease is entitled to compensation for expropriation when the lease is extinguished upon expropriation of the land to which the lease relates. Gildenhuis *Onteieningsreg* 64, 68-70, 118, 164, 193-194 thinks that the extinction of unregistered rights other than leases in terms of s 22 is in conflict with s 25(2) of the *Constitution* for authorising expropriation without compensation. See similarly Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 174 fn 347. Interestingly, s 12(1) of the *Expropriation Bill* of 15 March 2013 remedies this "oversight" by providing compensation to all holders of unregistered rights upon expropriation of their rights.

<sup>92</sup> See, for example, *Beckenstrater v Sand River Irrigation Board* 1964 4 SA 510 (T) 515; *Wallis v Johannesburg City Council* 1981 3 SA 905 (W) 908-909. See also Gildenhuis *Onteieningsreg* 61; Gildenhuis *Onteieningsreg* LLD-thesis 51.

<sup>93</sup> Section 2(1) of the *Expropriation Act*. Compare the definition for "expropriation" in the *Expropriation Bill* of 15 March 2013. For examples of cases see *Du Toit v Minister of Transport* 2003 1 SA 586 (C); 2005 1 SA 16 (SCA); 2006 1 SA 297 (CC); *Bodasing v South African Roads Board* 1995 4 SA 867 (D).

It follows that expropriation usually entails situations where the state acquires rights in property. Hence it is understandable why authors and the courts use this description to explain what happens when the state expropriates ownership of land or movable objects. However, it is less clear what happens in terms of the acquisition explanation when the state expropriates limited real rights in land. This is an important question, especially since *Agri SA* concerned the alleged expropriation of old order mineral rights, which are limited real rights.<sup>94</sup> A problematic example which comes to mind in this context is when the state owns land that is burdened with a long-term lease or a servitude and then decides to expropriate these rights. It cannot be said that the state "acquires" the rights or that they vest in the state by way of the original acquisition of ownership, as one cannot have a limited real right in your own property.<sup>95</sup>

One of the few cases that sheds light on the meaning of expropriation in this context is *Beckenstrater v Sand River Irrigation Board*<sup>96</sup> (*Beckenstrater*). *Beckenstrater* concerned the expropriation and appropriation by the state of "new" servitudes of abutment, storage and aqueduct over the applicant's land pursuant to the (previous) *Water Act* 54 of 1956 (*Water Act*). The applicant contended that the meaning of "expropriate" in section 94(1)<sup>97</sup> of the *Water Act* did not encompass the attempted expropriation, as the section – so the argument went – allowed the state only to expropriate existing rights and not to create new rights (ie servitudes) through expropriation. Trollip J held as follows:

[T]he ordinary meaning of 'expropriate' is 'to dispossess of ownership, to deprive of property' (see e.g. *Minister of Defence v Commercial Properties Ltd. and Others*, 1955 (3) SA 324 (N) at p. 327G; but in statutory provisions, like secs. 60 and 94 of the *Water Act*, it is generally used in a wider sense as meaning not *only* dispossession or deprivation but *also* appropriation by the expropriator of the particular right, and

<sup>94</sup> *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) para 25, citing *Van Vuren v Registrar of Deeds* 1907 TS 289 295-296, where mineral rights are described as *quasi*-servitudes. This finding was not overruled by the Constitutional Court on appeal.

<sup>95</sup> D 8 2 26: *Nulli enim res sua servit* ("[F]or no one can have a servitude [or limited real right] over his own property": Hiemstra and Gonin *Trilingual Legal Dictionary* 245.

<sup>96</sup> *Beckenstrater v Sand River Irrigation Board* 1964 4 SA 510 (T). Goldstone J relied on this judgment to describe the difference between deprivation and expropriation: see *Harksen v Lane* 1998 1 SA 300 (CC) para 32. See further the discussion of the *Harksen* judgment in s 3.3 below.

<sup>97</sup> "An irrigation board may, with the consent of the Minister, and for the purpose of exercising any function or power or carrying out any duty assigned to or imposed upon it by this Act, *expropriate any land or servitude over land* or any existing right or appropriate any substance or material on any land or temporarily use any land or any waterwork within its irrigation district as it may consider necessary." (Own emphasis.)

abatement or extinction, as the case may be, of any other existing right held by another which is inconsistent with the appropriated right.<sup>98</sup> (Own emphasis.)

The court found that the servitudes to be acquired by the state are personal in nature and that nothing in section 94(1) prevents it from expropriating (by way of appropriation) new servitudes in the applicant's land for its own benefit.<sup>99</sup> Consequently, it was held that the meaning of expropriation in the section specified extends to the appropriation – or "acquisition" – of new servitudes in the applicant's land and is not limited to the mere expropriation of existing servitudes (through their extinction).<sup>100</sup>

What the state acquired in *Beckenstrater* are limited real rights in the form of servitudes. These limited real rights are roughly similar to what was lost by the expropriatee, namely entitlements to use and enjoy his land in certain ways, which entitlements would be in conflict with the state's exercise of its newly acquired servitudes. Even though what is acquired by the state is not exactly similar to what is lost by the expropriatee, it is trite that the state acquired property in the form of servitudes.<sup>101</sup> Such a conclusion corresponds with the principles of the original acquisition of ownership mentioned earlier, since what is acquired need not be exactly similar to what is lost.<sup>102</sup> The principles of the law of servitudes also confirm this position in that the content of the entitlements that the servitude holder acquires need not necessarily be identical to the entitlements which the servient owner relinquishes or loses.<sup>103</sup> In this regard the state's gain may be described as the correlative of the expropriatee's loss,<sup>104</sup> since his ownership of the land is limited or diminished for the

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<sup>98</sup> *Beckenstrater v Sand River Irrigation Board* 1964 4 SA 510 (T) 515, quoted with approval in *Harksen v Lane* 1998 1 SA 300 (CC) para 32.

<sup>99</sup> *Beckenstrater v Sand River Irrigation Board* 1964 4 SA 510 (T) 515-517.

<sup>100</sup> *Beckenstrater v Sand River Irrigation Board* 1964 4 SA 510 (T) 516: "[T]he expression 'expropriate any servitude over land' in sec. 94 (1) was intended to cover not only the expropriation and extinction of an existing servitude, but also the expropriation and appropriation of a new personal servitude in favour of the Board".

<sup>101</sup> *Ex parte Optimal Property Solutions CC* 2003 2 SA 136 (C) paras 3-9, 19.

<sup>102</sup> Compare *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 58, quoted in s 2.3 above.

<sup>103</sup> Van der Merwe *Sakereg* 458: "[D]ie inhoud van die bevoegdhede van 'n serwituuthouer [is] nie noodwendig identies met die bevoegdhede wat die serwituutgewer afstaan ... nie."

<sup>104</sup> I rely on Australian law for purposes of this explanation: see the discussion of *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297 in s 3.4 below and compare *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 58.

duration of the expropriated servitudes' existence.<sup>105</sup> In other words, the expropriation resulted in a subtraction from the applicant's *dominium*.<sup>106</sup> It therefore seems that the expropriation of new servitudes in land by the state also fits the state acquisition description.

However, a vexing question is if Trollip J's dictum can be used to explain whether or not the expropriation of existing limited real rights (ie long-term leases and servitudes) held by others in land owned by the state also results in state acquisition of property. The expropriation of these rights is actually the other side of the *Beckenstrater* coin: instead of acquiring new limited real rights and limiting the expropriatee's use and enjoyment of his land, the state extinguishes existing limited real rights and subsequently obtains unburdened use and enjoyment of its land. Yet, as the state already owns the land to which the limited real rights relate, it may very well be asked if this benefit amounts to state acquisition of property. According to Van der Merwe<sup>107</sup> the servient owner's entitlements of use and enjoyment – as limited by the particular servitude – are merely suspended for the duration of the servitude's existence. In other words, they are inherently part of the servient owner's ownership and are therefore incapable of being split off from the ownership of the land so as to be "given" to the holder of the limited real right.<sup>108</sup> This view seems to imply that the expropriation of limited real rights held by others in land belonging to the state does not amount to state acquisition, as the entitlements are already "part" of the land, though they are but suspended.

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<sup>105</sup> *Robarts v Antoni* (SCA), unreported case number 327/2013 of 19 May 2014 para 17; *Lorentz v Melle* 1978 3 SA 1044 (T) 1049. See also Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 321-322; Van der Merwe *Sakereg* 458-459, 464-467.

<sup>106</sup> *Robarts v Antoni* (SCA) unreported case number 327/2013 of 19 May 2014 para 17; *Lorentz v Melle* 1978 3 SA 1044 (T) 1049.

<sup>107</sup> Van der Merwe *Sakereg* 458-459.

<sup>108</sup> Van der Merwe *Sakereg* 458 critiques the view of Maasdorp *Institutes* 146, where the latter author defines a servitude as "a detachment of some of the rights of ownership from the ownership of some particular property and either conferring them upon a person other than the owner, or attaching them as an adjunct to the ownership of another separately owned property". According to Van der Merwe this argument is unsound, as it perceives ownership as a bundle of sticks where certain entitlements can be "split off" from ownership and "given" to someone else. Viewing ownership as a bundle of sticks is characteristic of Anglo-American law and is not adhered to in South African law, which regards ownership as a unitary concept: see Van der Merwe *Sakereg* 173-176 and Van der Walt 1995 *TSAR* 20-24.

Yet, the essence of a limited real right is that the owner of the servient land is not allowed to interfere with the holder of the right's exercise of that right for the duration of its existence – the presence of the servitude limits the use and enjoyment of land by resulting in a subtraction from the *dominium*. Thus, upon extinguishment of the limited real right, ownership reverts back to its "full" or unencumbered extent.<sup>109</sup> In terms of this description it is hard to escape the reality that what happens here essentially amounts to acquisition, since what the state (re)gains through expropriating the limited real right – namely having unencumbered use and enjoyment of its land – is the correlative of the expropriatee's loss.<sup>110</sup> The expropriation of existing limited real rights through their extinguishment therefore also appears to fit the definition of state acquisition.<sup>111</sup>

From the brief analysis of pre-constitutional expropriation law it follows that state acquisition was recognised early on as a general characteristic of expropriation.<sup>112</sup> The acquisition description explains what happens when the state expropriates the ownership of land and also shows that the expropriation of limited real rights (either through their creation or extinguishment) amounts to state acquisition of property. This conforms to the position in legal literature, as most commentators think that the mere extinguishment of rights without some transfer to – or vesting of such rights in – the state does not result in expropriation.<sup>113</sup> However, pre-constitutional

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<sup>109</sup> Van der Merwe *Sakereg* 458.

<sup>110</sup> Compare the Australian decision of *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297, which is discussed in s 3.4 below.

<sup>111</sup> This conclusion finds support in Australian law: compare *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155, which is discussed in s 3.4 below.

<sup>112</sup> Compare *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 77-78 (Cameron J) and 102-105 (Froneman J). However, some authors think that state acquisition was already a requirement (and not just a general hallmark) for expropriation in pre-constitutional expropriation law: see Mostert *Mineral Law* 112-123; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 541.

<sup>113</sup> Iles "Property" 549; Mostert *Mineral Law* 122-123 fn 50, citing *Apex Mines Ltd v Administrator, Transvaal* 1988 3 SA 1 (A); Van der Vyver 2012 *De Jure* 131; Gildenhuys *Onteieningsreg* 8, 26-27, 62, citing *Elektrisiteitsvoorsieningskommissie v Fourie* 1988 2 SA 627 (T) 637; Southwood *Compulsory Acquisition* 14-15; Chaskalson and Lewis "Property" 31-14–31-15; Jacobs *Law of Expropriation* 42; Gildenhuys *Onteieningsreg* LLD-thesis 7, 51-52, 66-67. This is also the position in case law, see *Tongaat Group Ltd v Minister of Agriculture* 1977 2 SA 961 (A) 972; *Beckenstrater v Sand River Irrigation Board* 1964 4 SA 510 (T) 515; *Minister van Waterwese v Mostert* 1964 2 SA 656 (A) 667. Mogoeng CJ confirmed this view in *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 48 (footnote omitted), where he held that "[w]hereas deprivation always takes place when property or rights therein are either taken away [ie extinguished] or significantly interfered with, the same is not necessarily true of expropriation". However, Van der



expropriation cases and the views of academic commentators might create the erroneous impression that whether or not expropriation occurred depends solely on whether the state acquired property. One cannot ignore the specific contexts within which cases like *Tongaat* and *Beckenstrater* were decided – both judgments dealt with the interpretation of "expropriation" in legislation that explicitly empowered the state to expropriate property. The fact that the state acquired property in the process is therefore merely the result of and not the cause for a valid expropriation. Stated differently, state acquisition is a *consequence* of a valid expropriation rather than a *pre-requisite* for it in these cases. Furthermore, it is worth repeating that the power to expropriate (at least in pre-constitutional law) is sourced in legislation which specifically empowers the state to expropriate property. It is therefore conceivable, though I have been unable to find any examples in South African law, that empowering legislation could authorise the state to extinguish or destroy property through expropriation without it acquiring anything in the process.<sup>114</sup> This hypothetical example confirms that whether expropriation took place or not does not depend on the effect of the infringement but rather on whether or not the empowering source authorises it.

Still, it is trite that most expropriations result in the state acquiring property. State acquisition is therefore a useful factor when having to categorise property infringements, especially if it is unclear whether or not the empowering statute authorises expropriation. However, care must be taken not to conflate the cause-question (does the empowering statute authorise expropriation?) with the effect-question (did state acquisition occur?). The fact that the state acquired property is

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Walt *Constitutional Property Law* 197, 345 expresses the opinion that the destruction of property can amount to expropriation. See also Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 102 fn 125, 541-542 and Van der Vyver 2012 *De Jure* 131-133, who question if vesting is a requirement for expropriation under s 25, since the words "compulsory acquisition" do not appear anywhere in the provision. See further Van der Walt 2002 *THRHR* 464-465; Mostert 2003 *SAJHR* 572-573, 575-577.

<sup>114</sup> See Van der Walt *Constitutional Property Law* 197, 345, which is discussed in the previous fn. It seems that Van der Vyver 2012 *De Jure* 131-133 also thinks it is possible to have expropriation without the state acquiring anything in the process.

indicative that expropriation might have taken place, though it does not categorically mean that the infringement amounts to expropriation.<sup>115</sup>

### **3.3 The constitutional era**

*Harksen* was the first decision during the constitutional era that considered the meaning of expropriation. Here the Constitutional Court was called on to decide if section 21(1) of the *Insolvency Act* 24 of 1936 (*Insolvency Act*) complied with section 28(3)<sup>116</sup> – the expropriation provision – of the *Interim Constitution*. Section 21(1) provides that upon the sequestration of an insolvent spouse's estate the property of the solvent spouse vests in the Master of the High Court and, on appointment, in the trustee of the insolvent estate until such property is released. The applicant argued that this vesting of her property amounted to uncompensated expropriation contrary to section 28(3). The Court therefore had to decide whether or not the application of section 21(1) amounted to expropriation of the solvent spouse's property.

Goldstone J confirmed that expropriation is an original method of acquisition of ownership by approving its pre-constitutional definition.<sup>117</sup> In this sense the Court found that "expropriate" is "generally used in our law to describe the process whereby a public authority takes property (usually immovable) for a public purpose and usually against payment of compensation".<sup>118</sup> However, it then acknowledged that even though expropriation constitutes a form of deprivation,<sup>119</sup> there is an important difference between these two forms of state interference. Goldstone J described this difference as follows:

The distinction between *expropriation* (or compulsory acquisition as it is called in some other foreign jurisdictions) *which involves acquisition of rights in property by a*

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<sup>115</sup> Compare Van der Walt *Constitutional Property Law* 197, 345. See further s 1.2 of Part II of this article.

<sup>116</sup> "Where any rights in property are expropriated pursuant to a law ... such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable".

<sup>117</sup> *Harksen v Lane* 1998 1 SA 300 (CC) para 31, citing *Tongaat Group Ltd v Minister of Agriculture* 1977 2 SA 961 (A) 972, which is quoted in s 3.2 above.

<sup>118</sup> *Harksen v Lane* 1998 1 SA 300 (CC) para 31, citing *Tongaat Group Ltd v Minister of Agriculture* 1977 2 SA 961 (A) 972 and *Davies v Minister of Lands, Agriculture and Water Development* 1997 1 SA 228 (ZS) 232. Compare the discussion in s 3.2 above.

<sup>119</sup> *Harksen v Lane* 1998 1 SA 300 (CC) para 32.

*public authority* for a public purpose and the *deprivation of rights in property which fall short of compulsory acquisition* has long been recognised in our law.<sup>120</sup> (Own emphasis.)

In this dictum the Court made three findings: it confirmed that the objects of expropriation are *rights* in property and not the tangible things (such as land) to which these rights relate,<sup>121</sup> it laid down state acquisition as the defining characteristic which sets expropriation apart from deprivation, and also held that deprivation does not entail the acquisition of property by the state. The first finding is uncontroversial in that it corresponds to pre-constitutional law.<sup>122</sup> However, both the latter two rulings are problematic.<sup>123</sup> The finding concerning the role of state acquisition differs from pre-constitutional law, where it appears to have been only an explanation or general hallmark for expropriation rather than a pre-requisite for it. In this regard Goldstone J cited the two pre-constitutional decisions discussed in the preceding section,<sup>124</sup> neither of which provides authority for such a conclusion. The fact that the Court relied on *Tongaat* is understandable to a certain degree, as the affected interest in that case was – like the case before him – ownership. *Beckenstrater*, on the other hand, concerned the appropriation of limited real rights as opposed to the acquisition of

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<sup>120</sup> *Harksen v Lane* 1998 1 SA 300 (CC) para 32, citing *Beckenstrater v Sand River Irrigation Board* 1964 4 SA 510 (T) 515 and quoted with approval in *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 58.

<sup>121</sup> See further fn 87 above as well as the surrounding main text.

<sup>122</sup> Under the *Constitution* "property" will most probably also include ownership, limited real rights and certain personal rights: see the discussion in s 3.2 above as well as *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 58. See also the definition of "property" in the *Expropriation Bill* of 15 March 2013. See further *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) paras 57-64 (this judgment is analysed by Marais 2014 *SALJ*215-233) as well as the position in Australian law discussed in s 3.4 below.

<sup>123</sup> I expand on these two problems in ss 1.2-1.3 of Part II of this article.

<sup>124</sup> *Harksen v Lane* 1998 1 SA 300 (CC) referred to *Tongaat* in para 31 fn 16 and quoted from *Beckenstrater* in para 32. The Constitutional Court relied on four judgments for the purposes of construing the state acquisition requirement, namely the two pre-constitutional South African cases just referred to, two from the Zimbabwe Supreme Court (*Hewlett v Minister of Finance* 1982 1 SA 490 (ZS) and *Davies v Minister of Lands, Agriculture and Water Development* 1997 1 SA 228 (ZS)) and one from the Supreme Court of India (*HD Vora v State of Maharashtra* 1984 AIR 866 (SC)). I do not analyse the two Zimbabwean judgments, as a discussion of Zimbabwean expropriation law is beyond the scope of this article. It is, however, unnecessary to analyse *HD Vora*, as it did not concern the distinction between deprivation and expropriation but rather the difference between expropriation (or compulsory acquisition) and requisitioning, which is a form of temporary dispossession of tangible property for use by the state during war or an emergency situation: see Van der Walt *Constitutional Property Clauses* 336 fn 83; Van der Walt and Botha 1998 *SAPL* 20 fn 9. See Van der Walt *Constitutional Property Clauses* 336 fn 83, 485-489, Van der Walt *Constitutional Property Law* 152-153 and Van der Walt and Botha 1998 *SAPL* 20-22 for criticism of Goldstone J's reliance on the *HD Vora* and Zimbabwean cases.

ownership, which makes it less relevant. Still, the main reason why Goldstone J's reliance on these cases is questionable is the fact that both judgments dealt with acts which, unlike the *Insolvency Act*, explicitly authorise expropriation. Be that as it may, the *Harksen* court made it clear that state acquisition is the main difference between deprivation and expropriation, even though section 28(3) of the *Interim Constitution* – just like section 25(2) of the *Constitution* – does not cite it as a requirement for expropriation at all. Finally, describing deprivation as never resulting in state acquisition of property is overly simplistic, as there are instances of deprivation where the state does acquire property without the consent of the owner.<sup>125</sup>

Yet, despite the greater emphasis on state acquisition, Goldstone J added two qualifications to the expropriation inquiry that are not found in pre-constitutional law. They are (i) the broad context and purpose of the impugned provision as a whole and (ii) the permanence of the transfer.<sup>126</sup> It is interesting that the Court focused on the purpose of the impugned provision, as this consideration recognises the fact that the difference between deprivation and expropriation is not as straightforward as merely ascertaining if the state acquired property.<sup>127</sup> Moreover, it is analogous to the pre-constitutional authorisation requirement, which also considers the source of the infringement to establish whether expropriation took place. However, setting permanence as one of the qualifications is problematic, as foreign law shows that expropriations can, at least in some instances, be of temporary duration.<sup>128</sup> Still, the permanence of the transfer takes into account the effect of the infringement in determining whether or not expropriation occurred, which correlates with the requirement that the state has to acquire property for there to be expropriation.

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<sup>125</sup> Examples include taxation and criminal forfeiture: see the introduction as well as s 1.3 of Part II of this article.

<sup>126</sup> *Harksen v Lane* 1998 1 SA 300 (CC) paras 35-36.

<sup>127</sup> See s 1 of Part II of this article. I expand on the significance of Goldstone J's purpose-based approach in s 2 of Part II of this article.

<sup>128</sup> Allen *Commonwealth Constitutions* 167, citing *Minister of State for the Army v Dalziel* 1944 68 CLR 261; Van der Walt and Botha 1998 *SAPL* 22-23, citing *Attorney-General v De Keyser's Royal Hotel* 1920 AC 508. See also Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 542; Hopkins and Hofmeyr 2003 *SALJ* 50-51; Roux "Property" 46-31. See further s 2(1) of the *Expropriation Act* and compare the definition for "expropriation" in the *Expropriation Bill* of 15 March 2013.

The Constitutional Court held that even though the effect of section 21(1) might be to "transfer" ownership of the applicant's property to the Master and, upon appointment, to the trustee, this transfer did not amount to expropriation.<sup>129</sup> Goldstone J based this finding on the fact that the purpose and effect of section 21(1) is "clearly not to divest, save temporarily, the solvent spouse of the ownership of property that is in fact his or hers ... [and] to ensure that the insolvent estate is not deprived of property to which it is entitled".<sup>130</sup> It is unclear why the Court did not consider the authorisation requirement, especially given the fact that it probably would have confirmed the expropriation finding.<sup>131</sup> Still, the Court should be commended for not limiting the expropriation question to whether or not the state acquired property, as such an approach might very well have caused it to find that section 21(1) did result in expropriation of the applicant's property.

The Constitutional Court subsequently narrowed its expropriation investigation in *Reflect-All*. This case concerned the constitutionality of section 10(1) and (3) of the *Gauteng Transport Infrastructure Act 8 of 2001 (Gauteng Transport Infrastructure Act)*, which placed certain limitations on the use and enjoyment of the applicants' land. The applicants argued that the deprivation caused by this provision amounted to uncompensated expropriation of their property. Nkabinde J, relying on the dictum from *Harksen* quoted above, held that courts should be "cautious" to extend the meaning of expropriation to situations where the infringement does not result in the state acquiring the affected property.<sup>132</sup> In this instance the Court concentrated on the effect the deprivation had on the affected owners to decide whether or not the

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<sup>129</sup> The Constitutional Court did not make a pronouncement on whether s 21(1) had the effect of actually transferring ownership of the solvent spouse's property to the Master (and later the trustee) and merely assumed that this was the case: see *Harksen v Lane* 1998 1 SA 300 (CC) para 30, citing *De Villiers v Delta Cables (Pty) Ltd* 1992 1 SA 9 (A).

<sup>130</sup> *Harksen v Lane* 1998 1 SA 300 (CC) para 35, citing *Van Schalkwyk v Die Meester* 1975 2 SA 508 (N) 510.

<sup>131</sup> The *Insolvency Act* 24 of 1936 does not set out the circumstances, procedures or conditions through which property may be expropriated and also does not provide for compensation, all of which count against viewing s 21(1) as resulting in expropriation. It is worth emphasising that there is a rebuttable presumption that a statute does not authorise expropriation if it does not explicitly provide for compensation: see Gildenhuys *Ontheieningsreg* 13, 18, citing *Blackmore v Moodies GM and Exploration Company Limited* 1917 AD 402 416-417 and *Union Government v Schierhout* 1925 AD 322 348. See also *Belinco (Pty) Ltd v Bellville Municipality* 1970 4 SA 589 (A) 597.

<sup>132</sup> *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) para 64.

impugned section amounted to expropriation. It subsequently held that the application of section 10(1) and (3) did not amount to expropriation, as it did not result in a transfer of the affected rights to the state. Nkabinde J made it clear that infringements which only limit or extinguish property rights without concomitant acquisition by the state cannot amount to expropriation under section 25(2).

One is struck by the fact that the *Reflect-All* court only looked at the effect that the impugned provision had on the applicants' property to decide if expropriation had taken place. Indeed, the Court did not in any way refer to or consider any of the two qualifications laid down in *Harksen*, nor did it rely on the pre-constitutional authorisation requirement. Interestingly, the *Gauteng Transport Infrastructure Act* does set out the procedures, circumstances and conditions through which expropriation may take place and also provides for compensation,<sup>133</sup> which complicates the question whether the infringement amounts to expropriation. Still, Nkabinde J's approach towards the expropriation question denotes one of two things, namely that (i) the two "additional" qualifications set out by Goldstone J will be considered only if the state actually acquired property (as was assumed in *Harksen*) or that (ii) the Constitutional Court might choose to base this inquiry solely on the state acquisition requirement. Indeed, the chances are that the latter approach might be followed in future, which conclusion is strengthened when one considers the *Agri SA* court's effect-centred test to decide the expropriation question.

The *Agri SA* court confirmed the centrality of state acquisition, as laid down in *Harksen* and later acknowledged in *Reflect-All*.<sup>134</sup> In this sense Mogoeng CJ, like Goldstone J and Nkabinde J, did not refer to or consider the authorisation requirement at all. Yet, the Court affirmed that expropriation is an original method of acquisition of ownership by finding that the property rights acquired by the state do not have to be exactly the same as the rights that were lost by the expropriatee to satisfy the acquisition requirement.<sup>135</sup> The fact that Mogoeng CJ requires substantial similarity between what

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<sup>133</sup> See part 3 of the Act.

<sup>134</sup> See s 2.3 above. As stated in the main text surrounding fns 124-125 above, this differs from the position in pre-constitutional law.

<sup>135</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 58-59. In this regard Mogoeng CJ, like Goldstone J in *Harksen*, also confirmed that the objects of expropriation are rights in property: see fn 122 above.

is lost and what is acquired for the purpose of determining state acquisition supports the argument that the expropriation of limited real rights (like servitudes) results in state acquisition of property.<sup>136</sup>

However, the factors provided for establishing whether or not state acquisition – and therefore expropriation – took place are new and are not found in either the pre- or post-constitutional law.<sup>137</sup> In this sense the Court deviated from *Harksen* by considering the purpose of the *MPRDA* only to establish the meaning of state acquisition instead of using it to ascertain whether the interference amounted to expropriation. These are two separate questions which should not be confused – using the purpose behind the impugned statute to establish *whether* expropriation took place is not the same as relying on the purpose to establish the *meaning* of state acquisition (ie the effect that the interference must have for it to amount to expropriation). Though the purpose behind the impugned statute was taken into account in *Agri SA* it played a secondary role, in that Mogoeng CJ used the Act's purpose only to establish the meaning of state acquisition in the case before him. It thus appears that state acquisition will be interpreted more strictly when the purpose is of a transformation-oriented nature. Indeed, on the facts before it the Court held that the state had to acquire ownership of or the right to exploit the mineral rights for there to be state acquisition. The Court concluded that the interference did not amount to the expropriation of property, as the state had not acquired the right to exploit the mineral rights held by Sebenza. Yet, closer examination reveals that this finding might not be as self-evident as it *prima facie* appears, since the state did acquire the benefit of being able to grant new rights in minerals upon the extinguishment of the unconverted old order rights in those minerals, which benefit could potentially satisfy the state acquisition requirement.<sup>138</sup>

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<sup>136</sup> The fact that exact correlation is not required between what was lost and what is acquired (see *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 58) strengthens this argument. Compare the discussion in the main text surrounding fns 96-113 above.

<sup>137</sup> These factors appear in the main text surrounding fn 61 above.

<sup>138</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 80-81. Compare Badenhorst 2014 *THRHR* 328-329 and Badenhorst and Mostert 2004 *Stell LR* 49-50. This matter is discussed in more detail in ss 1.4 and 2.3 of Part II of this article.

It therefore seems as if the meaning that the *Agri SA* attached to this requirement generally corresponds to its pre-constitutional definition, despite the different role state acquisition now fulfils.<sup>139</sup> It has been seen<sup>140</sup> that state acquisition encapsulates the expropriation of both ownership and limited real rights (and probably personal rights as well), be it either through their extinguishment or creation. The fact that Mogoeng CJ requires there to be substantial similarity between what was lost and what is acquired probably means that the courts will adhere to the pre-constitutional meaning of state acquisition, even though this might not be the case regarding its role in the pre-constitutional era.

It is therefore trite that the expropriation of ownership or the right to exploit property will amount to state acquisition, at least when the impugned statute is aimed at transformation. In the context of cases such as *Tongaat*, *Beckenstrater* and especially *Harksen*, which is a decision from the constitutional era, it seems that a similar meaning might be attributed to this requirement even in cases which concern "normal," non-reformative legislation.<sup>141</sup> However, matters are complicated by the other four factors<sup>142</sup> Mogoeng CJ listed for the purpose of establishing the meaning of acquisition, which the Court – oddly – did not seem to use in deciding whether or not state acquisition actually occurred. In view of these considerations the last section of Part I of this article provides a brief overview of the acquisition requirement in Australian constitutional property law. Legal comparison with Australian law in this context is useful for two reasons. Firstly, Australian law developed a nuanced meaning for acquisition, one which broadly conforms to the one afforded to state acquisition in pre-constitutional law, and which explains many of the uncertainties touched upon earlier.<sup>143</sup> Secondly, it is as yet unclear how South African courts will use the particular four factors to ascertain the meaning of state acquisition in a given case. In this regard Mogoeng CJ's first factor bears a striking resemblance to one of the factors that the

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<sup>139</sup> *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 58, citing with approval the findings in *Harksen* which are referred to earlier in this section.

<sup>140</sup> See s 3.2 above.

<sup>141</sup> Compare *Harksen v Lane* 1998 1 SA 300 (CC) para 30.

<sup>142</sup> They are (i) the source of the affected right, (ii) the nature of the right, (iii) the content of the right, and (iv) the measures taken to interfere with or preserve the essence of the affected right.

<sup>143</sup> See the main text surrounding fns 96-113 above.



Australian High Court uses to establish whether acquisition took place or not, namely the source of the affected property right.

### ***3.4 The meaning and role of "acquisition" in Australian constitutional property law<sup>144</sup>***

Section 51(xxxi)<sup>145</sup> of the *Commonwealth Constitution* 1900 (the *Constitution*) confers the power on the Federal – or Commonwealth – Parliament to make laws with respect to the "acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has the power to make laws". The section uses the term "acquisition" instead of "expropriation"<sup>146</sup> and stipulates that "just terms"<sup>147</sup> are required only for property interferences which amount to the acquisition of property.<sup>148</sup> Section 51(xxxi) – and therefore the just terms guarantee – applies only to acquisitions by the Commonwealth and not to acquisitions by the different states.<sup>149</sup> The Australian property clause also concerns federal legislation which provides for the acquisition of property by a person other than the Commonwealth or one of its agents.<sup>150</sup> It follows

<sup>144</sup> The door to legal comparison with this jurisdiction was opened in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 76-83, where Ackermann J discussed Australian law for the purpose of deciding the property dispute at hand. For a more comprehensive discussion of this legal system, see Van der Walt *Constitutional Property Clauses* 39-72.

<sup>145</sup> Section 51(xxxi) of the *Commonwealth Constitution* (1900) has the status of a constitutional property guarantee, even though it does not appear in a bill of rights but rather in a part of the *Constitution* which concerns the legislative powers of the Commonwealth: see Van der Walt *Constitutional Property Clauses* 39, 41. On the status of s 51(xxxi) as a property guarantee, see *JT International SA v Commonwealth of Australia* 2012 HCA 43 para 41 per French CJ; *Theophanous v The Commonwealth* 2006 225 CLR 101 112-113 per Gleeson CJ; *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 168 per Mason CJ and 184 per Deane J and Gaudron J; *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297 303 per Mason CJ, Deane J and Gaudron J and 320 per Toohey J; *Re Director of Public Prosecutions; Ex Parte Lawler* 1994 179 CLR 270 283 per Deane J and Gaudron J.

<sup>146</sup> This corresponds to the position in other Commonwealth countries: see, for instance, s 16(1) of the *Constitution of Zimbabwe*, 1980 and s 13(2) of the *Federal Constitution of Malaysia*, 1957.

<sup>147</sup> "Just terms" may, for the present purposes, be understood as meaning "compensation": see Van der Walt *Constitutional Property Clauses* 58-60. Compare Allen 2000 *Sydney LR* 369-370.

<sup>148</sup> Even though s 51(xxxi) does not explicitly refer to the state's police power to limit the use, enjoyment and exploitation of property without compensation, it appears that the power to regulate or deprive property inherently vests in the Commonwealth and that it must be exercised in the public interest: see Van der Walt *Constitutional Property Clauses* 46-48. See also *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 180 per Brennan J and 189-190 per Deane J and Gaudron J.

<sup>149</sup> *PJ Magennis Proprietary Limited v The Commonwealth* 1949 80 CLR 382.

<sup>150</sup> *PJ Magennis Proprietary Limited v The Commonwealth* 1949 80 CLR 382 401-402 per Latham CJ, 411 per Dixon J, 422-423 per Williams J and 429-430 per Webb J; *Australian Tape Manufacturers Association Ltd v The Commonwealth of Australia* 1993 177 CLR 480 510-511 per Mason CJ,

that "acquisition" is an indispensable requirement for there to be "expropriation" in Australian law, which position is comparable to South African law after the *Agri SA* judgment.

To ascertain if an acquisition occurred, it must first be established if the affected interest amounts to property.<sup>151</sup> In this context the Australian High Court has made it clear that "property" will be interpreted widely so as to include ownership, limited real rights as well as certain personal rights in both tangible and intangible objects.<sup>152</sup> If the affected interest is indeed constitutional property, the inquiry then proceeds to whether or not there was an acquisition of property. Acquisition in this context is not limited to the physical taking of property,<sup>153</sup> although it neither encompasses any extinguishment, modification or deprivation of property rights.<sup>154</sup> The Commonwealth

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Brennan J, Deane J and Gaudron J and 526 per Dawson J and Toohey J; *Nintendo Co Ltd v Centronics Systems Pty Ltd* 1994 HCA 27 para 5 per Dawson J. See also Allen 2000 *Sydney LR* 375-376. In South African law it is also possible to have expropriations where the ultimate beneficiary is someone other than the state: see Van der Vyver 2012 *De Jure* 131, who cites *Offit Enterprises (Pty) Ltd v Coega Development Corporation* 2010 4 SA 242 (SCA) paras 14-18 and compare s 4 of the *Expropriation Bill* of 15 March 2013.

<sup>151</sup> Compare the first step in the *FNB* methodology, which also investigates whether the affected interest amounts to constitutional property: see *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) para 46.

<sup>152</sup> *JT International SA v Commonwealth of Australia* 2012 HCA 43 para 29 per French CJ, para 169 per Hayne J and Bell J; *Attorney-General for the Northern Territory v Chaffey* 2007 231 CLR 651 664 per Gleeson CJ, Gummow J, Hayne J and Crennan J; *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 184 per Deane J and Gaudron J; *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297 303-304 per Mason CJ, Deane J and Gaudron J. For instance, a contractual right – amounting to a chose in action in Australian law – is property for the purposes of s 51(xxxi): see *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 172 per Mason CJ; *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297 311 per Brennan J. A similar approach is likely to be followed in South African law, especially after *National Credit Regulator v Opperman* 2013 2 SA 1 (CC), where the South African Constitutional Court held that a claim for the restitution of money sourced in the law of unjustified enrichment is also "property" for the purposes of s 25. See further Van der Walt *Constitutional Property Clauses* 60-70 for a more comprehensive analysis of what constitutes "property" under s 51(xxxi). For a broader discussion which also focuses on other Commonwealth countries, see Allen *Commonwealth Constitutions* 119-161.

<sup>153</sup> *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 184-185 per Deane J and Gaudron J; *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297 303 per Mason CJ, Deane J and Gaudron J; *The Commonwealth of Australia v The State of Tasmania* 1983 158 CLR 1 145 per Mason J.

<sup>154</sup> *JT International SA v Commonwealth of Australia* 2012 HCA 43 para 30 per French CJ; *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 184-185 per Deane J and Gaudron J; *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297 304 per Mason CJ, Deane J and Gaudron J, 311 per Brennan J; *Australian Tape Manufacturers Association Ltd v The Commonwealth of Australia* 1993 177 CLR 480 528 per

(or another person) must at least obtain some identifiable benefit or advantage relating to the *ownership* or *use* of property to satisfy this requirement, no matter how slight or insubstantial it may be.<sup>155</sup> It is worth emphasising that what the Commonwealth acquires need not be exactly the same as what was lost by the affected party.<sup>156</sup> In Australian law the acquisition requirement is satisfied as long as the Commonwealth or someone else obtains some "benefit" or "receipt" and does not merely amount to a loss suffered by the affected party.<sup>157</sup> This clarifies why the extinguishment of a limited real right, such as a long-term lease, amounts to the acquisition of property. In *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia*<sup>158</sup> (*Mutual Pools*) it was held – by way of *obiter dictum* – that even though the reversioner (or grantor of a leasehold interest) does not acquire the actual leasehold interest upon its extinguishment, he or she does then acquire the benefit of having additional or increased rights in the leased property.<sup>159</sup> These rights, essentially

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Dawson J and Toohey J; *The Commonwealth of Australia v The State of Tasmania* 1983 158 CLR 1 145-146 per Mason J, 181-182 per Murphy J, 247-248 per Brennan J and 283 per Deane J.

<sup>155</sup> *JT International SA v Commonwealth of Australia* 2012 HCA 43 paras 144-154 per Gummow J, paras 169-173 per Hayne J and Bell J; *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 173 per Mason CJ, 185 per Deane J and Gaudron J; *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297 304 per Mason CJ, Deane J and Gaudron J; *The Commonwealth of Australia v The State of Tasmania* 1983 158 CLR 1 145 per Mason J.

<sup>156</sup> *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297 304-305 per Mason CJ, Deane J and Gaudron J. See also *Attorney-General for the Northern Territory v Chaffey* 2007 231 CLR 651 663 per Gleeson CJ, Gummow J, Hayne J and Crennan J; *Australian Capital Television Pty Limited v The Commonwealth of Australia; The State of New South Wales v The Commonwealth of Australia* 1993 177 CLR 106 165-166 per Brennan J and 196-198 per Dawson J. Compare *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 58.

<sup>157</sup> See the cases cited in the previous fn and compare with the position in pre-constitutional South African expropriation law discussed in s 3.2 above.

<sup>158</sup> *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155.

<sup>159</sup> *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 194-195 per Dawson J and Toohey J. Compare Hopkins and Hofmeyr 2003 *SALJ* 51, who describe expropriation as a situation where "the state derives use or benefit from the property which it has acquired". Interestingly, Badenhorst, Pienaar and Mostert *Silberberg and Schoeman* 541 describe expropriation as the termination of entitlements held by a property holder with the concomitant acquisition of *benefits* by the state, which description is analogous to the position in Australian law discussed in the main text. The authors (at fn 203) state that "[t]he entitlements [or benefits] acquired by the state may be different from those lost by the individual holder", which underscores why the expropriation of long-term leases amounts to state acquisition. See further s 3.2 above and as well as Mostert 2003 *SAJHR* 572.

being the entitlements to use and enjoy the property, are proprietary in nature in that they relate to the use of the property.<sup>160</sup>

In the light of this reasoning it has been held that the extinguishment of a claim (such as a debt) can also amount to acquisition if it is a vested right and the extinguishment results in a direct benefit or financial gain for the Commonwealth, by for instance not having to pay it.<sup>161</sup> The *locus classicus* concerning the extinguishment of a monetary claim in Australian law is *Georgiadis v Australian and Overseas Telecommunications Corporation*<sup>162</sup> (*Georgiadis*). This case turned on whether or not legislation that extinguished the plaintiff's common law right to claim damages from the Commonwealth for a work-related injury without providing just terms infringed section 51(xxxi). The majority held that the applicable provision resulted in the acquisition of property, even though the plaintiff's claim was merely extinguished and was thus not

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<sup>160</sup> *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 194-195 per Dawson J and Toohey J. This *obiter dictum* confirms why the expropriation of limited real rights in cases like *Beckenstrater* amounts to state acquisition of property in South African law. See further *British Columbia v Tener* 1985 17 DLR 4th 1; 32 LCR 340, which concerned legislation that prevented the holders of certain mineral rights in state-owned land from exploiting those rights. The Supreme Court of Canada (paras 39-41 per Wilson J) described these rights, which include the entitlement to sever minerals from the land to which they relate and to enter upon the land for this purpose, as being similar to *profits à prendre* or personal servitudes. The question before the Court was if preventing the mineral right holders from exercising these rights amounted to acquisition (and therefore expropriation in the Canadian context) of property by the Crown. Wilson J (para 68) held that under the present circumstances the mineral rights (or servitudes) were extinguished by the Crown (or state), as the state – as owner of the land – cannot hold a servitude in its own property. As to whether this extinction constituted acquisition, she held as follows: "This, however, does not mean that the acquisition of an outstanding *profit à prendre* held by someone else does not *enure* to his benefit. By depriving the holder of the *profit* of his interest – his right to go on the land for the purpose of severing the minerals and making them his own – the owner of the fee [namely the Crown] has effectively removed the encumbrance from his land. It would, in my view, be quite unconscionable to say that this cannot constitute an expropriation [by way of acquisition] in some technical, legalistic sense. Indeed ... the doctrine of merger would appear to operate so as to make the respondent's *loss* the appellant's *gain*." (Own emphasis.) Against this background it was found that the interference at hand resulted in state acquisition and therefore the expropriation of property. The Court's reference to the acquisition of a benefit by the state under these circumstances is analogous to ownership reverting back to its full or unencumbered state, even though Canadian law, like Australian law, is an Anglo-American legal system and therefore regards ownership as a bundle of sticks: see the sources mentioned in fn 108 above. See also Allen *Commonwealth Constitutions* 170, especially fn 28.

<sup>161</sup> *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297 305 per Mason CJ, Deane J and Gaudron J and 311 per Brennan J. Compare *Hewlett v Minister of Finance* 1982 1 SA 490 (ZS), where the Zimbabwe Supreme Court arrived at the opposite conclusion. *Hewlett* is one of the foreign judgments on which the *Harksen* court relied: see *Harksen v Lane* 1998 1 SA 300 (CC) para 33. See Van der Walt *Constitutional Property Clauses* 485-489; Van der Walt *Constitutional Property Law* 152-153; and Van der Walt and Botha 1998 *SAPL* 20-22 for criticism of the *Hewlett* decision.

<sup>162</sup> *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297.

"acquired" by the Commonwealth. The High Court reasoned that the Commonwealth received the benefit of being released from its liability to pay the debt, which allowed it to keep the money it would otherwise have had to pay out. Brennan J described this benefit as being the "correlative" of the plaintiff's claim.<sup>163</sup>

However, it must be emphasised that not *any* benefit will satisfy the acquisition requirement – in *JT International SA v Commonwealth of Australia*<sup>164</sup> (the *Plain Packaging* case) the High Court unambiguously declared that the benefit or receipt must be of a *proprietary* nature.<sup>165</sup> This case was about legislation that prohibits tobacco companies from using their trade marks on tobacco products and obliges them to put large health warnings and helpline information on these products. The plaintiffs argued that the applicable statute effected an acquisition of their intellectual property rights and goodwill contrary to section 51(xxxi). The majority found that the effect of the legislation on the plaintiffs' immaterial property rights did not amount to an acquisition of a proprietary benefit by the Commonwealth.<sup>166</sup> The Court reasoned that the plaintiffs merely lost their right to use the packaging they saw fit and that no one (including the Commonwealth) acquired the right to use the space on the packaging for purposes of advertisement or marketing. Gummow J, as part of the majority, distinguished two species of "benefit" in this context.<sup>167</sup> The first is when what is acquired corresponds to what is taken, such as when the state expropriates ownership in land. The second instance pertains to scenarios where the legislation

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<sup>163</sup> *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297 311 per Brennan J. See also *Theophanous v The Commonwealth* 2006 225 CLR 101 113-114 per Gleeson CJ; *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 176 per Brennan J; *The Commonwealth of Australia v The State of Tasmania* 1983 158 CLR 1 283 per Deane J. See further Allen *Commonwealth Constitutions* 171 and fn 31 as well as Allen 2000 *Sydney LR* 356. Compare *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) paras 58, the discussion in fn 136 as well as the surrounding main text.

<sup>164</sup> *JT International SA v Commonwealth of Australia* 2012 HCA 43.

<sup>165</sup> See *JT International SA v Commonwealth of Australia* 2012 HCA 43 para 42 per French CJ, paras 131, 144-154 per Gummow J and especially paras 169-173 per Hayne J and Bell J, which clarifies the position of Deane J in *The Commonwealth of Australia v The State of Tasmania* 1983 158 CLR 1 283, 286-287 as well as that of Deane J and Gaudron J in *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 185. See also *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* 1994 179 CLR 155 176 per Brennan J; *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297 311 per Brennan J.

<sup>166</sup> *JT International SA v Commonwealth of Australia* 2012 HCA 43 paras 43-44 per French CJ, paras 144-158 per Gummow J and paras 180-191 per Hayne J and Bell J.

<sup>167</sup> *JT International SA v Commonwealth of Australia* 2012 HCA 43 para 153.

modifies or extinguishes existing rights, which then results in a countervailing benefit or advantage of a proprietary nature for the Commonwealth, as was for instance the case in *Georgiadis*.<sup>168</sup> The fact that no one obtained a proprietary benefit in the rights in question, coupled with the fact that they are sourced in legislation and therefore more susceptible to modification,<sup>169</sup> led the majority to find against the plaintiffs. The Court acknowledged that the Commonwealth had, however, obtained the benefit of having increased protection of public health through enacting the legislation, but found that such a benefit is not proprietary in nature.

The source of the affected property right is therefore also important when considering if acquisition occurred,<sup>170</sup> especially in situations where the affected right is not sourced in the common law but in legislation (such as in the *Plain Packaging* case). These rights are by their nature more susceptible to modification or extinguishment, and hence the application of statutes which modify or alter them will typically not amount to the acquisition of property.<sup>171</sup> However, these rights – being property – still qualify for protection under the property clause, although their source and nature will be scrutinised more closely than in cases concerning common-law rights to determine whether acquisition occurred.<sup>172</sup> Two High Court judgments set out the principles in this context, namely *Health Insurance Commission v Peverill*<sup>173</sup> (*Peverill*) and *Attorney-General for the Northern Territory v Chaffey*<sup>174</sup> (*Chaffey*). The legal questions in these cases were whether or not the application of legislation, which permitted retrospective reductions of monetary claims sourced in different statutes amounted to

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<sup>168</sup> Although *Georgiadis* concerned a claim for damages which was sourced in common law.

<sup>169</sup> I expand on the importance of this factor in the next paragraph.

<sup>170</sup> This factor bears a striking resemblance to the first factor (ie the source of the right) listed by Mogoeng CJ in *Agri South Africa v Minister for Minerals and Energy* 2013 4 SA 1 (CC) para 64 for establishing the meaning of "state acquisition".

<sup>171</sup> *JT International SA v Commonwealth of Australia* 2012 HCA 43 paras 29-30 per French CJ; *Attorney-General for the Northern Territory v Chaffey* 2007 231 CLR 651 663-666 per Gleeson CJ, Gummow J, Hayne J and Crennan J and 668 per Kirby J; *Georgiadis v Australian and Overseas Telecommunications Corporation* 1994 179 CLR 297 305-306 per Mason CJ, Deane J and Gaudron J; *Health Insurance Commission v Peverill* 1994 179 CLR 226 236-237 per Mason CJ, Deane J and Gaudron J.

<sup>172</sup> *JT International SA v Commonwealth of Australia* 2012 HCA 43 paras 29-30 per French CJ and the sources referred to there; *Attorney-General for the Northern Territory v Chaffey* 2007 231 CLR 651 663-666 per Gleeson CJ, Gummow J, Hayne J and Crennan J, 668 per Kirby J and 671 per Callinan J.

<sup>173</sup> *Health Insurance Commission v Peverill* 1994 179 CLR 226.

<sup>174</sup> *Attorney-General for the Northern Territory v Chaffey* 2007 231 CLR 651.

acquisition of property. The High Court on both occasions rejected the argument that it does by holding that there was no "acquisition."<sup>175</sup> Two considerations were decisive in this regard, namely that the rights in question were (i) adjustable (and indeed adjusted and changed from time to time) and (ii) inherently susceptible to variation in terms of the provisions of the applicable statutes.<sup>176</sup> Whether an interference (or even extinguishment) of property rights sourced in legislation amounts to acquisition therefore depends on an interplay between these two considerations.

To summarise, for there to be an acquisition it is not necessary that what the Commonwealth or someone else acquires should be exactly similar to what was lost by the affected party. This requirement will be met as long as what is acquired entails some identifiable benefit or advantage which is of a proprietary nature, which will be the case when the benefit relates to the ownership or use of property. This position is analogous to pre-constitutional South African law as well as to the meaning afforded to state acquisition in *Agri SA*, where it was held that the state had to acquire ownership of or at least the right to exploit the affected mineral rights. In this context Australian law confirms why the expropriation of limited real rights (either through their creation or extinguishment) results in state acquisition. It also shows why the extinguishment of claims which have not yet come up for decision in South African law can amount to the acquisition of property under certain circumstances.<sup>177</sup>

An important factor for establishing whether acquisition occurred in Australian law, consideration of which could inform Mogoeng CJ's first factor to be used in determining the meaning of acquisition, is the source of the property right. This factor entails that

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<sup>175</sup> The majority in *Health Insurance Commission v Peverill* 1994 179 CLR 226 was not unanimous on this point, though. Mason CJ, Deane J and Gaudron J (236-237) decided that the affected rights amounted to "property", but held that there was no "acquisition" as meant in s 51(xxxi). Dawson J (250-251) and McHugh J (265-268) appear to have arrived at more or less the same conclusion. Toohey J (256) found that even though the affected interest was a chose in action and therefore property, that the impugned legislation did not affect an "acquisition of property" by the Commonwealth. Brennan J (243-244), on the other hand, held that the interest at stake did not amount to "property" and that s 51(xxxi) was therefore not engaged. See further in this regard Van der Walt *Constitutional Property Clauses* 64-65. The majority in *Attorney-General for the Northern Territory v Chaffey* 2007 231 CLR 651 appears to be *ad idem* that the applicable legislation did not result in the acquisition of property.

<sup>176</sup> *Attorney-General for the Northern Territory v Chaffey* 2007 231 CLR 651 667-671 per Kirby J; *Health Insurance Commission v Peverill* 1994 179 CLR 226 237 per Mason CJ, Deane J and Gaudron J. See generally *JT International SA v Commonwealth of Australia* 2012 HCA 43.

<sup>177</sup> Compare the discussion in fn 161 above, as well as in the surrounding main text.

legislation which modifies or even extinguishes property rights sourced in statute is less likely to result in acquisition than would be the case if it originated in common law. In this regard the finding in the *Plain Packaging* case seems to support the *Agri SA* court's conclusion that the *MPRDA*'s effect on Sebenza's old order mineral rights did not amount to state acquisition. Even though old order mineral rights originated from landownership and were therefore common-law rights, it is trite that these rights were heavily regulated by statute from early on.<sup>178</sup> In terms of the second consideration set out in *Peeverill* and *Chaffey*, it could perhaps be argued that the manner in which mineral rights could be acquired, held and exploited was inherently susceptible to variation by the state. When viewed from this angle the *MPRDA* is merely the latest step in a long series of mineral legislation which regulates how the holders of (old order) mineral rights may acquire, hold and exploit them.<sup>179</sup> This conclusion, coupled with the fact that neither the South African state nor anyone else acquired ownership or the right to exploit the affected mineral rights or entitlements upon the commencement of the *MPRDA*, appears to confirm the majority's finding that no state acquisition took place.<sup>180</sup>

The meaning of acquisition in Australian law therefore broadly corresponds to the position in South African law and clarifies many of the uncertainties pertaining to the meaning of state acquisition concerning the expropriation of limited real rights. Australian law also informs Mogoeng CJ's first factor for establishing the meaning of acquisition, which does not appear to have received attention in *Agri SA*. However, it must be emphasised that the mere fact that a property interference amounts to acquisition does not necessarily mean it engages section 51(xxxi). In other words, the fact that acquisition took place does not categorically indicate that the interference results in the "expropriation" of property. Here the Australian High Court's approach corresponds to the position in pre-constitutional South African law and differs from

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<sup>178</sup> Van der Walt *Constitutional Property Law* 404; Mostert *Mineral Law* 78, 93-94, 113-115, 136, 140; Badenhorst and Mostert 2003 *Stell LR* 384-393.

<sup>179</sup> See the sources referred to in the previous fn.

<sup>180</sup> However, another benefit that the South African state acquired (over time) is being able to grant new rights to minerals in cases like that of Sebenza where unused old order mineral rights were extinguished by the *MPRDA* upon non-conversion: see the main text surrounding fn 138. Whether or not the acquisition of this benefit amounts to the acquisition of property is addressed in ss 1.4 and 2.3 of Part II of this article.



Mogoeng CJ's effect-based test – for the acquisition to amount to expropriation which requires just terms (or compensation) it must also be an acquisition *with respect to* section 51(xxxi). Part II of this article expands on the importance of this qualification by identifying the shortcomings of confining the expropriation inquiry merely to whether or not the state acquired property.<sup>181</sup> It then considers how a purpose-based approach towards the expropriation question – as exemplified by *Harksen* and informed by Australian law – is able to avoid the pitfalls in this regard.

[To be concluded]

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<sup>181</sup> As alluded to in the main text surrounding fn 131 above, the *Harksen* judgment might have gone the other way if Goldstone J had only considered the effect of the infringement on deciding the expropriation question.

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**LIST OF ABBREVIATIONS**

|           |   |
|-----------|---|
| MPRDA     | Mineral and Petroleum Resources Development Act |
| SAJHR     | South African Journal on Human Rights           |
| SALJ      | South African Law Journal                       |
| SAPL      | South African Public Law                        |
| Stell LR  | Stellenbosch Law Review                         |
| Sydney LR | Sydney Law Review                               |
| TSAR      | Tydskrif vir die Suid-Afrikaanse Reg            |
| THRHR     | Tydskrif vir Hedendaagse Romeins-Hollandse Reg  |

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