The effect of constitutional environmental protection on land ownership

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Dissertation submitted in *partial* fulfillment of the requirements for the degree *Magister Legum* in Environmental Law and Governance at the Potchefstroom Campus of the North-West University

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April 2015

Abstract

Communities sometimes hold private property rights in or adjacent to a protected area. Section 25 of the *Constitution of the Republic of South Africa* of 1996 (the *Constitution*) protects a person's private property in that the state may not unfairly deprive or expropriate such private property. The interest in the environment are protected by section 24 of the *Constitution* which entails that every person has the right to an environment that is not harmful to one's health or well-being and also that the environment has to be preserved for present and future generations.

National parks are the most valuable natural resource in terms of nature conservation that South Africa has, as these parks harvest natural resources to be preserved for present and future generations. The question that arises is which restrictions are placed on owners in respect of nature conservation, and what the constitutionality of such restrictions is. The answer this question is somewhat difficult as both the right to property and the right to a safe and clean environment are both fundamental rights in the *Constitution,* and these rights deserve protection.

That being said, it is important to understand that no right in the Bill of Rights is an absolute right and all rights are subject to limitations. Such limitations should adhere to the requirements set out in section 36 of the *Constitution*. A limitation of any constitutional right will be accepted if it is proportional. Section 36(1) of the *Constitution* amounts to a general proportionality test to ensure that any right contained in the Bill of Rights is only limited by a law of general application and if such limitation is reasonable and justifiable.

The *National Environmental Management Act* 107 of 1998 (*NEMA*) as well as the *National Environmental Management: Protected Areas Act* 57 of 2003 (*NEMPA*) can be seen as laws of general application. *NEMPA* especially implies that private property holders may be deprived of their property, if it is situated in or adjacent to a protected area in order to conserve the environment, and this will also not be arbitrary as the private property holders are still allowed to reside on the land in question. *NEMA* as well as *NEMPA* makes provision that property may be expropriated for environmental purposes subject to compensation and the provisions of the *Expropriation Act* 63 of 1975. Limitation of property rights in order to protect and conserve the environment can thus not be seen as unconstitutional or unfair.

Opsomming

Gemeenskappe behou soms privaat eiendomsreg op eiendom wat in of naby 'n beskermde natuurgebied geleë is. Artikel 25 van die *Grondwet van die Republiek van Suid-Afrika* van 1996 (die *Grondwet*) maak daarvoor voorsiening dat 'n persoon se eiendomsreg op eiendom beskerm word en dat die staat nie enige eiendom onregverdig mag ontneem of onteien nie. ‘n Persoon se belang in die omgewing word beskerm deur artikel 24 van die *Grondwet* wat bepaal dat elke persoon geregtig is op 'n eiendom wat nie skadelik is vir die persoon se gesondheid of welstand nie, asook die reg dat die omgewing bewaar moet word vir huidige en toekomstige geslagte.

Nasionale parke is die waardevolste bron met betrekking tot natuurbewaring wat Suid-Afrika besit, aangesien hierdie parke alle natuurlike hulpbronne huisves. Die vraag wat nou ontstaan is, watter beperkings op grondeienaars met betrekking tot natuurbewaring geplaas word en wat die grondwetlikheid van hierdie beperkings is. Die antwoord tot hierdie vraag is ietwat moeilik, aangesien die reg tot eienaarskap asook die reg tot 'n veilige en skoon omgewing albei in die Handves van Menseregte ingesluit is, en hierdie regte verdien beskerming.

Dit is belangrik om te begryp dat nie alle regte in die Handves van Menseregte 'n absolute reg is nie en beperk kan word. Hierdie beperkings moet voldoen aan die vereistes soos uiteengesit in artikel 36 van die *Grondwet*. 'n Beperking van enige grondwetlike reg sal aanvaar word indien dit proporsioneel is. Artikel 36 het die gevolg van 'n algemene proporsionele toets om toe te sien dat enige reg vervat in die Handves van Menseregte slegs beperk word wat betref 'n algemeen geldende regsvoorskrif en indien die beperking redelik en regverdigbaar is.

Die *Wet op Nasionale Omgewingsbestuur* 107 van 1998 (*NEMA*) sowel as die *Wet op nasionale Omgewingsbestuur: Beskerme Gebiede* (Wet 57 van 2003) (*NEMPA*) kan beide gesien word as wette van algemene toepassing. *NEMPA* impliseer dat eienaars wat privaat eiendom naby of in 'n beskermde natuurgebied besit van hulle grond ontneem mag word om die natuur te beskerm en bewaar. Dit sal ook nie arbitrêr wees nie aangesien hierdie eienaars steeds op die grond mag woon. *NEMA* en *NEMPA* maak daarvoor voorsiening dat eiendom onteien mag word indien daar vergoeding betaal word en onderhewig aan die bepalings van die *Onteieningswet* 63

van 1975. Beperking op eiendomsreg om die omgewing te beskerm kan dus nie as ongrondwetlik of onregverdig beskou word nie.

Key Words.

Deprivation

Expropriation

Environment

Environmental conservation

Law of general application

Management

Management authority

Protected areas

Property

Public purpose/interest

INDEX

LIST OF ABBREVIATIONS

DFA	*Development Facilitation Act* 67 of 1995
ECA	*Environment Conservation Act* 73 of 1989
EIAs	environmental impact assessments
IEM	integrated environmental management
MEC	member of the executive council
NEMA	*National Environmental Management Act* 107 of 1998
NEMPA	*National Environmental Management: Protected Areas Act* 57 of 2003
NEMPs	National Environmental Management Principles
PAJA	*Promotion of Administrative Justice Act* 3 of 2000
PPA	*Physical Planning Act* 88 of 1967
SANParks	South African National Parks
WCNP	West Coast National Park

1 Introduction

The introduction contains the problem statement, research question, methodology and also a brief overview of all the chapters to understand what each paragraph of this dissertation will contain. The right to property as well as the right to the environment are both fundamental rights which deserve protection and the broad concept thereof is explained in the introduction.

1.1 Introduction and problem statement

Environmental protection is included in section 24 of the *Constitution of the Republic of South Africa* of 1996[1] as a constitutional right. There is a positive duty upon the state to protect the environment for present and future generations.[2] Section 24 of the *Constitution* provides that every person has the right "to an environment not harmful to one's health or well-being",[3] and also that the environment should be protected.[4] This protection includes that one should also promote economic and social development.[5] In South Africa, the protection of property is also included in section 25 of the *Constitution* as a constitutional right. Section 25 makes provision for certain property rights to be infringed upon or limited by state interference, and also provides for guidelines to determine to which extent the state may interfere with a person's property.[6] These guidelines are referred to as a process of balancing of constitutional rights through the proportionality test. There should be a rational reason for any right to be limited.[7]

In the case of *Corium (Pty) Ltd and Others v Myburgh Park Langebaan and Others*[8] (a pre-1996 constitutional decision), the respondents were interdicted from developing a township in a nature area, which was to be incorporated into the West Coast National Park.[9] The facts in this case were used as case study to determine in

1 Hereafter referred to as the *Constitution.*
2 De Waal, Currie and Erasmus *The Bill of Rights Handbook* 527.
3 S 24(a) of the *Constitution.*
4 S 24(b) of the *Constitution.*
5 S 24(b)(iii) of the *Constitution.*
6 S 36 of the *Constitution*.
7 See Chapter 4 of this dissertation for an explanation of the limitation clause in the *Constitution*.
8 1993 1 SA 853 (C); hereafter referred to as the *Corium* case.
9 Hereafter referred to as the WCNP.

which circumstances the state may deprive[10] a private land owner of its property and when it is necessary to expropriate[11] property in a nature area, subject to compensation.[12] When putting the *Corium* case in context, the most important aspect of the case is the balance between the rights of the owner, which were being taken away and the public purpose to protect the environment, more specifically, protected areas.

1.2 Research question

The question that arose pertained to restrictions placed by the environmental clause[13] and environmental legislation[14] on the property rights of an owner's right to his land in respect of nature conservation and the extent to which these restrictions are in accordance with the constitutional protection of property rights.[15]

One should consider to which extent the environmental clause in the *Constitution* places certain restrictions on the property rights of land owners in order to protect and conserve protected areas, and to which extent the protected rights of land owners and the right to their land, may be limited or infringed upon by such restrictions.

1.3 Methodology

This study report is mainly based on a literature study of primary and secondary resources, which include textbooks, law journals, legislation, case law and electronic resources relating to nature conservation, protected areas, the environmental clause and the property clause in the *Constitution*, mainly in respect of deprivation and expropriation. All of the resources were used to analyse and compare the environmental and property clauses in the *Constitution* and to determine the restrictions placed by environmental protection on an owner of property and also how one should balance conflicting rights in order to achieve a desired end.

10 S 25(1) of the *Constitution*; see 3.3 of this dissertation for a discussion of deprivation.
11 S 25(2) of the *Constitution*; see 3.4 of this dissertation for a discussion of expropriation.
12 S 25(3) of the *Constitution.*
13 S 24 of the *Constitution*.
14 *Inter alia NEMA* and *NEMPA*.
15 S 25 of the *Constitution*.

1.4 Overview of chapters

Chapter 2 will mainly focus on environmental conservation and will provide an analysis of section 24 of the *Constitution* and other environmental statutes applicable to nature conservation. It will also be necessary to determine whether the provisions of the *National Environmental Management: Protected Areas Act*[16] and other environmental legislation such as the *National Environmental Management Act*[17] are reconcilable with the protection of a person's right to property in terms of section 25 of the *Constitution*, to either deprive or expropriate property that is subject to nature conservation. The main problem is that there are communities that hold private property rights in or adjacent to protected areas. It is difficult to find a solution for this problem as section 24 and section 25 of the *Constitution* are both fundamental rights that deserve protection. Should the environment now be harmed in order to protect property rights? Or should property rights be infringed upon in order to protect and conserve the environment?

It is also important to look at the legal standing to enforce environmental laws.[18] South Africa always had a very strict and restrictive approached with regard to legal standing. A person could only approach a court if such a person had a personal interest in a matter.[19] The purpose of this dissertation is to determine the current position regarding legal enforcement in South Africa. Reference in this regard will, amongst other sources, be made to the case of *Wildlife Society of Southern Africa and others v Minister of Environmental Affairs and Tourism of the Republic of South Africa*[20]

When developers are limited to do with their property as they please, it is important to balance conflicting rights in terms of section 36 of the *Constitution.* Although the *Corium* case is a pre-constitutional case, it is important to decide whether the restrictions that the constitutional environmental clause places on the rights of property can be justifiable in these circumstances in accordance with the balance of convenience and specifically, according to the guidelines in section 36 of the *Constitution*.

16 57 of 2003; hereafter referred to as *NEMPA*.
17 107 of 1998; hereafter referred to as *NEMA*.
18 Mbodla 2000 *SALJ* 362.
19 Mbodla 2000 *SALJ* 362.
20 1996 3 1095 (Tk); hereafter referred to as the *Wildlife* case.

It is always important to balance the right of property owners and those of the general public and determine in whose favour the balance will tip. The aim of the study was to compare environmental protection with the protection offered to land owners in terms of section 25 of the *Constitution*. It was necessary to determine whether the limitation imposed by the state results in a deprivation or expropriation of the property in question.

Chapter 3 of this dissertation mainly focuses on the property clause in the *Constitution*, namely section 25. The property clause is broadly divided into four categories, namely section 25(1);[21] section 25(2) and (3);[22] section 25(4)[23] and section 25(5) to (9).[24] Chapter 3 will be divided into two sections: one being deprivation and the other, expropriation. Reference will be made to the case of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/s Wesbank v Minister of Finance*[25] regarding the distinction between a deprivation and an expropriation. The pre-constitutional provisions of the *Expropriation Act*[26] are still in force only if they are not in conflict with the *Constitution*, as the latter is the supreme law. Reference will also be made to the *Expropriation Act*. Property may also only be expropriated if it is subject to compensation.

Chapter 4 of this dissertation deals with the balancing of convenience of conflicting rights, in order to determine when, how and to which extent conflicting rights may be infringed upon. In order to determine to which extent rights in the *Constitution* may be infringed upon, reference will be made to section 36 of the *Constitution.*

Chapter 5 provides an overview of all of the preceding chapters. The purpose of this chapter is to answer the question whether section 24 of the *Constitution* as well as other environmental statutes, such as *NEMA* and *NEMPA*, place certain restrictions on the rights of land owners in respect of their right to their private property and how one should interpret the balance of convenience. In whose favour should the balance tip and how will one be compensated?.In order to understand the research question,

21 This section focuses on deprivation; Strydom 2012 *Without Prejudice* 70.
22 This section focuses on expropriation and the requirements thereto; Strydom 2012 *Without Prejudice* 70.
23 This section is known as the interpretation clause; Strydom 2012 *Without Prejudice* 70.
24 This section deals with all the aspects regarding land reform; Strydom 2012 *Without Prejudice* 70.
25 2002 4 SA 768 (CC); hereafter referred to as the *FNB* case.
26 63 of 1975; hereafter referred to as the *Expropriation Act*.

an analysis of the necessary environmental statutes and provisions relating to nature conservation will follow first.

2 Nature conservation

Since 1994, South Africa's transformative attitude is evident in the significant number of environmental statutes which according to Couzens,[27] "have the potential to alter significantly the nature of our environmental jurisprudence". The environment is a vital necessity for the well-being of living organisms and therefore, according to Joubert and Faris[28] no development should "subsist upon a deteriorating environmental base."

There is no doubt that environmental conservation is becoming increasingly important,[29] as can be seen in improvements made in environmental legislation. Examples of improving, environmental legislation are specifically found in the *National Environmental Management Act*[30] and the *National Environmental Management: Protected Areas Act*[31], which protect and conserve the environment and environmental resources, but also allow for public participation and the use of natural resources.[32] Many of these resources are, however, in the possession of private individuals and form part of private property.[33] The state has the responsibility to regulate private property[34] in order to protect the environment.[35] Regulatory limitations have to take place in the form of environmental conservation and these will be allowed if, according to Du Plessis,[36] such limitations are legitimate, necessary, not arbitrary,[37] and also not unfair.[38] Ways to regulate private property are found in section 25 of the *Constitution*, namely to deprive and expropriate[39] private property for legitimate use by the state. Property may be deprived in order to protect the resources in protected areas[40] and may be expropriated for environmental purposes.[41]

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27 Couzens 2010 *SALJ* 18.
28 Joubert and Faris (eds) *The Law of South Africa* (LexisNexis Durban 2012) 129.
29 Du Plessis 2011 *TSAR* 512.
30 107 of 1998; hereafter referred to as *NEMA.*
31 57 of 2003; hereafter referred to as *NEMPA.*
32 See *inter alia* s 41 and s 42 of *NEMPA*.
33 Du Plessis 2011 *TSAR* 512.
34 See the discussion on deprivation and expropriation in Chapter 3 of this dissertation; Van der Walt *Constitutional Property Law* 190–520.
35 Du Plessis 2011 *TSAR* 512.
36 Du Plessis 2011 *TSAR* 512.
37 See the discussion on the test laid down for non-arbitrariness in chapter 3 of this dissertation.
38 Du Plessis 2011 *TSAR* 512.
39 See chapter 3 of this dissertation for a discussion on deprivation and expropriation.
40 S 41 of *NEMPA*.
41 S 36 of *NEMA*; s 81 of *NEMPA*.

As section 25 of the *Constitution* will be discussed in detail in Chapter 3 of this dissertation, only a short discussion regarding the difference between deprivation[42] and expropriation[43] will follow in this paragraph. "Deprivation" refers to the process where the use and enjoyment of property is limited. The owner still has ownership over the property, but may not use the property as he/she pleases. "Expropriation" refers to the process where the state causes a loss of property of an owner.[44] As the property is "taken away", such state action is subject to compulsory compensation to be paid to the owner.[45] The *Expropriation Act* makes provision that compensation will not be paid if one's property is deprived and only once it is expropriated.[46] An expropriation should always be executed and authorised by an Act.[47] Both *NEMA* and *NEMPA* make provision for expropriations. Before expropriations under *NEMA* are discussed, a general discussion of *NEMA* will follow first.

2.1 National Environmental Management Act

Van der Linde explains that there are three legislative mechanisms enacted in South Africa to protect the environment.[48] The first of these mechanisms is to protect the environment by way of a regulatory approach in the *Constitution*, the second is environmental framework legislation, and the third is to adopt specific environmental legislation that can cover a range of environmental media.[49] Section 24 of the 1996 *Constitution* specifically makes provision for environmental protection.

In order to give effect to the provisions of the *Constitution*, specifically section 24, *NEMA* was enacted. *NEMA* now forms the basic legal framework Act in order to protect the environment.[50]

According to Van der Linde,[51] before the 1996 *Constitution* was in force, environmental protection in South Africa was regulated in an uncoordinated[52]

42 See 3.1 of this dissertation for a discussion on deprivation.
43 See 3.2 of this dissertation for a discussion on expropriation.
44 S 25(2) of the *Constitution*.
45 S 25(2) and (3) of the *Constitution*.
46 Du Plessis 2011 *TSAR* 512.
47 Du Plessis 2011 *TSAR* 512.
48 Van der Linde "National Environmental Management Act (NEMA)" 143.
49 Van der Linde "National Environmental Management Act (NEMA)" 143; Van der Linde also gives an example of the difference between framework legislation and environmental-specific legislation, namely: *NEMA* is South Africa's framework legislation and the *Conservation of Agricultural Resources Act* 43 of 1983 is an example of environmental-specific legislation.
50 Glazewski *Environmental Law in South Africa* 137; Van der Linde "National Environmental Management Act (NEMA)" 197.

manner and was also reactive. Protection of the environment was achieved through legislation that regulated specific media.[53] The fact that there was no framework legislation, such as *NEMA*, is evident through the hundreds of laws at national level that dealt with environmental protection, whether it was directly or indirectly.[54] Before *NEMA* was enacted, the framework legislation regarding the protection of the environment was the *Environment Conservation Act.*[55] *NEMA* has accordingly repealed the greater part of *ECA*. It should also be noted that *NEMA*'s function, according to Glazewski,[56] "is to further the national environmental interests by laying down the institutional structures and legal mechanisms to champion the environmental cause." In my opinion, one of the most important mechanisms laid down by *NEMA* is the principles contained in Chapter 1 of this Act. *NEMA* specifically states that negative impacts on the environment and people's environmental rights should be anticipated or prevented or kept to a minimal and remedied.[57] This can be linked directly to protected areas. In order to prevent degradation of a protected area, it is necessary to deprive a land owner of his/her property.[58]

According to Van der Linde, there are four so-called pillars[59] that can be identified when considering *NEMA*. The first of these is the National Environmental Management Principles,[60] found in *NEMA*.[61] These NEMP's form the corner-stone and are central to environmental management in South Africa.[62] Any development in or adjacent to a protected area should adhere to the principles in *NEMA*. Section

51 Van der Linde "National Environmental Management Act (NEMA)" 195–196.
52 Environmental laws were fragmented in the sense that an Act was promulgated for one reason and that reason only; an example is the *Water Act* of 1956, as the overall objective of the Act was to cater for the supply of water to agriculture and industry. This position has however changed and environmental laws are much more integrated, in the sense that any development should be sustainable and take into consideration all areas of environmental law; Kidd *Environmental Law* 12.
53 Van der Linde "National Environmental Management Act (NEMA)" 197.
54 Van der Linde "National Environmental Management Act (NEMA)" 197.
55 73 of 1989; hereafter referred to as *ECA*.
56 Glazewski *Environmental Law in South Africa* 135.
57 S 2(4)(viii) of *NEMA*.
58 See the discussion on deprivations under *NEMPA* in 2.3.1; s 41 of *NEMPA*.
59 These pillars include the following: firstly, ensuring quality in environmental issues through the National Environmental Principles; secondly, co-operative governance procedures; thirdly, civil society participation; fourthly, the adherence to constitutional imperatives to respect, protect, promote and fulfil the environmental right in the Bill of Rights in the *Constitution*. An example of the fourth pillar can be found, *inter alia*, in s 28 of *NEMA*, to avoid and remediate environmental damage, and in s 29, which protects workers who refuse environmentally hazardous work
60 Hereafter referred to as NEMP.
61 S 2 of *NEMA*.
62 Van der Linde "National Environmental Management Act (NEMA)" 198–201.

2(3) of *NEMA* specifically states that all developments should be socially, environmentally and economically sustainable. This entails that the environment, specifically protected areas, cannot be extensively harmed in order to better economic or social opportunities. Together with the principles in *NEMA*,[63] Kidd[64] is of the opinion that there are some distinct environmental common law principles, most importantly those of the polluter pays principle,[65] the precautionary principle,[66] the preventative principle,[67] the principle of co-operation,[68] the duty of care to avoid harm to the environment,[69] the life cycle responsibility[70] and public trust.[71] Environmental impact assessments[72] have now also been nationally recognised as an accepted environmental law norm, and to my opinion can also be included in the list of principles in *NEMA* that have to be adhered to.

When the state has to make certain decisions regarding the protection of the environment, the principles contained in section 2 of *NEMA* serve as a guideline for all organs of state.[73] Together with decision-making, the notion of sustainable development should always be taken into account. This is also a principle that forms the centre of the environmental principles.[74] There are, amongst several others, two distinct cases that dealt with sustainable development and the protection of the

63 See s 2 of *NEMA*; for other principles see Kidd *Environmental Law* 10 – sustainable development; environmental justice.
64 See Kidd *Environmental Law* 7-11.
65 Kid *Environmental Law* 7; this principles entails that a person that is involved in any polluting activity should also be responsible for the costs of preventing or dealing with the pollution; also see s 2(4)(p) of *NEMA*.
66 Kidd *Environmental Law* 9; when there is scientific uncertainty whether a certain activity may cause harm to the environment, it should be treated as hazardous until it is proven to be save; it is better to avoid any harm than to try to remedy the consequences of it later, which remedy may not even be possible.
67 Kidd *Environmental Law* 10; this principles entails that all environmental degradation and harm should be prevented. This principle can, however, be criticised, as no harm to the environment and pollution can be completely prevented. It is an inevitable side-effect of human activities such as developments.
68 Kidd *Environmental Law* 11; this entails collaboration between the public and private sector to achieve environmental goals; for a detailed discussion regarding co-operative governance, see Van der Linde "National Environmental Management Act (NEMA)" 202.
69 Kidd *Environmental Law* 11; harm to the environment should be avoided, or where it cannot be avoided, it should be mitigated.
70 Kidd *Environmental Law* 11; this principle is also referred to as "cradle to grave" – the person responsible for any toxic substance or pollutant remains responsible for that substance or pollutant throughout the life cycle of the project until the substance has been disposed of.
71 Kidd *Environmental Law* 11; see s 2(4)(o) of *NEMA* – the environment is held in public trust for the people; the benefit, use and environmental resources must serve the public interest and the environment must be protected as the people's common heritage.
72 Hereafter referred to as EIA.
73 Van der Linde "National Environmental Management Act (NEMA)" 198.
74 Van der Linde "National Environmental Management Act (NEMA)" 199; s 2(3) of *NEMA*; s 2(4) of *NEMA*.

environment. The first of these cases is that of *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* [75] where the member of the executive council[76] refused the construction of a filling station on commercial property. Judge Claasen maintained the decision of the MEC by stating that economical and financial sound developments should be balanced with the environmental impact that the development will have.[77] In *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others,*[78] the concept of sustainable development was the central feature of the Constitutional Court's decision, together with the three-pillar approach, namely economic, social and development.[79]

2.1.1 Integrated environmental management

Integrated environmental management[80] is provided for in *NEMA* for all development activities in the country.[81] IEM includes the inter-relationship between the different spheres of government, the environmental media,[82] the different line functionalities of government and the different tools for environmental management.[83] In short, an IEM is developed for the environment, so that the consequences of any development on the environment can be adequately understood in the planning process of a development.[84] The *ECA* did not make provision for IEM, therefore, provision has been made in *NEMA* to address IEM, which is found in Chapter 5 of *NEMA*. This chapter in *NEMA* gives effect to the provision in section 24 of the *Constitution*,[85] which provides that the state has a certain duty in order to give effect to the environmental right contained in the *Constitution*, through management strategies, conservation, environmental education and an integrated approach to resource utilisation.[86] In *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation,*

75 2004 5 SA 124 (W).
76 Hereafter referred to as MEC.
77 2002 5 SA 124 (W).
78 2007 6 SA 4 (CC); per Ngcobo for the majority; hereafter referred to as the *Fuel Retailers* case.
79 Kidd *Environmental Law* 17–18.
80 Hereafter referred to as IEM.
81 See chapter 5 of *NEMA*.
82 Land, air, water and soil.
83 Bosman, Kotze and Du Plessis 2004 *SAPLJ* 414.
84 Glazewski *Environmental Law in South Africa* 231.
85 S 24(b) of the *Constitution*.
86 Van der Linde "National Environmental Management Act (NEMA)" 203–204.

Environment and Land Affairs,[87] the court held that the IEM system, with appropriate environmental tools of EIAs is an example of the "other measures" mentioned in section 24(b) of the *Constitution*.[88]

According to section 23(2) of *NEMA,* IEM is the integration of fundamental principles[89] of environmental management into all decisions that may have a detrimental impact on the environment.[90] It is thus necessary that one should evaluate the impact that an activity would have on the environment, socio-economic conditions and cultural heritage.[91] IEM should also assess the risks that an activity could have on the environment, which consequences it might have and also alternatives to mitigate the harm.[92]

2.1.2 Environmental impact assessments

The 1972, Stockholm Conference[93] introduced environmental impact assessments which are now applied internationally.[94] Principle 17 of the 1992 Rio Declaration on Environment and Development[95] gives a good general idea as to what an environmental impact assessment[96] is:[97]

87 2004 5 SA 124, 143 (W).
88 2004 5 SA 124 (W).
89 Glazewski *Environmental Law in South Africa* 232; the principles contained in an IEM according to Glazewski provides for a democratic participatory, holistic, sustainable, equitable and accountable approach to environmental issues.
90 S 23(2)(a) of *NEMA*.
91 S 23(2)(b) of *NEMA*; see *Oudekraal Estates (Pty) Ltd v The City of Cape Town and others* 2010 1 SA 333 (SCA)-hereafter the *Oudekraal* case- which is discussed in 2.2.1 of this dissertation; in order to apply IEM effectively, one can use the help of the so-called Integrated Environmental Management Guideline Series, which is a six-volume series of booklets published by the Department of Environmental Affairs that has played an important role in spreading the philosophy regarding IEM; see *Integrated Environmental Management Guidelines Series* Department of Environmental Affairs 1992.
92 S 23(2)(b) of *NEMA*.
93 The United Nation Conference on the Human Environment (the Stockholm Conference) played a significant part to change a fragmented and vague approach to protect the environment, by giving a framework of principles to address environmental problems. The Stockholm Conference also helped to establish the United Nations Environment Programme to, *inter alia*, promote environmental conservation; Devine "International Environmental Law" 159; also see discussions regarding the Stockholm Conference in Kid *Environmental Law* 52 – 55.
94 See, *inter alia*, Rio Principles (1992 Rio Declaration on Environment and Development) and 1991 Espoo Convention.
95 The Rio Declaration on Environment and Development adopted Agenda 21. This Agenda contains a plan for sustainable development; see Pillay *et al* SAJS 331-333; the Rio Declaration on Environment and Development also confirmed principles such as the polluter pays and precautionary principles; see Verschuuren *PELJ* 1-57.
96 Hereafter referred to as EIA.
97 Also see in Glazewski *Environmental Law of South Africa* 231 for different meanings of authors regarding the meaning of an EIA; one evaluates the consequences that a major development may have on the environment; other authors refer to an EIA as an administrative process to

> Environmental Impact Assessments, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a national authority.

In short, according to Allan, an EIA[98] refers to all the advantages and disadvantages that a proposed activity will have on the environmental, social and economic aspects, and it assists authorities to determine whether a development should continue or not.[99] Guidelines to adhere successfully to the requirements of an EIA are found in Chapter 5 of *NEMA* as well as the environmental impact assessment regulations.[100] Section 24(1) of *NEMA* requires all persons who are engaged in listed activities to consider and also to report to EIA administrators about the environmental risk and impact that the activity might have on the environment. The Minister of Environmental Affairs and Tourism or MEC has the authority to identify specific areas in which a proposed activity should not take place.[101] The said Minister or MEC may also regulate identification of activities and geographical areas, as well as listed activities[102] and the process of environmental authorisation.[103] One first, however, has to determine whether the EIA will be for a basic assessment or a full (scope) assessment. *Government Notice* 386 specifically lists that an EIA is needed for any construction of resorts, lodges, hotels or other tourism or hospitality facilities in a protected area contemplated in *NEMPA*.[104] The above-mentioned government notices refer to basic assessment. If a scoping assessment is needed, one has to adhere to the requirements of *Government Notice* R387.[105]

If a person does not adhere to the regulations issued by the Minister of Environmental Affairs and Tourism or MEC, and continues with an activity without environmental authorisation, such a person will be held criminally liable[106] in terms of

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determine the impact that an activity may have on the environment; it may also be the predicting, identifying, evaluating and mitigating of the biophysical, social and other effects of a project before decisions regarding major developments are made.

98 See GN R982 in GG 38282 of 4 December 2014.

99 Allan 2012 *Civil Engineering* 56.

100 GN R982 in GG of 4 December 2014.

101 S 24(2) of *NEMA*.

102 See GN R386 in GG 28753 of 21 April 2006 for a list of listed activities that require an EIA regarding basic assessments.

103 S (2), (3), (5) and (6) of *NEMA*.

104 GN R386 in *GG* 28753 of 21 April 2006 (see activity 1(d) in the listed activities).

105 GN R387 in *GG* 28753 of 21 April 2006.

106 See s 34 of *NEMA*.

section 24F of *NEMA*[107] and may also be punished with a fine of R5 million rand or 10 years′ imprisonment or even both.[108] If a person contravenes section 24F of *NEMA* and does not obtain prior written authorisation, such a person can apply for retrospective authorisation from the Minister or MEC, where after such applicant may be required to compile a report and submit certain information.[109] According to section 24 of *NEMA* as well as IEM in section 23 of *NEMA,*[110] environmental authorisation and conducting an EAI form the very core of the EIA procedure. Some people might think that section 24G undermines the purpose of an environmental authorisation, namely that an authorisation should precede an activity and should not take place after the detrimental activity to the environment had already taken place.[111] I, however, believe that this insertion provides that owners of private property will be afforded the opportunity to rectify their fault.[112] This might have the effect that they will now be deprived of the right to their property.[113]

In concluding with the discussion regarding EIA, the court held in *Fuel Retailers* case,[114] environmental authorities always have to ensure that environmental, social and economic impacts of a proposed development are properly investigated in order to adhere to the environmental principles in *NEMA*.

2.1.3 Compliance and enforcement[115]

National parks, one of the most valuable natural resources, are seen as a matter of great public importance. In this regard, section 28 of *NEMA*[116] regarding the duty of

107 S 24F of *NEMA* as amended by the *National Environmental Management Amendment Act 8 of 2004*. The amendment act, together with its amendments, became operational on 7 January 2005.
108 S 24F of *NEMA*.
109 S 24G of *NEMA.*
110 Van der Linde "National Environmental Management Act (NEMA)" 205.
111 Van der Linde "National Environmental Management Act (NEMA)" 193–221; also see *Silvermine Valley Coalition v Sybrand van der Spuy Boerdery and Others* 2002 1 SA 478 (C) at 448–489.
112 Also see s 28 of *NEMA* (duty of care and remediation of environmental damage) which affords the opportunity to a developer to remediate the harm he/she has caused the environment.
113 See 3.1 of this dissertation for an explanation of deprivation.
114 2007 6 SA 4 (CC.)
115 See discussion regarding governance and environmental governance in Kotze 2003 "Environmental Governance" 103–125.
116 Every person that causes, has caused or may cause significant pollution or degradation to the environment must take reasonable measures to prevent such pollution for occurring, continuing or recurring, or, as far as such harm to the environment is authorised by law or cannot easily be avoided, or stopped, to minimise and rectify such pollution or degradation of the environment.

care[117] towards the environment and remediation of environmental damage and pollution is applicable.[118]

Section 28 of *NEMA* applies to a person who has the right to use land on which an activity is performed or undertaken[119] and includes an owner but also a person in control of the land. The common law principle of duty of care to the environment is codified in respect of the environment in the above-mentioned section 28 of *NEMA*. It is important to note three distinct considerations regarding the duty of care principle in *NEMA*. The first of these is that the duty to take certain measures has a retrospective effect and includes historic pollution.[120] The issue of historic pollution and retrospective application was dealt with in *Bareki NO V Gencor Limited and Others*.[121] In this case, the court had to decide whether section 28 of *NEMA* also included that the pollutant should remediate the consequences of historic pollution regarding asbestos mining operations dating back to the 1980s. Fairness was one of the important factors that determined the outcome of the case and the court also distinguished between retroactive and retrospective application. The court then finally held that the retrospective application of *NEMA* does not go beyond the commencement of the Act.[122]

Section 28 of *NEMA* secondly states that a person who causes "significant pollution" should remedy such harm. Criticism against *NEMA* is that it does not make provision for what is meant by "significant pollution".[123] As there is no guideline to follow, each case will be handled on a case-by-case basis.[124] Section 28 further makes provision

117 See Van der Linde and Basson "Environment" 14; it is stated by the authors that the duty of care provision in s 28 of *NEMA* emphasises the right to a healthy environment, as set out in s 24 of the *Constitution*, by codifying the common law "duty of care" and "life cycle management" contained in s 2 of *NEMA*.

118 Pollution has a very wide meaning and includes pollution to all of the environmental media, namely water, air and land.

119 S 28(2)(a) of *NEMA*.

120 Van der Linde "National Environmental Management Act (NEMA)" 211.

121 2006 1 SA 432 (T).

122 Du Plessis and Kotze 2007 *SLR* 161–162, 167, 168; Van der Linde and Basson "Environment" 15.

123 Van der Linde and Basson "Environment" 14; although *NEMA* does not make provision to explain what "significant pollution" is, it does in s 28(3) of *NEMA* cover a range of activities that determine when a duty of care has been discharged; also see Van der Linde "National Environmental Management Act (NEMA)" 211.

124 Van der Linde "National Environmental Management Act (NEMA)" 211–212.

that certain prescribed measures have to be taken to satisfy the legislative requirement.[125]

2.2 Expropriations under NEMA

There are several statutes that make provision for the state to expropriate property or certain rights in property.[126] For the purpose of this chapter, the focus is on the expropriation provisions of *NEMA.*

NEMA, according to Couzens, is the most dedicated environmental statute in South Africa, to which all environmental statutes are subject.[127] The reason for *NEMA* to be a dedicated statute is that it imposes a general duty of care on all citizens in order to conserve the environment. Section 28(1) of *NEMA* provides that:

> Every person that causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures[128] to prevent such pollution or degradation from occurring, continuing or recurring, or, as far as such harm to the environment is authorised by law or cannot easily be avoided, or stopped, to minimise and rectify[129] such pollution or degradation of the environment.

125 See s 28(3) of *NEMA* – investigate, evaluate and assess the impact of an activity on the environment; inform and educate employees of the risk of their work and educate them how to avoid harm and degradation to the environment; cease, modify and control an act that causes pollution to the environment; contain or prevent the movements of pollutants; eliminate the source of the pollution; remedy the effect of the pollution.

126 Some environmental provisions that make provision for expropriation of property include the following: According to s 49(1) of the *National Forest Act* 84 of 1998, the Minister may expropriate property and reserve it for forestry or any other legitimate purpose, if that purpose is a public purpose or in the public interest; in terms of s 64(1) of the *National Water Act* 36 of 1998, the Minister of Water Affairs may expropriate property for any purpose contemplated in the Act, if it is for a public purpose or in the public interest; s 65 of the *National Water Act* 36 of 1998 also makes provision for expropriation for rehabilitation and other remedial work; s 9(1) of the *National Environmental Management: Integrated Coastal Management Act* 24 of 2008 makes provision for the acquisition of private land by the state for the purposes of declaring that land as a coastal public property; s 55(1) of the *Mineral and Petroleum Resources and Development Act* 28 of 2002 makes provision for the expropriation of any land, by the Minister and the payment of compensation thereof, if it is necessary for the achievement of the objectives of the Act; The *Expropriation Act* 63 of 1975 applies to all expropriations.

127 Couzens 2010 *SALJ* 18.

128 These measures include the following: investigate, evaluate and assess the impact on the environment (s 28(3)(a)); inform and educate the employees of the environmental risks of their work and the manner in which their tasks must be performed in order to avoid causing significant pollution or degradation of the environment (s 28(3)(b)); cease, modify or control any act, activity or process causing the pollution or degradation (s 28(3)(c)); contain or prevent the movements of pollutants or the causing of degradation (s 28(3)(d)); eliminate any source of the pollution or degradation (s 28(3)(e)) and remedy the effects of the pollution or degradation.

129 One should keep in mind that where a development has occurred, it cannot be said that a person should rectify such pollution or development, and the wording of s 28 of *NEMA* is subject to criticism. Once the development takes place, there is no way in which such pollution to the environment can be rectified, or even be brought to a minimum.

If a person fails to comply with section 28(1) of *NEMA* and does not take reasonable measures to prevent or stop pollution or degradation of the environment, the Director-General may, according to section 28(4) of *NEMA*, direct a person who fails to take measures in terms of section 28(1) of *NEMA* to investigate, evaluate and assess the impacts that the activities may have on the environment and also to report thereon,[130] commence taking reasonable measures before a specific date,[131] diligently continue with those measures,[132] and complete these measures before a specific date.[133] If a person fails to comply with certain measures and does not undertake rehabilitation or other remedial work, the right in the use of the property may be expropriated.[134] Section 28(6)(a) provides that:

> If a person required under this Act to undertake rehabilitation or other remedial work on the land of another reasonable requires access to use of or a limitation on the use of that land in order to effect rehabilitation or remedial work but is unable to require it on reasonable terms, the Minister may
>
> (a) expropriate the necessary rights in respect of that land for the benefit of the person undertaking the rehabilitation or remedial work who will then be vested with the expropriated rights.

The Minister of Environmental Affairs and Tourism may then recover all costs from the person for whose benefit the expropriation was effected.[135] Couzens is of the opinion that the expropriation of rights in or on land is of a temporary nature, until the remedial work is done.[136]

NEMA explicitly states in section 36(1) of the Act that property may be expropriated by the Minister of Environmental Affairs and Tourism, for environmental or other purpose under this Act subject to compensation.[137] The purpose of the expropriation should also then be for a public purpose or in public interest.[138] It is provided for in section 36(2) of *NEMA* that the *Expropriation Act* applies to all expropriations under *NEMA*.[139] *NEMA* provides further that the amount of compensation and the time and manner of payment should be in accordance with section 25(3) of the *Constitution*,

130 S 28(4)(a) of *NEMA*.
131 S 28(4)(b) of *NEMA*.
132 S 28(4)(c) of *NEMA*.
133 S 28(4)(d) of *NEMA*.
134 Couzens 2010 *SALJ* 24.
135 S 28(6)(b) of *NEMA*.
136 Couzens 2010 *SALJ* 24.
137 S 36(1) of *NEMA*; the Minister of Environmental Affairs must consult the Minister of Minerals and Energy before any mineral rights are expropriated.
138 S 36(1) of *NEMA*.
139 S 36(2) of *NEMA*.

and also that a person should first be given a hearing before any property is expropriated.[140] It should be noted that *NEMA* does not make provision for property to be deprived.

2.2.1 Oudekraal Estates (Pty) Ltd v City of Cape Town and Others[141]

In this case, developers had been granted a permit to develop property,[142] which plans were approved in 1961. However, there were never any developments on the specific property.[143] Only in 1996, Oudekraal Estates submitted engineering plans in order to develop on the land. As the plans to develop were not submitted in the required time, the City of Cape Town was of the view that the permission granted in 1961 had lapsed. The court, on review, had to decide whether the city's delay to bring an application for the setting aside of the approval to build on the land in question was unreasonable and whether such a late application could be condoned.[144] Although it is unreasonable to bring the application more than 30 years later, the court condoned the late application.[145] The developer alleged that the review application brought by the national heritage authority and also South African National Parks[146] would amount to an expropriation, as the right that was given to a developer in 1961, was now "taken away".[147] This argument was rejected by the court. The court stated that section 25 protection in terms of the *Constitution*, is afforded to property holders, which in the *Oudekraal* case, was not applicable.[148] The court held that, should the right to develop the sensitive land stand, it would be a threat to an environmentally significant area.[149]

Not only did the court take into account the effect that the development would have on the environmental, it also took into consideration the effect that such development would have on the community and the public at large.[150] The *court a quo's* decision was confirmed by the Supreme Court whose decision was based on the interests of

140 S 36(3) of *NEMA*.
141 2010 1 SA 333 (SCA); hereafter referred to as the *Oudekraal* case.
142 Oudekraal is a piece of private property on the slopes of Table Mountain. There were also Muslim graves on the property, which is of National Heritage importance.
143 The *Oudekraal* case; Du Plessis 2011 *TSAR* 514; Couzens 2010 *SALJ* 28.
144 Du Plessis 2011 *TSAR* 514.
145 The *Oudekraal* case; Du Plessis 2011 *TSAR* 514.
146 Hereafter referred to as SANParks
147 The *Oudekraal* case at par 68.
148 Couzens 2010 *SALJ* 28–29.
149 Du Plessis 2011 *TSAR* 514.
150 See chapter 4 of this dissertation for an explanation of the public interests and how to balance the convenience in question.

the public.[151] Du Plessis points out the significance of the findings in this case when she states the following:

> What is of interest about the case is the fact that Oudekraal Estates' entitlement to develop the property (and back in 1961 with valid approval from the City of Cape Town to do so) was limited 50 years later, because the changing interests of the community required such a restriction.

2.3 National Environmental Management: Protected Areas Act

NEMPA is envisaged to give effect to and achieve progressive realisation of the fundamental environmental right in section 24 of the *Constitution* in order to establish a partnership with the population,[152] for which the state acts as trustee of all protected areas in South Africa.[153] The establishment of protected areas is a valuable conservation tool, and according to Paterson,[154] is "widely used in South Africa to protect the natural and cultural heritage." South Africa's protected areas are currently regulated by *NEMPA* and the regulations[155] promulgated in terms of *NEMPA*.[156] According to Strydom, the most important objective of *NEMPA* is the declaration and management of protected areas.[157] In order for a declaration to have any legal effect, the declaration should be effected by notice in a *Government Gazette*.[158] Management is defined[159] in *NEMPA* as:

> "management" in relation to a protected area includes, control, protection, conservation, maintenance and rehabilitation of the protected area with due regard to the use and extraction of biological resources, community-based practices and benefit-sharing activities in the area in a manner consistent with the Biodiversity Act.

In my opinion, what is endeavoured by *NEMPA* is appropriate and also co-operative management. If an area is managed properly, one can adhere to the objectives of sustainable utilisation of protected areas for the benefit of people,[160] and also for

151 Du Plessis 2011 *TSAR* 514.
152 Strydom "Protected Areas" 962.
153 S 3(a) of *NEMPA*.
154 Paterson 2007 *SAPL* 1.
155 See GN R1061 in *GG* 28181 of 28 October 2005.
156 Strydom "Protected Areas" 962.
157 Strydom "Protected Areas" 962.
158 Declaration originates from the MEC; Strydom "Protected Areas" 951–970.
159 S 1 of *NEMPA* (management).
160 S 2(e) of *NEMPA*.

local communities to participate in the management of protected areas[161] and thus provide for the existence of SANParks.[162]

In the *Corium (Pty) Ltd and Others v Myburgh Park Langebaan and Others*[163], Judge Conradie[164] explained the importance of nature parks and stated, "National parks are a national asset of immense value." From this statement alone, one can realise the impact that developing activities can have within nature areas. It is clear that in some instances, environmental protection will deprive an owner to develop on his/her land for the sake of environmental protection. Section 16 of the *ECA* deals with the declaration of a protected environment before the promulgation of *NEMPA* and states that a competent authority may declare an area to be a protected environment, but such area may only be declared if,[165]

> ...there are adequate grounds to presume that the declaration will substantially promote the preservation of specific ecological processes, natural systems, natural beauty or species of indigenous wildlife or the preservation of biotic diversity in general.

NEMPA provides for a system of protected areas, which are divided into different categories.[166] There are different activities that may take place in each of the protected areas. Section 51 of *NEMA* states that the minister or the MEC, may

> by notice in the *Provincial Gazette* restrict or regulate development that may be inappropriate for the area, given the purpose for which the area was declared, and the carrying out of other activities that may impede such purposes.

NEMPA makes provision for activity or developments to take place within a protected environment, given that such activity or development should be regulated.[167] Current legislation[168]makes it possible for activities to be regulated within a protected environment. The regulation of activities within a protected environment may constitute a deprivation as the use and enjoyment of private property are restricted.

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161 S 2(f) of *NEMPA*.
162 S 2(g) of *NEMPA*.
163 1993 1 SA 853 (C); hereafter referred to as the *Corium* case.
164 *Corium* case 858E.
165 S 16(a) of the *ECA*.
166 S 9 in *NEMPA* gives the different types of protected areas. S 9 of *NEMPA* should be read with s 37 of *NEMPA*.
167 No reference was made in ECA and no provision was made to regulate activities within protected environments. S 16(a) of ECA only makes provision that an area should be declared a protected environment in order to protect the ecological and natural processes.
159 The most important legislation in this regard and for the purpose of this dissertation is *NEMPA;* also *NEMA;* also see *inter alia* s 28(3), (5) and (6) of the *National Heritage Resources Act* 25 of 1999.

In terms of current legislation,[169] an area may be declared a protected area. Protected areas include and may be declared as follows: special nature reserves, national parks, nature reserves and protected environments;[170] world heritage sites;[171] marine protected areas;[172] specially protected forest areas, forest nature reserves, and forest wilderness areas declared in terms of the *National Forest Act* 84 of 1998.[173] Section 28 of *NEMPA* deals with the declaration of a protected environment. Section 28(2)(f) of *NEMPA* explicitly deals with the declaration of an area regarding the change in land. This section states that a declaration may only be issued:

> to control change in land use of the area if the area is earmarked for declaration as, or inclusion in, a national park or nature reserve.

Section 51 of *NEMPA*, regarding the regulation or restriction of activities in protected areas, should be read with section 28 of the same Act. If a certain development will be inappropriate for the environment or area in question and the development does not fit the purpose for which that area was declared, the Minister of Environmental Affairs and Tourism or MEC should regulate or restrict the development or activity by notice in the *Government Gazette*.[174] This will also cause a deprivation of the developing owner's right to do with his/her property as he/she pleases.

Activities in protected areas are regulated or restricted by the regulations made, amongst others, under section 86 of *NEMPA*.[175] Section 86 of *NEMPA* provides that the Minister responsible for national environmental management may make regulations or restrict activities that will have an adverse effect on the environment in protected areas,[176] or land uses in protected areas that are and will be harmful to the environment.[177] Regulations made under section 86 of *NEMPA* will result in the deprivation of an owner's right to his/her property. The regulations made under

169 See *inter alia* in terms of the *National Forest Act* 84 of 1998 an area can be declared a specially protected forest area, forest nature reserve and forest wilderness area in terms of s 8 of the Act; a protected environment is declared as such in terms of s 28 of *NEMPA*; a national park is declared as such in terms of s 20 of *NEMPA*; an area is declared as a nature reserve in terms of s 23 of *NEMPA;* a mountain catchment area is declared in terms of the *Mountain Catchment Areas Act* 63 of 1970.
170 S 9(a) of *NEMPA*.
171 S 9(b) of *NEMPA*.
172 S 9(c) of *NEMPA*.
173 S 9(d) of *NEMPA*.
174 S 51(a) of *NEMPA*.
175 S 49(a) of *NEMPA*.
176 S 86(1)(d)(i) of *NEMPA*.
177 S 86(1)(d)(iii) of *NEMPA*.

section 86 are seen as a law of general application and it will be difficult to prove that these deprivations are arbitrary.

2.3.1 Private land owners within protected areas

As *NEMPA* may regulate activities within protected areas, which previous legislation did not do, it is clear that *NEMPA* moved away from the traditional exclusionary approach to a more human-centred approach.[178] Current environmental legislation is designed to promote the incorporation of private and communal land in the network of protected areas,[179] as people sometimes hold private property rights in or adjacent to a protected area. Land owners sometimes harvest on and use the land within protected areas to undertake commercial activities. If one prohibits such a land owner from completing the latter activities, it is inconsistent with the objectives in terms of *NEMPA*. The problems that may arise are that a land on which individuals and local communities reside, of which they are not the owners, is an area that is earmarked for incorporation into a specific protected environment. *NEMPA* does however have mechanisms that can cater for instances like these.[180]

2.3.2 Environmental management

Any activity regarding environmental management should include firstly, identifying the issue concerned;[181] secondly, implementing the planning outcomes; and lastly, checking or verifying the implemented arrangements.[182] There is no concise definition for environmental management and it can be summarised as the planning, doing, checking and acting activities of managers.[183] Previously, environmental management was seen as the ecology and conservation against the economy and development.[184] Today, the position has changed by implementing a more integrated approach to environmental management.[185] According to Nel and Kotze (2009),[186] the position has now moved to:

178 Paterson 2007 *SAPL* 26; see s 2(e)–(f) of *NEMPA*.
179 Paterson 2007 *SAPL* 26.
180 Paterson 2007 *SAPL* 27.
181 Nel and Kotze "Environmental Management: An Introduction" 7.
182 Nel and Kotze "Environmental Management: An Introduction" 7.
183 Nel and Kotze "Environmental Management: An Introduction" 11.
184 Nel and Kotze "Environmental Management: An Introduction" 11.
185 See the discussion on integrated environmental management in Nel and Kotze "Environmental Management: An Introduction" 1–33.
186 Nel and Kotze "Environmental Management: An Introduction" 11.

> a continuum of environmental management paradigms that range from frontier economics to; environmental protection; resource management end eco-development; to a deep ecology paradigm that reintroduces the principles of ethics into the environmental management debate.

The shift to a more ethical approach to environmental conservation is evident in new environmental laws which provide for integrated management,[187] impact assessments[188] and proper rehabilitation of the environment.[189]

2.3.2.1 Management of protected areas

Chapter 4 of *NEMPA* deals with the management of special nature reserves, national parks, nature reserves and protected environments.[190] Any management in the latter environments should be assigned to a stipulated management authority. It is then important to note that a management plan is needed for the proper management of an area which should be submitted to the Minister responsible for national environmental management or the MEC for approval.[191] This plan ensures the protection, conservation and also management of the protected areas in question, which is consistent with the objectives of *NEMPA*.[192] *NEMPA* contains certain mechanisms which, to my opinion, gives effect to such a plan. The first mechanism is that people can be appointed as management authorities. Such management authorities should manage the area in accordance with the *National Environmental Management*: *Biodiversity Act* [193] or *NEMA* as well as other national, provincial and municipal laws.[194] This creates the impression that environmental management should be integrated and acknowledges that all elements of the environment are linked and interrelated.[195] Authorities should always take into account the effects of any decision on the environment and also the people within the environment.[196] The category of people who can be appointed in terms of *NEMPA* to regulate an activity within a protected area, is very broad. It includes local communities, communal and also private land owners who reside in or adjacent to a

187 See chapter 5 of *NEMA*.
188 See chapter 5 of *NEMA.*
189 See s 28 of *NEMA*.
190 Glazewski *Environmental Law in South Africa* 344; s 37 of *NEMPA*.
191 S 39 of *NEMPA*.
192 S 41(1) of *NEMPA*.
193 10 of 2004.
194 S 40(1)(b)(ii)–(iv) of *NEMPA*.
195 S 4(b) of *NEMA*.
196 S 4(b) of *NEMA*.

protected area.[197] The category of people includes suitable persons, organisations and organs of state.[198]

The second mechanism is found in section 42 of *NEMPA* which makes provision for the co-management[199] of a protected area. Section 42(1)(a) provides that the management authority may conclude an agreement with the state, a local community or an individual.[200] This agreement can specifically be made to regulate[201] human activities that affect the environment in a specific area.[202] The co-management agreement provides, *inter alia*, for the occupation of a protected area or a portion thereof.[203] It is also provided for in section 50(1)(b) of *NEMPA* that the management authority in a specific area[204] may enter into written agreements with the local community inside or adjacent to a protected area. This is to allow members of the public to use biological resources in the park in a sustainable manner.[205]

It is clear that *NEMPA* creates certain mechanisms to provide for public participation in protected areas and also for the sustainable use of environmental resources and sharing benefits derived from such resources.[206] Strutory mechanisms are not the only way in which to regulate private property within or adjacent to protected areas. The Department of Environmental Affairs and Tourism (DEAT) has also published several other initiatives. These initiatives, according to Paterson, include the following: Directorate: People and Conservation; the introduction of the People and Parks programme, which aims in expanding the local community involvement; the

197 Paterson 2007 *SAPL* 27.
198 S 38 of *NEMPA*.
199 Co-management contemplated in s 42(a) may not lead to fragmentation or duplication of management functions; see s 42(b) of *NEMPA*.
200 S 42(1)(a) of *NEMPA*.
201 The activities listed in s 42(2) may also be further restricted. An example is where commercial and mining activities are restricted in the following areas: special nature reserves, national parks, nature reserves, world heritage sites, marine protected areas, protected forest areas, forest nature reserves or forest wilderness areas. Prospecting and mining rights in the areas mentioned are only possible with the consent of the Minister of Minerals and Energy Affairs in the case of a protected environment – see Strydom "Protected Areas" 951–970.
202 S 42(1)(a)(ii) of *NEMPA*.
203 S 42(2)(e) of *NEMPA*; s 2(a)–(i).
204 The area refers to a national park, a nature reserve or a world heritage site. The Act in this regard does not make provision for special nature reserves or protected environments.
205 S 50(1)(b) of *NEMPA*.
206 Paterson 2007 *SAPL* 28.

People and Parks Forum and the establishment of individual park forums, where a park forum is established for each national park.[207]

It is important to note that management authorities as well as the Minister if Environmental Affairs and Tourism or the Minister responsible for national environmental management or MEC should always keep the principles in *NEMA* in mind when making any decision or drafting any management plan. The principles are binding on all organs of state[208] and they also provide that any development should be socially, environmentally and economically sustainable,[209] again introducing the concept of sustainable development. In concluding, it was established that a proper management plan has to be approved by the Minister or MEC whereafter management authorities are appointed to regulate the environment in order to have equitable access to environmental resources and also to ensure that environmental degradation is kept to a minimal.[210] Although the *NEMPA* tries to address and regulate the activity of private property holders within protected areas, private property holders may still sometimes be restricted from doing with their property as they deem fit. Private property holders also bear the risk of their property being expropriated in terms of *NEMA* or *NEMPA.*

2.4 Expropriations under NEMPA

NEMPA further explicitly makes provision for land to be expropriated by the state. Section 80 of *NEMPA* deals with the acquisition of private land by the state. Section 80(1) of *NEMPA* provides that the Minister responsible for environmental management may acquire land or any right in or to land which has been or is proposed to be declared or included in a national protected area.[211] The acquisition can be achieved by any one of the following means: by purchasing the land or right;[212] exchanging the land or rights for other land or rights;[213] or by expropriating the land or rights in accordance with the *Expropriation Act*.[214] If no agreement can be reached with the owner of the land, the land may be expropriated in accordance with

207 See Paterson 2007 *SAPL* 28 (footnote 193); see further discussions in Paterson 2007 *SAPL* 1-33.
208 S 2(1)(a) of *NEMA.*
209 S2(3) of *NEMA.*
210 S 28 of *NEMA.*
211 S 80(1) of *NEMPA*.
212 S 80(1)(a) of *NEMPA*.
213 S 80(1)(b) of *NEMPA*.
214 S 80(1)(c) of *NEMPA*.

section 25 of the *Constitution*.[215] Section 80(2) of *NEMPA* has similar provisions regarding land or any right in land that may be expropriated which has been or is proposed to be declared as or included in a provincial protected area.[216]

Section 81 of *NEMPA* deals with the acquisition of private land by SANParks. SANParks may acquire private land or any right in or to private land which has been or is proposed to be declared as or included in a national park, subject to the approval of the Minister of Environmental Affairs and Tourism acting with the concurrence of the Cabinet member responsible for land affairs.[217] The acquisition can take place in one of the following ways: by purchasing the land or right;[218] or if the land or right is donated or bequeathed, by accepting the donation or bequest.[219] Should the parties fail to agree on a purchase price for the land or right in question, the Minister may, expropriate the property in accordance with the *Expropriation Act* and subject to the provisions of section 25 of the *Constitution*.[220] The expropriation should be on behalf of SANParks or the state.[221]

2.5 Section 24 of the Constitution

Nature conservation is a constitutionally protected right.[222] As the *Constitution* is the supreme law of South Africa nature conservation is a right that should be adhered to. The importance of the constitutional environmental right is expressed in *Director: Mineral Development, Gauteng Region, v Save the Vaal Environment.*[223] This case stated that, by the inclusion of the environmental right as fundamental in the *Constitution,* it requires that the environmental considerations be recognised and respected in the administrative process in our country, and there should, according to this case "be a change in the legal administrative approach to environmental concerns."[224] The *Constitution* also states in section 7(2) that the state should adhere to its constitutional obligation to respect, protect, promote and fulfil the rights in section 24 of the *Constitution*.[225] Section 24(a) of the *Constitution* states that

215 S 80(1)(c) of *NEMPA*.
216 See s 80(2)(a)–(c) of *NEMPA*.
217 S 81(1) of *NEMPA*.
218 S 81(1)(a) of *NEMPA*.
219 S 81(1)(b) of *NEMPA*.
220 S 81(2) of *NEMPA*.
221 S 81(2) of *NEMPA*; Couzens 2010 *SALJ* 26.
222 S 24 of the *Constitution*.
223 1991 2 SA 709 (SCA).
224 1991 2 SA 709 (SCA).
225 S 7(2) of the *Constitution*.

everyone has the right "to an environment that is not harmful to their health and well-being."[226] This right is a fundamental right and it has two aspects: the first being that one has the right to an environment not harmful to one's health[227] and the second being that one has the right to an environment that is not harmful to one's well-being.[228]

According to section 24(b) of the *Constitution,* every person has the right to have the environment protected for the benefit of present and future generations.[229] It is stated by Joubert and Faris[230] the "present generation holds the earth in trust for the next generation." This can be achieved through legislative and other measures.[231]

This right is seen by Kidd[232] as a "directive principle" that obliges the state to take certain positive measures in order to attain this right and to secure environmental protection by means of reasonable legislative and other measures.[233] This positive obligation upon the state is also highlighted in *Government of the Republic of South Africa v Grootboom*.[234] In this case, judge Yacoob stated that it is not enough merely to adhere to the legislative provisions, but it has to be supported by "appropriate, well-directed policies and programmes."[235] It may be said that section 24(b) of the *Constitution* dealing with responsibility to protect and conserve the environment is directed to the state. Section 8(2) of the *Constitution* states,

> a provision in the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.[236]

The relevance of the latter section is that natural and juristic persons at times act in a way that is detrimental to the environment and thus section 24 of the *Constitution* is

226 S 24(a) of the *Constitution*; also see Feris "Environmental Rights and Locus Standi" 133.
227 Glazewski *Environmental Law in South Africa* 76–77. The purpose of this dissertation is not to explain the effect a proposed development will have on the health and well-being of an individual, but what the effect of a proposed development will be on nature conservation itself. S 24(b) of the *Constitution* will thus be explained more thoroughly.
228 Glazewski *Environmental Law in South Africa* 77; s 24(a) of the *Constitution*; Kidd *Environmental Law* 22; see Van der Linde and Basson "Environment" 16–18.
229 See Van der Linde and Basson "Environment" 18–19.
230 Jouber and Faris (eds) *The Law of South Africa* (LexisNexis Durban 2012) 129.
231 S 24(b) of the *Constitution*; see Glazewski *Environmental Law in South Africa* 78–80.
232 Kidd *Environmental Law* 22.
233 Kidd *Environmental Law* 23.
234 2001 1 SA 46 (CC).
235 2001 1 SA 46 (CC) 42C.
236 S 8(2) of the *Constitution*.

also applicable to natural and juristic persons.[237] The state has the positive right to protect the environment and natural and juristic persons have the duty in the negative sense not to do anything that would cause harm and undermine the protection of the environment.[238]

Section 24(b) of the *Constitution* also includes certain objectives that should be reached by the reasonable legislative and other measures, namely to prevent pollution and ecological degradation;[239] to promote conservation;[240] and to secure ecologically sustainable development and use of natural resources while still being able to promote economic and social development. The last principle represents sustainable development[241] in South Africa. Whenever the environment is involved, the concept of sustainable development[242] will always be present.[243] Section 24 of the *Constitution* provides that government has a duty to protect the environment. As South Africa is a developing country, one should always address issues such as poverty, unemployment and the need for infrastructure development, to name a few.[244] The court also stated in the *Fuel Retailers* case [245] that the *Constitution* "contemplates the integration of environmental protection and socio-economic development" and that the sustainable use of natural resources is "at the core of

237 Kidd *Environmental Law* 24.
238 Kidd *Environmental Law* 24.
239 S 24(b)(i) of the *Constitution*; Glazewski *Environmental Law in South Africa* 80.
240 S 24(b)(ii) of the *Constitution*; the different statutory obligations from the state contained in environmental legislation and regulations are the "measures" to protect the environment; see different legislation in, for example, Glazewski *Environmental Law* chapters 9 (Biodiversity), 12 (Wild animals, forests and plants), 13 (Living marine resources), 14 (Water) and 16 (Heritage).
241 At the Stockholm Meeting in 1970, the idea of sustainable development was born out of an effort to find an understanding between the development requirements of the countries in the Southern Hemisphere and the conservation demands of the developed states in the North. The Stockholm Meeting increased the awareness of environmental issues and also set in motion the concept of sustainable development to realise development requirements without sacrificing the environment. Out of the Stockholm Meeting, the United Nations Environmental Programme was formed to license the concept of environmentally sound development. In 1983, the World Commission on Environment and Development was established to examine environmental and developmental issues around the world and also offer suggestions to address them. At the Earth Summit, countries had the chance to sign conventions on global warming and biodiversity, the Declaration on Environment and Development and also an Agenda for the 21st century to teach countries on the state of the environment and also development; although there are several more documents that established the idea of sustainable development, one can see that sustainable development is not a current issue, but that countries have already faced years of struggle to achieve the ultimate goal of development and sustainable use of natural resources.
242 Only a brief reference will be made to the concept of sustainable development as it was not the purpose of this study to evaluate what is meant with sustainable development.
243 It was not the purpose of this study to examine in detail what sustainable development entails.
244 Kotze 2003 *PELJ* 5.
245 2007 6 SA 4 (CC).

protecting the environment."[246] Although the inclusion of sustainable development into the *Constitution* has very ambitious goals, it also has inherent tensions. A person often has to reconcile the relationships between poverty, inequitable access to resources, economic growth and protection of the environment.[247] Furthermore, yo my opinion, one also has to reconcile the difficulties between the right to own property and the right to have the environment protected, thus, sometimes, placing a restriction on the right to private property. There seems to be a conflict of interest with regard to environmental and property protection. The *Corium* case was used as a case study in the current research to provide an example of the conflicting nature of property rights and environmental protection.

2.6 Corium (Pty) Ltd and Others v Myburgh Park Langebaan (Pty) Ltd and Others *(case study)*

The *Corium* case was used as a case study in the current research to determine whether environmental protection and property rights are inconsistent with one another. Although the *Corium* case was decided before the 1996 *Constitution*, the facts were used as a case study in the current research to indicate how the balancing of the constitutional rights to property and the environment respectively are to be applied after the incorporation of the 1996 *Constitution*. Both environmental as well as property protection are fundamental rights in the *Constitution* that has to be adhered to and protected. Any environmental protection links with protected areas, as protected areas harvest the most important natural resources.

2.6.1 Facts and background of the Corium *case*

In the *Corium* case, the Administrator of the Cape granted a property developer a permit to develop a "township development cluster" on land which was proclaimed to be a nature area,[248] with the view to incorporate the area into the WCNP. The land in

246 2007 6 SA 4 (CC).
247 Kotze 2003 *PELJ* 15.
248 Nature area was defined in the *Physical Planning Act* 88 of 1967 as any area which could be utilised in the interest of and for the benefit and enjoyment of the public in general and for the reproduction, protection or preservation of wild animal life, wild vegetation or objects of geological, ethnological, historical or other scientific interest; when this case was decided, the provisions of the *ECA* were still in force. S 16(1)(a) of the Act provided that a protected natural environment can only be declared if there are grounds that the declaration will substantially promote the preservation of specific ecological processes, natural systems, natural beauty, or species of indigenous wildlife or the preservation of biotic diversity in general. (Several provisions of the *ECA* has been repealed. It deserves mentioning, as the *Corium* case was decided when several of the latter Act's provisions were still in force.)

question was thus a protected natural environment according to section 16 of the *ECA*,[249] of which most provisions have now been repealed.[250] This land was part of an area that surrounded the Langebaan Lagoon.[251] According to the provisions of the *Physical Planning Act,*[252] a prerequisite for the valid issue of a permit in order to use the land for another reason than that for which it is lawfully used, is that a minister or administrator may issue such a permit by proclamation in the *Government Gazette*.[253] When one looks at the merits in the *Corium* case, it was said that the Administrator, who issued the permit, had not been given the power to do so by proclamation in the *Government Gazette*.[254] The applicants, who were nearby land owners, proceeded to restrain the developer from developing on the land pending review proceedings to determine whether the decision to grant the permit in terms of section 8(1)(a) of the PPA was valid, and accordingly sought an interdict. Section 8(1)(a) of the PPA states that:

> (1) The Minister may in his discretion –
> (a) direct that a permit (to be signed by an officer designated thereto by him) be issued subject to such conditions as he may determine …

The applicants were of the view that the Administrator did not have the proper authority in terms of section 8(1)(a) to grant the permit which gave the developer the right to develop on the land. They were of the view that the Administrator was not designated by proclamation to issue permits. Accordingly, the developers were interdicted from developing on the area in question.

Judge Conradie was called upon to consider the impact the developments would have on the general public. A balance had to be found between the right of a private property holder to his property and the general public's right to an environment that is not harmful to their health or well-being.[255] The most important part of the judgment

249 The *ECA* was the first environmental act in South Africa that addressed the necessary definitions and generic elements that were applicable to environmental law issues, environmental governance and management.
250 The definition for environment as used in *ECA* has not been repealed by *NEMA* and may still be used for interpreting provisions in *ECA* that has not been repealed.
251 The Lagoon was already identified in 1979 as a nature heritage that deserved national protection. The proclamation of this Lagoon as a nature area in terms of the *Physical Planning Act* 88 of 1967 was effected on 14 December 1984 and it became a protected natural environment in terms of the *ECA* on 9 June 1989.
252 88 of 1967; hereafter referred to as PPA
253 S 13B of the PPA.
254 1995 3 SA 51 (C) 52 headnote (*Corium* case 1995 decision).
254 1995 3 SA 51 (C) 52 headnote (*Corium* case1995 decision).
255 See s 24(a) of the *Constitution*.

in the *Corium* case was where the judge dealt with the balance of convenience.[256] Judge Conradie[257] stated that "the balance of convenience is perhaps the most difficult part of this decision." She explained further:

> The first Respondent will suffer loss if an interdict is granted. This circumstance deserves sympathetic recognition. On the other hand, I am called upon to consider not only in the interests of the applicants, but those of the general public whose member may be affected.[258]

2.6.2 Planning as a method to deprive/expropriate an owner of his property rights

Section 13B of the PPA gives the Administrator the authority to issue permits, only if the State President by way of a proclamation in the *Government Gazette* gives such authority.[259] In the *Corium* case, it was the Respondent's case that the State President did give authority to the Minister to issue a permit authorising the developers to develop in the nature area and accordingly adhered to section 8(1)(a) of the Act. Provisions of the PPA (Act 88 of 1967) were partially repealed by the *Physical Planning Act* 125 of 1991,[260] which aimed at the promotion of the physical development of South Africa, the development of national and regional development plans and regional and urban structure plans.[261] None of the 1991 Act's provisions have however been implemented.[262]

The most recent Act regarding this type of development is the *Development Facilitation Act*.[263] Although most of the sections of the DFA are still in operation, the implementation of the Act should be questioned.[264] In *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others*[265] , the court held that the defects in the DFA should be corrected after 24 months of the date that the judgment

256 See chapter 4 of this study for a discussion on the balance of convenience.
257 1993 1 SA 853 (C) 858E.
258 1993 1 SA 853 (C)858E.
259 S 13B of the *Physical Planning Act* 88 of 1967.
260 125 of 1991; Van Wyk *Planning Law* 42.
261 Long title of the *Physical Planning Act* of 1991; Van Wyk *Planning Law* 113.
262 The implementation of this Act was overtaken by proposals in *Wise Land Use: White Paper on Spatial Planning and Land Use Management*; Van Wyk *Planning Law* 113.
263 Hereafter referred to as the DFA; chapters V and VI have been declared unconstitutional in *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 6 SA 182 (CC) at par 95.
264 Van Wyk *Planning Law* 105.
265 2010 6 SA 182 (CC).

in this case was given.[266] The DFA was also included in the list of statutes to be repealed in the draft *Spatial Land Use Management Bill* 2011.[267] *The Spatial Land Use Management Bill* has been promulgated in 2013, but its provisions are not yet in force.

2.7 Legal standing

It is necessary to understand the legal standing[268] of a person who wants to institute legal action for or on behalf of the environment. Since 1994, the armoury of weapons, as stated by Couzens, has become more easily available to enforce environment-related laws to deal sufficiently with environmental problems.[269]

Previously, the approach to determine whether a person had a legal standing in the law, was very restrictive, and a person who approached the court to claim certain relief had to prove that he/she claimed on behalf of his/her own interests.[270] This strict approached meant that a person could not institute action for the public interest, nor could such a person claim on behalf of the interests of the environment.[271] This seemed to be the biggest obstacle for environmentalists as most, if not all, environmental issues affect the public interest and not that of a particular person alone.[272]

Section 38 of the *Constitution* as well as section 32(1) of *NEMA* changed the above position and a restrictive approach regarding legal standing is no longer needed nor is it constitutional. These provisions ensure that a strict approach will no longer be

266 *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 6 SA 182 (CC) at par 95; the DFA also has many provisions that do not bear any recognition anymore; for example, in the list of definitions, environment is defined with reference to the definition of environment in the *ECA* – many provision of *ECA* have been repealed.

267 Van Wyk *Planning Law* 43.

268 Also referred to as *locus standi*.

269 Couzens 2010 *SALJ* 18.

270 Mbodla 2000 *SALJ* 362.

271 Feris "Environmental Rights and Locus Standi" 130; before 1994, South Africa already had environmental laws that regulated the way in which one should treat the environment. The most well known of these laws are: the *Water Act* 54 of 1941, which is partially repealed by the *National Water Act* 36 of 1998; the *Atmospheric Pollution Prevention Act* 45 of 1965; the *Mining Rights Act* 20 of 1967, which was repealed by the *Mineral and Energy Laws Rationalisation Act* 47 of 1994; the *Sea Fishery Act* 12 of 1988, which was repealed by the *Marine Living Resources Act* 18 of 1998; the *Conservation of Agricultural Resources Act* 43 of 1983; the *Health Act* 63 of 1977; the *Hazardous Substances Act* 15 of 1973 and the *ECA* 73 of 1989. Although there were environmental legislation available, the people as well as the environment were not adequately protected and the reason for this, according to Patterson and Kotze *Environmental Compliance and Enforcement in South Africa: Legal Perspectives*, was that enforcement of these laws was not sufficient enough.

272 Mbodla 2000 *SALJ* 362.

followed with regard to enforcement of fundamental rights. *NEMA* has its own legal standing clause.[273]

The notion of the legal standing clause in *NEMA* is that it is a very expensive as well as lengthy ordeal to institute action for the breach of an individual environmental right.[274] According to Mbodla,[275] "ascertainable damages incurred by the average citizen are generally marginal." Due to the minimal damages and high litigations costs, environmental plaintiffs create special interest groups.[276] If they are granted legal standing, these special interests groups provide the necessary resources to prosecute effectively.[277]

Mbodla [278] is of the view that private citizen enforcement is the "legislative response" to "enforce changed priorities." This seems to be true, when one looks at the decision of the *Corium* case.[279] Mbodla is of the view that the *Corium* case, amongst others, is a step forward with regard to our environmental laws.[280] *Wildlife Society of Southern Africa and others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and others*[281] specifically dealt with *locus standi*. Judge Pickering in this case stated that, where there is statute that obliges the state to take certain measures to protect the interest of the public, members like the Wildlife Society have *locus standi* at common law in order to promote environmental conservation.[282] It is clear from the latter case as well as the *Corium* case, that

273 Any persons or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including principles contained in chapter 1 or any other statutory provision concerned with the protection of the environment. The provision that is of concern here is s 32(e) of *NEMA*, which states that a person may institute an action in the interests of protecting the environment.

274 Mbodla 2000 *SALJ* 362.

275 Mbodla 2000 *SALJ* 362–363.

276 De Waal, Currie and Erasmus *The Bill of Rights Handbook* 523

277 Mbodla 2000 *SALJ* 363.

278 Mbodla 2000 *SALJ* 363.

279 Also see the *Wildlife* case; Mbodla 2000 *SALJ* 636.

280 Mbodla 2000 *SALJ* 363.

281 The *Wildlife* case.

282 The *Wildlife* case at page 472; in this case, the Wildlife Society applied for an order to prohibit persons from, *inter alia*, erecting buildings, constructing roads or carrying on other activities that may disturb the natural state of the land (s 39(2) of the Transkeian Government Decree on Environmental Conservation). The order was to compel the Minister of Environmental Affairs and Tourism, the Premier of the Eastern Cape Province and the members of the Executive Council for Agriculture and Environmental Planning of the Eastern Cape Province to enforce the provisions of s 39 of the Transkeian Government Decree on Environmental Conservation. Although this decree had many strict provisions regarding any development in coastal conservation areas, there had been several developments along the coast that disturbed the ecological integrity of the coastline.

courts, not only in South Africa,[283] are starting to shift to more "environmentally friendly" judgements and are starting to realise that the environment has an intrinsic value.[284] Any person can institute an action on behalf of others or may act within the interests of the environment. It is also evident in case law that courts do not favour a strict approach with regard to legal standing.[285]

The question to be asked here is what happens to the rights of owners in land. If their property is being earmark for an inclusion into a national park, are their rights in terms of their property deprived or are they expropriated to deal with their property? To answer these questions it is important to look at the *Corium* case and to examine the facts on the basis of section 25(1) and section 25(2) of the *Constitution*.

283 See *Sierra Club v Morton* 405 US 727 (1972) 755; Judge Blackmun states that: this case poses significant aspects of a wide, growing, and disturbing problem, that is, the Nation's and the world's deteriorating environment with its ecological environmental disturbances.

284 Mbodla 2000 *SALJ* 364.

285 The *Wildlife* case; the *Corium* case; Mbodla *SALJ* 364.

3 Constitutional property clause

The constitutional property clause is contained in section 25 of the *Constitution*. This chapter will focus on what is meant by this section of the *Constitution*, mainly the provisions regarding deprivation and expropriation of property.

3.1 Introduction

As can be seen in *Corium Myburgh Park Langebaan (Pty) Ltd and Others,*[286] the developers were interdicted from developing a township in the area in question. The developers were already given a permit to conduct building activities and were thus the owners of the area. The *Corium* case highlights the problem that constitutional rights may be infringed upon in order to conserve protected areas as they are of immense national importance. Therefore, a discussion of the constitutional property clause will follow in order to determine to which extent property rights may be infringed upon. The most important case law, in my opinion, regarding a deprivation of property is that of *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services and Another*; *First National Bank of SA Ltd t/a Wesbank v Minister of Finance*[287] which explains in detail what is meant by a deprivation and expropriation, the requirements one has to adhere to as well as a discussion of the fact that no law may permit arbitrary deprivation.

3.2 Content of the property clause

Section 25 of the *Constitution* protects a land owner of his/her property. To have one's property rights fundamentally protected, has been part of the South African dispensation since the incorporation of the constitutional property clause[288] in the *Interim Constitution*. Pre-constitutionally, South Africa, allowed for parliamentary sovereignty which made it possible to infringe on property rights.[289] Examples of

286 1993 1 SA 853 (C); hereafter referred to as the *Corium* case.
287 2002 4 SA 768 (CC); hereafter referred to as the *FNB* case.
288 S 28 of the *Interim Constitution* 200 of 1993.
289 S 28 of the *Interim Constitution* provided:

(1) Every person shall have the right to acquire and hold rights in property, to the extent that the nature of the rights permits, to dispose of such rights.
(2) No deprivation of any rights in property shall be permitted otherwise than in accordance of a law.
(3) Where any rights in property are expropriated pursuant to law referred to in subsection (2), 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, taking into account all relevant factors, including, in the case of determination

laws that allowed for the unfair regulation of land use and ownership is the *Prevention of Illegal Squatting Act* [290] and the *Group Areas Act .*[291] These Acts are no longer in force and there is now a fair process followed in obtaining land or the removal of certain people from a land. The *Constitution* of 1996 gives guidelines with regard to, *inter alia,* property infringement.[292] The constitutional property clause was included in the 1996 *Constitution* to confirm the protection of property rights and also to regulate activities regarding one's property.[293] Roux (2014) is of the opinion that the function and purpose of the property clause is to find a proportionate balance[294] between property rights on the one hand and the promotion of the public interest on the other.[295] The regulation of one's property entails that any right to property may be limited, only if a limitation is justifiable in terms of section 25 and 36 of the *Constitution,* and that the protection provided for in section 25 of the *Constitution* is not an absolute right.[296] The state has a positive duty to protect one's property,[297] but the state also has a duty to regulate property for a public purpose or in the public interest to the extent that it is reasonable and justifiable.[298] According to Van der Walt, the constitutional property clause is twofold, as it contains two contradictory

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of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of investments in it by those affected and the interest of those affected.

290 52 of 1951; This Act formed part of the system of racial segregation in South Africa and allowed for the forcible removal of squatting communities, also for the eviction and destruction of homes of squatters.

291 77 of 1957; The *Group Areas Act* 41 of 1950 forced the physical separation of different races by creating different residential areas for different races. This led to the forced removal of people who did not reside in the right areas according to the Act. The Act was replaced by the *Group Areas Act* 77 of 1957 and after this Act, the *Group Areas Act* was amended several times and accordingly repealed by the *Abolition of Racially Based Land Measures Act*, 1991.

292 S 36 of the *Constitution*.

293 Badenhorst, Pienaar and Mostert *The Law of Property* 521; Van der Walt *Constitutional Property Law* 12.

294 See Woolman and Botha "Limitations"; chapter 4 of this dissertation deals explicitly with the balance of convenience and to find a proportionate balance between conflicting rights.

295 Roux "Property" 2.

296 Gildenhuys *Onteieningsreg* 1; Joubert and Faris (eds) *The Law of South Africa* (LexisNexis Durban 2012) 133. Glazewski *Environmental Law in South Africa* 82; also see *Growthpoint Properties Ltd SA v Commercial Catering and Allied Workers Union* 2010 31 ILJ 2539 (KZN) – in this case, the questions needed to be answered whether the noise that the picketing strikers made inside the mall was an unlawful interference with the property rights of the owner of the mall. The court had to balance the right to strike and to picket on the one hand with the right to property and a healthy and safe environment on the other hand. In order for the different rights to be balanced, both these rights had to be limited to a certain extent, which highlights the fact that no right could ever be guarded as absolute. Van der Walt states that the outcome of the case was unsatisfactory, stating that one should rather focus on the authorising law than the actions of the strikers; Van der Walt *Constitutional Property Law* 236.

297 De Waal, Currie and Erasmus *The Bill of Rights Handbook* 527; S 7(2) of the *Constitution* states that the state must respect, protect, promote and fulfil the rights in the Bill of Rights.

298 S 36 of the *Constitution*.

parts. It protects one's private property against unconstitutional interference on the one hand, but it also allows for infringement on property rights for the greater good, more specifically, for state interference to promote land and other reforms.[299] When a private property holder has private property rights in or adjacent to a protected area, such a person has the right to have such property protected, according to section 25 of the *Constitution*. It is, however, possible that this right may be infringed upon in order to protect the environment. When one is the owner of property, one has the right to do with the property as one pleases. This becomes problematic if, for example, such owner wants to run a business that will pollute the environment. Environmental laws make provision that an owner of private property may not always do as he/she pleases and should consider the environment, and therefore environmental laws place certain restrictions on an owner's right regarding his/her property.[300]

There are certain tensions that may arise from contradictory concepts like these. According to *Reflect-All* 1025 CC *and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another,*[301] the purpose of section 25 of the *Constitution*, is not to protect owners of state interference, but rather to safeguard owners from illegitimate and unfair state interference. According to Roux, the course that should be followed is to determine whether a constitutional right has been infringed upon, and if such infringement exists, whether it can be justified under the general limitation clause.[302]

The aim of this chapter is to determine to which extent private property should be protected and also to which extent it may be infringed upon. Therefore, a detailed analysis was done of section 25 of the *Constitution*, with specific reference to sections 25(1), (2) and (3) of the *Constitution*.

299 Van der Walt *Constitutional Property Law* 12.
300 Glazewski *Environmental Law in South Africa* 82; *sic utero tuo at alienum non laedas*, which means that you should use your property in such a way that it will not harm another; see *King v Dykes* 1971 3 SA 540 (RA) at par 545.
301 2009 6 SA 391 (CC).
302 Roux "Property" 3; see 4.2 for a discussion of s 36 of the *Constitution*.

3.3 Deprivation

Deprivation is contained in section 25(1) of the *Constitution*. This subchapter explains what is meant by a deprivation and to what extent the state may interfere with property before it has exceeded the limits of a deprivation.

3.3.1 Defining deprivation

A person may only be deprived of his/her property if such deprivation takes place in terms of a law of general application,[303] and if such law does not permit arbitrary deprivation of property.[304]

Section 25 of the *Constitution* implies that the right to property may be limited legitimately though regulatory deprivation.[305] Before one can analyse what deprivation entails, it is firstly necessary to determine when a person is entitled to protection under section 25 of the *Constitution*. One therefore has to determine whether the property in question indeed constitutes property[306] as contemplated in sections 25(1) and (2) of the *Constitution.* In the *FNB* case, the court did not give a meaning to what property entails[307] and gave a narrow holding of what ownership entails.[308]

The definition of deprivation includes expropriation,[309] which is a form of deprivation in the narrower sense,[310] as both of these terms entails that the right to one's

303 See 3.3.3 of this study.
304 See 3.3.2.1 and 3.3.2.2 of this study.
305 Van Wyk *Planning Law* 212–213.
306 Property is not limited to land and it is also not limited to ownership. Property includes other real rights such as servitudes, and also customary and communal property rights; Glazewski *Environmental Law in South Africa* 82–83.
307 2002 4 SA 768 (CC) 51E; the court held that such an exercise will be "practically impossible". Instead, the court held that ownership of corporeal movable, as well as land ownership, is "at the heart of our constitutional concept of property"-2002 4 SA 768 (CC) 51E.
308 The court did, however, in the decision of the *FNB* case, gave a guideline and indication as to how the courts in future should address the threshold of property. The court said the following: In stating that ownership of corporeal movables and land ownership constituted property for the purpose of s 25 of the *Constitution,* the court held that this was the case "both as regards the *nature of the right* involved as well as the *object of the right*". According to Roux, the choice of words of the court suggests the court's determination of more complex claims will hinge on a composite assessment of these two issues. See Roux "Property" 10.
309 2002 4 SA 768 (CC) 57; judge ackermann distinguishes deprivation from an expropriation by implying that a deprivation has a wide interpretation and expropriation has a narrower interpretation; Van der Walt *Constitutional Property Law* 341; Roux "Property" 18; Badenhorst, Pienaar and Mostert *The Law of Property* 544; when an expropriation is involved, the s 25(1) requirements have to be adhered to in addition to the s 25(2) and (3) requirements; see 3.2 of this study.

property is being infringed upon.[311] Expropriation is distinguished from deprivation in that, in the case of expropriation, the owner is dispossessed from his/her property, which is appropriated by the state. It should however be kept in mind that the purpose of regulatory deprivation is not intended to "take away" the property or for property rights to vest in the state, but rather to regulate the use of the property.[312] It can most easily be described as statutory interference with property rights.[313] The distinctions *prima facie* seems to be basic; however, this may have some inherent difficulties.[314] An example of property rights being infringed upon in order to regulate the property is found in the *National Environmental Management: Protected Areas Act*[315] Section 42 of *NEMPA* specifically makes provision for individuals to enter into co-management agreements with management authorities in order to regulate activities in protected areas.[316]

After the decision in the *FNB* case, a wide meaning was given to the term "deprivation".[317] In this case, the court held that "any interference with the use, enjoyment or exploitation of private property involves some deprivation."[318] Deprivation can most easily be described as the "duly authorised" and "fairly imposed" restriction on the use, enjoyment or exploitation or disposal of private property.[319] The person who is deprived of the property should have some title in or right in or to the property.[320] As there is no clear definition of the term "deprivation", the court held that a good example of a deprivation, both in its grammatical and

310 According to the *FNB* case at par 57–58, it was held that an expropriation is a subset of a deprivation; one always first has to adhere to the requirements of a deprivation before one can analyse whether an interference is an expropriation; Van der Walt *Constitutional Property Law* 341–344; Roux "Property" 33; *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing, in the Province of Gauteng and Others* 2005 1 SA 530 (CC) (hereafter referred to as the *Mkontwana* case).

311 Van Wyk *Planning Law* 213; *FNB* case par 57; see 3.3.3 of this dissertation.

312 Van der Walt *Constitutional Property Law* 196–197.

313 Strydom 2012 *Without Prejudice* 70.

314 Van der Walt *Constitutional Property Law* 194–200; the distinction between deprivation and expropriation becomes more difficult in the following instances: if the focus falls exclusively on the questions whether the state acquires the property; whether the extent of the deprivation is slight or serious or perhaps excessive and lastly; whether the acquisition is permanent or temporary.

315 57 of 2003; hereafter referred to as *NEMPA.*

316 S 42 of *NEMPA*.

317 Roux "Property" 18.

318 2002 4 SA 768 (CC) 57G-H; Roux "Property" 18;Joubert and Faris (eds) *The Law of South Africa* (LexisNexis Durban 2012) 136;

319 Van der Walt *Constitutional Property Law* 196; The *FNB* case at par 57: any interference with the use, enjoyment or exploitation of private property involves some kind of deprivation relating to the entitlements of the property concerned.

320 Roux "Property" 18.

contextual sense entails "dispossessing an owner of all rights, use and benefit to corporeal movable goods."[321] Also in the *Mkontwana* case, the court did not feel the need to give a definition for the term "deprivation". All that a deprivation depends on is the extent[322] of the interference or limitation on the use, enjoyment and exploitation of property.[323]

A deprivation of property is the way in which the state interferes with private property or some form of loss in the value of the property.[324]One can also not be compensated if one's property is deprived.[325] The property is not taken away or appropriated by the state,[326] but the exercise of activities on the property is restricted or limited.[327] It can be taken from the *FNB* decision that the constitutional property clause protects natural as well as juristic persons.[328] Section 8(4) of the *Constitution* also states that juristic persons are entitled to the rights in the Bill of Rights.[329] A deprivation should also not single out a specific individual or a specific group of people. These people alone should not be the subject of special burdens.[330] A person may not be deprived of his/her property by legislative or other measures which will have the effect that those persons will be singled out for "discriminatory treatment" or that the deprivation will "capriciously interfere with a person's property rights."[331]

321 2002 4 SA 768 (CC) 61E case; Roux "Property" 18.
322 See Van der Walt *Constitutional Property Law* 347–354, 376–384 for a discussion on constructive expropriation, in cases where a deprivation is so severe that compensation is needed. The position in South Africa is, however, not yet completely clear and therefore will not be discussed in this dissertation.
323 The *Mkontwana* case.
324 Van der Walt *Constitutional Property Law* 196; Strydom 2012 *Without Prejudice* 70.
325 Van Wyk *Planning Law* 213.
326 *Agri South Africa v Minister of Minerals and Energy* 2011 3 SA 296 (GNP); 2012 1 SA 171(GNP) (hereafter referred to as the *Agri* case). In this case, the court held that an expropriation could only have occurred if, in addition to the deprivation of the property, there has been an appropriation by the expropriator (state) of the right in question as well as the abatement or extinction of the right in question (at par 78).
327 Van Wyk *Planning Law* 213.
328 Van der Walt *Constitutional Property Law* 71.
329 S 8(4) o the *Constitution*; also see Roux "Property" 9.
330 Van der Walt *Constitutional Property Law* 232.
331 Roux "Property" 21; in this regard, the law of general application has the effect of prohibiting a deprivation to only be applicable to an individual or certain groups of people, and is enacted, according to Van der Walt, to "proscribe the so-called bills of attainder"; Van der Walt *Constitutional Property Law* 232; also see Woolman and Botha "Limitations" 50–51.

Case law gives more attention to the formal requirements of deprivation than to focus on attempts to define deprivation.[332] In the *Mkontwana* case, it was stated that deprivation of one's property would mean that there is a limitation on the property that goes beyond the "normal" restrictions on the property. The latter is, however subject to criticism as any restriction could amount to the deprivation of one's property. There are no "normal" restrictions on a person's property[333]; there are merely restrictions. The *Mkontwana* case fails to explain what is meant by a "normal" restriction. With regard to the environment, section 42 of *NEMPA*, as previously mentioned, makes provision for a co-operation agreement between an individual person and a management authority. The question that arises is whether this restriction is normal or not. It is my opinion that making use of the word "normal" will give rise to further confusion and requirements that have to be adhered to.

In the traditional sense, property rights are regulated for the purpose of public health, public safety and public security.[334] It is however argued that the regulatory control of property rights in South Africa could also be for aesthetic building control, environmental conservation and historic preservation, to name a few.[335] For the purpose of this study, deprivations are discussed with reference to the influence they will have on nature conservation and private property rights within an area which is subject to nature conservation.

3.3.2 First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National bank of SA Ltd t/a Wesbank v Minister of Finance[336]

The *FNB* case dealt with the conflict of security interests regarding the ownership of a bank in order to secure payment of a loan, and the statutory interests of the state

332 Badenhorst, Pienaar and Mostert. *The Law of Property* 545; an example is found in the *Mkontwana* case, where the Constitutional Court did not define the term, but stated that "the existence of a deprivation depends on the extent of interference with the limitation, use, enjoyment or exploitation of the property".

333 S 25(1) of the *Constitution* specifically states that a person may not be deprived of their property, except in terms of a law of general application, and that no law may permit arbitrary deprivation. Nowhere in the *Constitution* does it state that there are certain boundaries to be crossed before an interference is a deprivation.

334 Strydom 2012 *Without Prejudice* 70; Van Wyk *Planning Law* 213.

335 Strydom 2012 *Without Prejudice* 70; examples of deprivation to protect the public health and safety of the property include the following: laws relating to the regulation of land-use planning, development and building; rent control; and prescribing the use of the property for criminal activities and environmental conservation.

336 2002 4 SA 768 (CC).

to enforce payment of certain tax debts.[337] The court adopted a regulatory principle (police-power principle)[338] in which the state can regulate the use of one's property. This is also seen as a legitimate exercise of the state's power.[339] Deprivation, which is regulation without compensation, is seen as constitutional.[340] Even if a deprivation causes loss of the value of the property, it will still not be subject to compensation.[341] The payment of no compensation is justified as a deprivation if the deprivation serves the public purpose/public interest.[342]

The findings in the *FNB* case, comprised in my opinion, the most significant decision on the limitation of property rights by the Constitutional Court.[343] The *FNB* case gave a comprehensive analysis of what the property clause entails. The Constitutional Court stated that the purpose of section 25 of the *Constitution* should be seen as protecting private property rights as well serving public interests and to find a proportionate balance[344] between these two concepts.[345] The context within which one interprets the property clause, will thus, according to Van der Walt, be an important factor.[346] This statement by Van der Walt can be applied to the *Corium* case, where judge Conradie dealt with the balance of convenience.[347]

In the *FNB* case, the court described a deprivation to be a wider category of an expropriation. The court held that all expropriations can be seen as deprivations, but not all deprivations should be seen as expropriations.[348] In the *FNB* case, the court did not make any reference to the finality or permanency of an expropriation.

337 Van der Walt 2004 *SALJ* 864; the facts of the *FNB* case are not in any way related to the problem statement in this study.
338 The police power principle, according to Van der Walt, means that the state is not obliged to either leave all existing property rights unaffected by state action or else pay compensation for any detrimental effect that its action may have on private property. It should rather be said that the state is authorised, by the police power, to regulate the use, enjoyment and exploitation of private property,
339 See the explanation on the police-power principle in Van der Walt *Constitutional Property Law* 213–218.
340 Van der Walt 2012 *Annual Survey of SA Law* 182.
341 Van der Walt 2012 *Annual Survey of SA Law* 182.
342 Van der Walt *Constitutional Property Law* 214; in *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 6 SA 391 (CC) at par 33 it was stated that the use of private property may be regulated in order to protect the public welfare; however, such regulation should not be arbitrary deprivation.
343 Van der Walt 2004 *SALJ* 865.
344 See the explanation on proportionality in Woolman and Botha "Limitations" 69–70; also see chapter 4 of this dissertation.
345 Van der Walt *SALJ* 866; the *FNB* case at par 50, 69–70; Roux "Property" 2.
346 Van der Walt *SALJ* 866.
347 1991 1 SA 853 (C) 858.
348 2002 4 SA 768 (CC) 57H-58, *;* Van der Walt *SALJ* 867.

Instead, the court held that an interference with one's property should always first adhere to the requirement of a derivation in terms of section 25(1) of the property clause of the *Constitution*. [349] The requirements for an expropriation can only be considered once the requirements of a deprivation have been met or the infringement or limitation adheres to section 36 of the *Constitution*. The infringement should be allowed by a law of general application and it should also not be arbitrary.[350] If an interference thus does not comply with section 25(1) of the *Constitution* and can also not be justified in terms of section 36 of the *Constitution*, there is no need to look into the requirements of an expropriation and the interference will be rendered unconstitutional or invalid.[351] If the interference, however, does not adhere to the formal requirements of a deprivation, but does adhere to the requirements of section 36 of the *Constitution* it will be a valid and legitimate deprivation.[352]

3.3.2.1 The requirement of non-arbitrariness according to the *FNB* case

In the Constitutional Court decision of *FNB*, Judge Ackermann introduced a substantive element by adopting a "thick" interpretation of the requirement that a law may not permit arbitrary deprivations.[353] The test to prove whether an infringement will be arbitrary is whether there was insufficient reason for the infringement or whether it was procedurally unfair.[354] The test regarding whether there was sufficient reason for an infringement to be arbitrary is called "substantive arbitrariness".[355]

When one has to decide whether an infringement is arbitrary or whether there was a sufficient reason for the infringement, certain relationships have to be considered.[356] The first is the means of the infringement and the ends that the state wants to

349 2002 4 sa 768 (CC) 60C.
350 Roux "Property" 20.
351 Van der Walt *SALJ* 868; 2002 4 SA 768 (CC)58A.
352 Badenhorst, Pienaar and Mostert. *The Law of Property* 545.
353 Van der Walt *Constitutional Property Law* 245.
354 Van der Walt *Constitutional Property Law* 245; Roux "Property" 24 – the right to administrative action, according to Van der Walt, for procedurally fairness is an administrative action rather than law. There will thus not be an overlap between the constitutional property clause and the administrative justice clause with regard to procedurally fairness. If a deprivation is procedurally unfair, such an action will be challengeable under s 25(2) of the *Constitution*. If a person is deprived of property regarding an administrative action in a procedurally unfair manner, it will be challengeable under the *Promotion of Administrative Justice Act* 3 of 2000 (hereafter referred to as *PAJA*). There are two possible areas where they might well overlap. In this regard see the explanation by Roux in Roux "Property" 25.
355 Van der Walt 2004 *Constitutional Property Law* 245.
356 Van der Walt 2004 *SALJ* 870.

achieve.[357] In this regard, one should look at section 24 of the *Constitution*. Every person has the right to an environment that is not harmful to one's health and well-being, and one also has the right to an environment that will be preserved for future generations. The "means of the state" implies that the state has to use its powers in order to limit private property holders to do with their property in a protected area as they please, and the ends that the state wants to achieve is for the state to adhere to section 24 of the *Constitution.* By acting in a way which is not arbitrary, as is contemplated in section 25 of the *Constitution,* there will be a balance between the means and the ends that the state wants to achieve. When looking at *NEMPA,* the same conclusion could be made. Section 2(e) of *NEMPA* states that sustainable utilisation of protected areas should be promoted for the benefit of the people, in such a way as to preserve the ecological character of a land.[358] The ends that the state wants to achieve are to preserve and protect the environment. The means by which this should be achieved, is by depriving an owner of his/her property.

The second relationship refers to the purpose of the deprivation and the person whose property is affected. The purpose will be, as mentioned above, that the environment has to be preserved for future generations, and therefore, there should be certain limitations on the property rights of the holders of such rights. The last of the relationships is the relationship between the purpose of the deprivation and the nature of the property and also the extent of the deprivation.[359] The nature of the property is a protected area, and the deprivation serves to protect the area, as protected areas harvest most natural resources.[360]

As a law of general application will prohibit arbitrary deprivation, the question arises why one should also include the requirement of non-arbitrariness. Only a law of general application may limit any right that is contained in the Bill of Rights.[361]

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357 Van der Walt 2004 *SAJL* 870.

358 S 2(e) of *NEMPA*; in order for the ecological character of a land to be preserved and protected, it will sometimes be demanded of the state to deprive owners of their private property. This will later benefit such a person, as the environment will be preserved for present and future generations.

359 Van der Walt *SALJ* 870; Van der Walt *Constitutional Property Law* 245; in the *Corium* case, the nature of the area was a nature area with the intention to incorporate the area into the WCNP. The developers where the owners of that nature area. The court had to balance the convenience between these two rights in order to justify the interdict that was given.

360 See Strydom " Protected Areas" 951.

361 Van der Walt *Constitutional Property Law* 237; Woolman and Botha "Limitations" 47.

Van der Walt aims to answer the above-mentioned question by stating that the requirement of non-arbitrariness provides for "formal, procedural justice" to ensure that the regulatory deprivation is in line with a legitimate government purpose.[362] When the deprivation is not arbitrary, it means that there is not a heavy burden on a person or group of persons or that they should not be singled out for "discriminatory treatment", in order to fulfil the public purpose.[363] It is said that a law that does not fulfil the public purpose is highly unlikely ever to provide a sufficient reason for any deprivation.[364] The deprivation should thus not only be allowed by legitimate government purposes, but there should also be a "balance between the ends it serves and the means it employs to reach them". [365]. In this regard it is important to look at what was decided in *S v Bhulwana.*[366] A statement was made regarding the scales of conflicting rights. On the one side of the scale one should place the purpose, effect and importance of the infringing legislation; on the other side one should place the nature and effect of the infringement caused by such legislation.[367] There has to be a proportionate balance between the public purpose of the deprivation and the harm that it will cause.[368] The idea that there should be a balance links with the idea of proportionality.[369]

In determining whether the infringement is permissible, one also needs to balance the interests on grounds of further requirements by section 36 of the *Constitution*. These requirements are listed in section 36(1)(a)–(e). The further requirements by the *Constitution*[370] provides for a stricter application of the non-arbitrary requirement.[371] Section 36 of the *Constitution* states that the deprivation should be

362 Van der Walt *Constitutional Property Law* 237; an example of a legitimate government purpose is where a developer will not be allowed to develop beyond a flood line. The food line gives an indication to what extent water will rise if there could be a flood.
363 Van der Walt *Constitutional Property Law* 238; Roux "Property" 21.
364 Roux "Property" 33.
365 Van der Walt *Constitutional Property Law* 238.
366 1996 1 SA 388 (CC) 18; this case was decided before the 1996 *Constitution* came into force. Therefore, no reference is made to the findings of this case, as it can no longer be used as precedent. It is only used in this study for clarity and to understand the concept of infringement of legislation and the balancing of rights.
367 *S v Bhulwana* 1996 1 SA 388 (CC) 18; the more substantial the inroad into fundamental rights, the more persuasive the grounds for justification should be.
368 Van der Walt *Constitutional Property Law* 238.
369 Woolman and Botha "Limitations" 69; Badenhorst, Pienaar and Mostert *. The Law of Property* 545–546; see chapter 4 of this dissertation; see 4.2.2 of this dissertation regarding the proportionality test; proportionality is introduced by s 36(1) of the *Constitution*, which is explained in 4.2 of this dissertation.
370 S 36(1)(a)–(e) of the *Constitution*.
371 Badenhorst, Pienaar and Mostert *. The Law of Property* 546.

reasonable and to the extent that it is not unfair. [372] It is not enough to establish whether there is a rational connection between state interference and the manner in which the deprivation of property should be achieved; it should rather be that there is an adequate cause for the deprivation.[373] According to Woolman and Botha, one should establish what the purpose of the limitation is and also the appraisal of its importance.[374] This means that a court should always establish that the limitation is not inconsistent with the "values of an open democratic society based on human dignity, equality and freedom."[375]

3.3.2.2 Arbitrariness test

An important explanation regarding the meaning of the term "arbitrary" is found in the *FNB* case. The case states that the law will be arbitrary if it "does not provide a sufficient reason for the deprivation in question" and this is when the deprivation is substantively arbitrary, or when the deprivation is "procedurally unfair".[376] A conclusion that may be reached through the test regarding whether a limitation will be arbitrary according to the *FNB* case is, to my opinion,that this test is very broad and flexible. This is evident in the fact that an infringement cannot be either a deprivation or an expropriation. It is intertwined with one another and all requirements for a deprivation and expropriation should be assessed. Most importantly, is that law requires a limitation or infringement of the property to be fair and this could thus apply to all property challenges.[377] To decide whether a deprivation id arbitrary is, however, subject to a high degree of judicial discretion.[378] The conclusion of the latter, in my opinion, is that the arbitrary test is also applicable in respect of nature conservation and to properties that are situated within a protected nature area or sensitive area.

372 S 36(1) of the *Constitution*.
373 2002 4 SA 768 (CC) ; Badenhorst, Pienaar and Mostert *The Law of Property* 545.
374 Woolman and Botha "Limitations" 73
375 Woolman and Botha "Limitations" 74; s 36(1) of the *Constitution*.
376 2002 4 SA 768 (CC); 100H; in the *FNB* case, the court did not focus on the requirement of "procedurally unfair" and just focussed on substantive arbitrariness; see the discussion on substantive arbitrariness in Van der Walt *Constitutional Property Law* 245–264; also see Joubert and Faris (eds) *The ;Law of South Africa* (LexisNexis Durban 2012)
377 The *FNB* case; Badenhorst, Pienaar and Mostert*. The Law of Property* 547; there is also a disadvantage of the non-arbitrary test to be too wide in that it may engulf all the other elements of the constitutional property inquiry and thus limit the possibilities of the balancing of interests at various points in the enquiry. The *FNB* case stated that "it is practically impossible to furnish and judicially unwise to attempt a comprehensive definition of property for purposes of s 25" (at par 51E).
378 Badenhorst, Pienaar and Mostert*. The Law of Property* 546.

The *Mkontwana* case was the first Constitutional Court case in which the test of arbitrariness, formulated in the *FNB* case, was used. The *Mkontwana* case,[379] however, followed a different approach to the arbitrariness test.[380] The court did not focus on the interrelated factors to determine arbitrariness but rather on the extent[381] of the deprivation.[382] If the deprivation is minimal, one merely has to find a rational connection between the "means and ends". Where the deprivation is however more extensive, the reason for the infringement should be more compelling.[383] In the *Mkontwana* case, the standard of the test was thus not as high as in the *FNB* case.[384]

3.3.2.3 Procedural arbitrariness

Section 25(1) of the *Constitution* does not make an explicit distinction between what is substantively unfair and what is procedurally unfair.[385] It should however be kept in mind that, although procedurally unfairness was not described in the *FNB* case, it is a ground to establish whether a deprivation was arbitrary and therefore requires explanation.[386] It is important that there be a procedural mechanism by which a person's rights can be protected,[387] as is explained in *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial*

379 Facts of the *Mkontwana* case: This case dealt with the limitations on land owners' ability to alienate their land for the sake of improved fiscal efficiency. The legislation (*Local Government Municipal Systems Act* 32 of 2000) that allows for the municipalities to collect charges for the consumption of water and electricity affected the land owners' right in order to alienate their property. The legislation was contested on the ground that there was an embargo placed on the land if the charges payable to the municipality was outstanding even if the owner did not incur the debts. The Court found that the legislation in question was not arbitrary, as it was limited to one incident of ownership and it was temporary.

380 2005 1 SA 530 (CC).

381 The court stated that a deprivation depends on the extent of the interference with or limitation, use, enjoyment or exploitation and at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society; the question arises how one can determine the extent of a deprivation. When will the deprivation be minor and when will it be extensive? When will the deprivation go beyond the normal restrictions on the property use and enjoyment? It does not seem that the *Mkontwana* case gives a clear description on the latter questions; it also has to be kept in mind that the moment that the state goes beyond the normal restrictions on the use and enjoyment of property, it would be in conflict with the *Constitution*; the state should never exceed the boundaries of deprivation, even if it seems that the deprivation is minor.

382 *Mkontwana* case; Badenhorst, Pienaar and Mostert*. The Law of Property* 546.

383 Badenhorst,, Pienaar and Mostert *The Law of Property* 546.

384 Badenhorst,, Pienaar and Mostert *The Law of Property* 548.

385 See S 25(1) of the *Constitution*; Van der Walt *Constitutional Property Law* 264.

386 Van der Walt *Constitutional Property Law* 265.

387 In *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 6 SA 391 (CC) it was argued that the relevant sections of the *Gauteng Transport Infrastructure Act* 8 of 2001 where procedurally unfair and arbitrary because there was no procedural mechanism that protected the applicants' rights.

Government and Another.[388] Van der Walt is of the opinion that, when any deprivation is caused directly by legislation, it is already mentioned in section 25(1) and also section 36 of the *Constitution* that any deprivation should be in terms of a law of general application and will thus not be arbitrary and procedurally fair.[389] Van der Walt also mentions that when someone wants his/her case to be heard, with regard to procedural fairness, there are only two applications. The one application is where the legislation that provides for the deprivation is subject to judicial oversight[390] and review proceedings. Section 48 of *NEMPA*, however, only makes provision for prospecting and mining activities to be reviewed immediately after the section took effect.[391] This is the only section in *NEMPA* that mentions the word "review". There is thus room for improvements in *NEMPA* to make more provision for judicial review proceedings with regard to the deprivation and expropriation of land which is proposed or declared to be included in a national park.[392]

3.3.3 The requirement of the law of general application.

The requirement of "law of general application" contains the rule of law principle as well as the principles contained in the *Constitution.*[393] This safeguards the public that any deprivation of property will only be valid if such deprivation is imposed by a valid law.[394] Environmental laws such as the *National Environmental Management Act*[395]

388 2009 6 SA 391 (CC).
389 Van der Walt *Constitutional Property Law* 270.
390 See *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC); *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others* 2005 3 SA 589 (CC).
391 S 48(2) of *NEMPA*.
392 See s 81(1) of *NEMPA* for an example.
393 Van der Walt *Constitutional Property Law* 232.
394 The law should be properly authorised and promulgated; in society, there are different rules that have to be adhered to. The first of these rules are the rules that form part of legislation, parliamentary statutes, provincial and local authority, common law rules and subordinate or delegated rules such as regulation; Smit 2008 *Acta Academia* 218; in *President of the Republic of South Africa and Another v Hugo* 1997 4 SA 1 (CC), 1997 6 BCLR 708 it was held by judge Mokgoro that the following are regarded as laws of general application as they are all seen as "adequately accessible" to the public: statutes, regulations and common law principles. These rules are all seen as rules of general application; Woolman and Botha explain the standing in the European Court of Human Rights. According to the case of *Sunday Times v United Kingdom* (1992) 14 EHRR 229*,* it was held that a law is "adequately accessible" firstly if an indication is given how to reach a legal rule in order to make it possible for a person to regulate his conduct. Secondly, a law will be "adequately accessible" if a person needs legal advice in order to foresee what the consequences of certain actions will be. This, of course, has to be reasonable in the given circumstances; Woolman and Botha "Limitations" 65–66; other informal rules will not fall within the category of laws of general application; examples include: internal administrative rules of an organisation, codes of conduct, personnel regulations of companies and rules of churches or trade unions. These rules do not qualify as laws of general application, as these rules only apply to a limited group of people and are not generally accessible. For a law of general

and *NEMPA* are properly authorised and promulgated laws and any deprivation of property in terms of these laws will, to my opinion thus be lawful and valid.

A deprivation is only justified by a law of general application.[396] This requirement is mentioned in the property clause itself[397] and also in section 36(1) of the *Constitution*.[398] The "law" mentioned in the latter requirements is that the right in property may be limited by statutes, also accompanying legislative regulations and rules of the common law[399] and customary law.[400] The authorisation of common law and customary law as legitimate limitations on property also adheres to the requirement that the limitation should not be arbitrary.[401] Van der Walt however questions the fact that customary law or the common law would raise the issue of arbitrariness.[402]

The requirement of a law of general application does not merely mean that there should be law present. The law should also fulfil further requirements, namely the law should be generally applicable, non-arbitrary, specific and also accessible.[403] Woolman and Botha take it further by providing additional considerations to determine whether a law would qualify as a law of general application. The first is that there should be parity.[404] The second consideration, according to Woolman and Botha, is that the person who enforces the law is required by the rule of law to do so in terms of an identifiable standard.[405] The third consideration is that the law should be precise enough to enable individuals to adhere to the law in question

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application to be valid, such a law should be applicable to the general public; Rautenbach *Rautenbach-Malherbe Constitutional Law* 303.

395 107 of 1998; hereafter referred to as *NEMA*.

396 S 25(1) of the *Constitution*; Badenhorst, Pienaar and Mostert*. The Law of Property* 545.

397 S 25(1) of the *Constitution.*

398 "The rights in the Bill of Rights may be limited only in terms of law of general application...".

399 The most obvious area of law where common law can be used to deprive a person of his private property for a regulatory purpose can be found in neighbour law. The common law rules of nuisance (smoke, noise, etc.) play a part in the way that land owners can enjoy the use and enjoyment of their property to the extent that it causes annoyance for one's neighbour.

400 Badenhorst, Pienaar and Mostert *The Law of Property* 545.

401 Van der Walt *Constitutional Property Law* 234.

402 Van der Walt states the following regarding the customary and common law: "In view of the fact that the police power regulation is nowadays usually exercised by way of legislation, it is difficult to imagine that deprivation authorised by rules of common law would raise arbitrariness problems of the kind that would bring s 25(1) into the picture"; Van der Walt *Constitutional Property Law* 234–235.

403 Van der Walt *Constitutional Property Law* 232; Badenhorst, Pienaar and Mostert*. The Law of Property* 545.

404 Woolman and Botha "Limitations" 48; parity, ; see *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 2 SA 674 (CC), 2000 3 BLCR 241 at par 40 – the doctrine of supremacy of parliament is rejected.

405 The rule of law inherently prohibits any arbitrary action by the state.

sufficiently.[406] The fourth consideration is that the law should be accessible to the public and should be sufficiently understood by the public. The last consideration according to Woolman and Botha is that the phrase "law of general application" should attempt to avoid any justification of bills of attainder.[407] The law of general application should not single out a specific person or group of persons.[408] The requirement of law of general application states that the deprivation should have occurred by a law that was properly enacted and promulgated, in other words, valid.[409] The question arises as to which law qualifies as the law of general application. The answer seems simple, all original and delegated legislation will qualify as law of general application. Internal administrative policy documents will not qualify as law of general application.[410]

3.4 Expropriation

According to the *FNB* case, if the deprivation does adhere to the formal requirements, the question arises whether the deprivation could be an expropriation of the property.[411] It should be kept in mind that, after the *FNB* finding, the Constitutional Court did not strictly follow the method that was used in the *FNB* case, and this latter case can thus not always be used as the case law precedent to distinguish deprivations from expropriations.[412] According to Van der Walt, the Constitutional court "signalled" in more recent cases that it would deal with expropriations directly in terms of sections 25(2) and (3) of the *Constitution* and does

406 Laws should not be too vague and should also not grant the state a strong discretion to use its power as it deems fit.

407 Bills of attainder declare a person or a group of persons guilty of a crime and punish them without any judicial trial; Woolman and Botha "Limitations" 50.

408 Van der Walt *Constitutional Property Law* 232; one should keep in mind that the legislation that makes provision for the deprivation of property is usually of a general nature and that it is not likely that a deprivation will not adhere to the law of general application or will fail the law of general application; most laws do affect some people and not others, but a deprivation that singles out or burdens a particular person or group of people will not fall in the ambit of the law of general application – see Badenhorst, Pienaar and Mostert. *The Law of Property* 545; Van der Walt *Constitutional Property Law* 233.

409 Van der Walt *Constitutional Property Law* 232.

410 Van der Walt *Constitutional Property Law* 233; Woolman and Botha in "Limitations" state that their four-pronged test for law of general application should be satisfied by most legislation, regulations, subordinate legislation other than regulations, municipal by-laws, principles of the common law, principles of customary law and rules of the court and international conventions]; it remains unclear whether norms and standards and directives and guidelines issued by government agencies statutory bodies qualify as law of general application.

411 Badenhorst, Pienaar and Mostert *The Law of Property* 545; 2002 4 SA 768 (CC) 58B.

412 Especially in so far as starting out with the non-arbitrariness analyses is concerned; Van der Walt *Constitutional Property Law* 343; *Du Toit v Minister of Transport* 2006 1 SA 297 (CC).

not have to look at section 25(1) of the *Constitution* first.[413] Sections 25(2)[414] and (3)[415] of the *Constitution* deal with expropriation and the compensation payable. Expropriations are regarded as a subset of deprivation,[416] but can most easily be distinguished from deprivations as compensation is payable in the case of expropriations.[417] The expropriation should comply with the requirements of deprivations[418] as well as those of expropriations.[419] The state can sometimes expropriate[420] property for environmental purposes if the state, for example, wants to create a national park.[421]

3.4.1 Definition of expropriation

As the term "expropriation" is defined differently in different constitutions,[422] it does not have a precise, universal definition.[423] It is described as a "compulsory acquisition"[424] or as the "taking away of property".[425] According to Van der Walt, the fact that the state would rather want to acquire property through expropriation rather than by deprivation, could also be seen as a distinguishing factor.[426] Expropriation can also be distinguished from deprivation by noting that regulatory deprivation affects the property of a specific area, whereas expropriation only affects a specific property or a specific owner.[427] The latter cannot be regarded as an absolute

413 Van der Walt *Constitutional Property Law* 343.
414 Property may by expropriated only in terms of a law of general application, for a public purpose or in the public interest (s 25(2)(a)) and subject to compensation, the amount of which and the time and manner of payment of which have either been agreed by those affected or decided or approved by a court (s 25(2)(b)).
415 The amount of compensation and the time and manner of payment must be just and equitable, reflecting an equal balance between the public interest and the interests of those affected, having regard to all the relevant factors (s 25(3)).
416 Van Wyk *Planning Law* 220; Van der Walt *Constitutional Property Law* 341; Roux "Property" 28–30; Badenhorst Pienaar and Mostert*. The Law of Property* 558.
417 Van der Walt *Constitutional Property Law* 343.
418 S 25(1) of the *Constitution.*
419 S 25(2) and (3) of the *Constitution.*
420 See 2.2 and 2.4 of this dissertation regarding expropriations under *NEMA* and *NEMPA*.
421 Establishment of a national park should be done in accordance with the provisions of *NEMPA*.
422 Van der Walt *Constitutional Property Law* 336.
423 Van der Walt *Constitutional Property Law* 336.
424 See s 51(xxxi) of the *Australian Commonwealth Constitution* 1900; art 31(2) of the *Indian Constitution* as amended by the Fourth Amendment in 1955; art 13(2) of the *Federal Constitution of Malaysia* 1957; s 16(1) of the *Constitution of the Republic of Zimbabwe* 1980.
425 See the *Fifth Amendment to the US Constitution*; art 29 of the *Constitution of Japan* 1946; s 5 of the *Government of Ireland Act* 1920.
426 Van der Walt *Constitutional Property Law* 337; there are also certain situations where the loss of the affected property by its former holder rather than acquisition by the state is the functional element for expropriation, therefore state acquisition of property cannot be regarded as the only element that should be taken to account with regard to expropriation, although it may be one of the factors that need to be considered.
427 Van der Walt *Constitutional Property Law* 338.

statement. Although not always so, some deprivations may focus on a small class of properties, while expropriation by the state may affect a large class of properties or owners, although this is also in most cases not so.[428]

3.4.2. The law of general application

In order to protect individuals against discriminatory action, the law of general application was designed.[429] German law[430] is probably the law that regulates the right to expropriate property most strictly.[431] As the current study was not a comparative study, German law will not be discussed.

The state has the authority, subject to compensation, to expropriate one's property.[432] In order to prevent that certain individuals are singled out, the expropriation of property has to adhere to the "law of general application".[433] The law of general application with regard to expropriation differs from the law of general application with regard to deprivation in that the authorising law to expropriate property should be very specific in nature and should state a very particular kind of state action.[434]

The most prominent piece of legislation that deals with expropriation is the *Expropriation Act,*[435] which may be regarded as a law of general application. In terms of the *Expropriation Act,* the process of expropriation is as follows: the Minister of Public Works decides to expropriate property and has to serve a notice of the

428 Van der Walt *Constitutional Property Law* 338; it should however be kept in mind that deprivations on a small group of persons or an individual person place an unfair burden on them for the sake of society at large and it will rather be seen as constructed expropriation or invalid.

429 *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 1 BCLR 23 (T) par 29G–H; Badenhorst, Pienaar and Mostert*. The Law of Property* 565.

430 According to German law, expropriation is such an extreme infringement upon one's private property that it can only be authorised if a statute explicitly foresees and authorises the expropriation and also the compensation that needs to be paid. This is not the position in South African law. In South African law, the *Constitution* authorises an expropriation even if a statute or legislation does not make specific provision for it or explicitly states expropriation is authorised. According to South African law, the expropriation is authorised by a law of general application, even if that law does not explicitly provide for expropriation.

431 Van der Walt *Constitutional Property Law* 454.

432 Badenhorst, Pienaar and Mostert*. The Law of Property* 564.

433 Du Plessis *Compensation for Expropriation under the Constitution* 94; see 3.3.3 for a detailed discussion on the law of general application; De Vos and Freedman (eds) *South African Constitutional Law in Context* (Oxford Southern Africa 2014) 361.

434 Van der Walt *Constitutional Property Law* 454; an example of a very specific state action is the expropriation of private property for public purpose or for public interest.

435 63 of 1975; the pre-constitutional provisions of the *Expropriation Act* 63 of 1975 are only valid insofar as they are not in conflict with the *Constitution* and the constitutional framework. It should rather be said that the principles in the *Expropriation Act* should be interpreted within the new constitutional framework.

expropriation on the owner of the land.[436] The notice will display the day on which the expropriation will take place and when the state will take possession of the land.[437] The notice may notify the owner of the amount of compensation that will be paid,[438] but this is not a prerequisite. If the notice does not indicate an offer of compensation, the owner may, within 60 days of the date of service of the notice on him/her, make a written response where he/she claims the amount of compensation.[439] Should the Minister not accept the amount of compensation, he/she may make another offer to the owner.[440] If no settlement is reached, the Minister may approach the appropriate court to decide on a suitable amount of compensation.[441]

3.4.3 Public purpose/Public interest

According to Du Plessis,[442] the main concern regarding the drafting of the *Constitution* was that expropriation should be possible for any land reform purpose. In this regard, it was assumed that public purpose would be interpreted too narrowly and public interest was included in the final *Constitution*.[443] An individual person's land may now be expropriated for the purposes of land reform.

Before an expropriation can be regarded as lawful, it has to be for a public purpose or in the interest of the public. As private property may be expropriated, it is easy for the state to abuse its power; therefore, to prevent such abuse, that the state has to prove that the expropriation is not improper and that it will serve in the public's best interest[444] and is indeed strictly necessary.[445] The public purpose requirement is also twofold in nature. It can be seen as a public purpose in the wide sense and a public purpose in the narrow sense.[446] When it is interpreted in the wider sense, the term

436 S 7(1) of the *Expropriation Act*; the notice should contain a description of the property that is going to be expropriated.
437 S 7(2)(b) of the *Expropriation Act*.
438 S 7(2)(d) of the *Expropriation Act*; if the notice does have an offer of compensation, the owner has 60 days to except or reject the offer. If the owner does not comply within 60 days, the Minister may approach the competent court to determine compensation that is suitable.
439 S 9(1) of the *Expropriation Act*.
440 S 10(4) of the *Expropriation Act*; the owner has 30 days to reply.
441 For a more detailed analyses regarding the expropriation process, see Gildenhuys *Onteieningsreg* 111-136.
442 Du Plessis *Compensation for Expropriation under the Constitution* 94.
443 S 25(4) in the *Constitution*; Du Plessis *Compensation for Expropriation under the Constitution* 94.
444 Badenhorst, Pienaar and Mostert. *The Law of Property* 566.
445 Van der Walt *Constitutional Property Law* 459.
446 Badenhorst, Pienaar and Mostert *The Law of Property* 567.

means to "benefit the general public".[447] When the more narrow definition is used, it means to expropriate "for governmental purposes".[448] Van der Walt asks two questions regarding the public interest[449] requirement. Firstly, when looking at the definition of public interest, the question arises whether one adheres to the purpose of the definition when private property is eventually transferred to another person, or when another person benefits from the property that once did not belong to him/her.[450] In my opinion, this cannot be regarded as serving the public interest as one party benefits for the expropriation, whilst the other suffers a loss of his/her property. The owner who loses the land does, however, receive compensation for the property lost. The second question that needs to be answered is whether it can be allowed for the state to change the status of the land which is expropriated, thus changing the purpose that the land was always used for.[451] The answer to this question can be found in *Harvey v Umhlatuze Municipality and Others*.[452] In this case, the court held that the decision to use the property for another purpose as the purpose it was expropriated for was "in the exercise of its public power and in the ordinary course of administering the properties."[453] The basis of this argument lies in the fact that, once an owner loses ownership of a property, that owner loses all entitlements to the property and the new owner can administer the property as he/she deems fit.[454] Property may be expropriated if it is for a public purpose[455] and subject to compensation.[456] Section 25 does not make provision that the property being expropriated has to be used for the same purpose as the reason it was expropriated for. The state, however, should show that the new purpose does also satisfy the requirement of public purpose.[457] An authority can, just as in the case of a private owner, use the property for any purpose the authority deems necessary or beneficial.[458] The position is however questionable and subject to criticism, and

447 Badenhorst, Pienaar and Mostert *The Law of Property* 567.
448 Badenhorst, Pienaar and Mostert *The Law of Property* 567.
449 Public interest is defined in the *Constitution* as to include the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources; Badenhorst, Pienaar and Mostert *The Law of Property* 567.
450 Van der Walt *Constitutional Property Law* 460.
451 Van der Walt *Constitutional Property Law* 460.
452 2011 1 SA 601 (KZP).
453 2011 1 SA 601 (KZP) par 63; Van der Walt *Constitutional Property Law* 496.
454 Van der Walt *Constitutional Property Law* 496.
455 S 25(2)(a) of the *Constitution*.
456 S 25(2)(b) of the *Constitution*.
457 Van der Walt *Constitutional Property Law* 498.
458 Van der Walt *Constitutional Property Law* 498; also see *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another* 2001 3 SA 1151 (CC).

legislation might be developed to refrain the state from changing the purpose of expropriated land.[459]

3.5 The payment of compensation

The purpose for the payment of compensation, according to Gildenhuys, is to place the owner in the same financial position wherein he would have been had he did not lost his property.[460] Section 25 of the *Constitution* contains general provisions regarding the payment of compensation. Firstly, property may only be expropriated when compensation will be paid.[461] Secondly, the amount of compensation and the time and manner of the payment thereof will either be agreed upon by the parties or decided by a court.[462] The last requirement entails that the amount of compensation and the time and manner of payment should be just and equitable, reflecting a balance between the public interest and the parties affected by the expropriation.[463] There are also certain factors that have to be taken into account regarding the last requirement. These factors are: the current use of the property,[464] the history of the acquisition and use of the property,[465] the market value of the property,[466] the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property,[467] and lastly the purpose of the expropriation.[468] The provisions are silent in determining exactly when compensation has to be determined and only state that it should be agreed upon by the parties or by a court. The amount of compensation can thus also be determined before the property is expropriated. Section 25(2)(b) only states that compensation has to be paid and not that it has to be determined.[469] It is generally accepted that a person will be fully compensated if his/her property is expropriated.[470] This is also the position in the common law and is also, according to Gildenhuys, the foundation of the

459 See *Minister of Public Works and others v Kyalami Ridge Environmental Association and Another* 2001 3 SA 1151 (CC); Van der Walt *Constitutional Property Law* 498–499.
460 Gildenhuys *Onteieningsreg* 151.
461 S 24(2)(b) of the *Constitution*.
462 S 25(2)(b) of the *Constitution*.
463 S 25(2)(b) of the *Constitution*.
464 See Gildenhuys *Onteieningsreg* 153 – the amount of compensation to be paid could also depend on the right to the property which will be taken away from the owner. If the property is subject to a servitude, for example, the land in question is worth less than it would have been if there was no servitude; 25(3)(a) of the *Constitution*.
465 S 25(3)(b) of the *Constitution*.
466 S 25(3)(c) of the *Constitution*; Gildenhuys *Onteieningsreg* 174.
467 S 25(3)(d) of the *Constitution*.
468 S 25(3)(e) of the *Constitution*.
469 Boggenpoel 2012 *SALJ* 620.
470 Gildenhuys *Onteieningsreg* 155.

Expropriation Act.[471] Compensation is calculated in terms of section 12 of the *Expropriation Act*. The main focus seems to be that of market value in order to determine the price of compensation and the willing buyer, willing seller principle.[472]

471 Gildenhuys *Onteieningsreg* 155.

472 Du Plessis *Compensation for Expropriation under the Constitution* 214; also see Du Plessis 2013 *SLR* 362; Gildenhuys *Onteieningsreg* 174.

4 Balance of convenience

According to Van der Walt [473] "the aim of section 25 is to establish a just and equitable balance between the protection of private property and the promotion of public interest." Woolman and Botha gives a quite simple meaning to the term "balancing" by merely saying it is a "head-to-head" comparison of competing rights, values or interests.[474]

The current study found that the competing principles in the *Constitution* are that one has the right to an environment that is not harmful to one's well-being,[475] and also to have the environment protected.[476] On the other hand, one has the right to have one's private property protected.[477] Both these constitutional rights have limitations and cannot be seen as absolute rights.[478] It is my opinion that it is quite difficult to find a balance between these two constitutional rights. When can one's property be limited to protect the environment? And when can the environment be harmed in order to protect one's right to private property? In this regard, Woolman and Botha make it clear that balancing should not be understood as finding an equal balance between conflicting interests. When conflicting rights are balanced, it sometimes means that one right or interest will outweigh another right or interest.[479] In *Corium (Pty) Ltd and Others v Myburgh Park Langebaan and Others*[480] it was held that the balance of convenience was perhaps the most difficult part of the decision.[481] It was

473 Van der Walt *Constitutional Property Law* 41.

474 Woolman and Botha "Limitations" 95; the concept of balancing rights are described by Currie when he says the following: Balancing is a metaphor used in the process of legal reasoning in rights cases. It is an apt metaphor to describe a process that entails finding a resolution to a problem of competing principles by the ascription of relevant weighs to the competitors. This is a process made inevitable by the particular structure of the South African Bill of Rights; a generous catalogue of rights, each of which are expressly qualified by the possibility of limitation in the service of countervailing considerations; Currie 2010 *SAPL* 422.

475 S 24(a) of the *Constitution*.

476 S 24(b) of the *Constitution*.

477 S 25 of the *Constitution*.

478 Rautenbach is of the opinion that the limitation of certain rights, has the outcome of providing peace and order in a community - see Rautenbach *Rautenbach-Malherbe Constitutional Law* 301; for example, if the right to have the environment protected was seen as an absolute right, without the possibility for the environmental right to be limited, there would be no developments of townships etc. and the concept of sustainable development would be of no value.

479 Woolman and Botha "Limitations" 95; the most significant court case to use as example that one right can outweigh another is that of *S v Makwanyane* 1995 3 SA 391 (CC), where the right to life and the right to human dignity outweighed the interest of the state to impose the death penalty.

480 1993 1 SA 853 (C); hereafter referred to as the *Corium* case; the applicants in this case sought an interdict to restrain the respondent (developer) from developing a township in development in a proclaimed nature area.

481 1993 1 SA 853 (C) 858 E; It should be kept in mind that the *Corium* case can no longer be used as authority, as it was decided before the 1993 *Constitution* as well as the 1996 *Constitution*

said by Judge Conradie[482] that "the first Respondent will suffer damages if an interdict is granted". The damages of the respondents are not the only interests that have to be kept in mind, but also those of the general public.[483] (The *Corium* case was not used as case law in the current study, as it was decided before the 1993 and 1996 *Constitution* came into force; it is merely mentioned as an example and case study to illustrate the problem.)

The whole notion and idea regarding fundamental rights in the *Constitution* is that the *Constitution* gives these rights a higher status. and this implies that the rights are at a higher level than other parts of the law.[484] One can thus come to the conclusion that the rights contained in the Bill of Rights are of particular importance for society and that they are enriched above other norms.[485] An individual therefore has a strong right to have his/her fundamental rights protected. This is in some instances difficult to achieve as fundamental rights are sometimes in conflict with one another.[486]

4.1 General rules

Normally an interdict is used to restrain a person from acting unlawfully or to compel a person to act lawfully. There are general rules that need to be followed when one seeks an interdict. With regard to interim interdicts, an applicant has to demonstrate that there exists a *prima facie* right[487] to have property protected for example. If there are enough grounds that there will be irreparable harm and there exists no other remedy, the court may grant the interdict, although one should look at all the facts present and use one's discretion.[488] The court always has a discretion in deciding whether or not to grant an interdict. All the circumstances have to be considered and

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came into force. It was decided on principles of the common law and therefore, the *Corium* case can only be seen as an example to explain the conflict between environmental protection and the right to private property.

482 1993 1 SA 853 (C) 858E.

483 1993 1 SA 853 (C) 858E.

484 Bilchitz 2010 *SAPL* 425.

485 Bilchitz 2010 *SAPL* 425.

486 In terms of this dissertation, the right to have one's property protected and the right to the environment are in conflict with one another, as the right to property could be infringed upon to protect the interests in the environment.

487 Penfold and Du Plessis 2007 *SALJ* 560.

488 In *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 4 SA 348 (A) at 362 EM Grosskopf JA states that the courts have not defined the so-called discretion, save for mentioning the obvious examples such as the strength or weakness of the applicant's right, the balance of convenience, the nature of the prejudice that may be suffered by the applicant and the availability of other remedies.

also the probabilities of success of the applicant.[489] The nature of the injury that the respondent will suffer and whether the interdict is granted need to be considered, but also the damages that the applicant will suffer if the interdict is not granted.[490] In the *Corium* case, it was held that the respondent would suffer damages if the interdict was granted, and this deserved sympathetic recognition.[491] When considering the interests of the general public, sympathetic recognition for the damages of the respondent does not cause the balance of convenience to tip in favour of the respondent. In *PS Booksellers (Pty) Ltd and another v Harison and Others*[492] it was held that:

> Whilst sympathetic recognition is given to the extent to which the first respondent will be financially disadvantaged if the interdict sought were to be granted against her, I do not believe that this is sufficient to tip the balance of convenience in her favour.

This leads to the balance of convenience, namely the stronger the prospects of success, the less is the need for the balance to favour the applicant. However, the weaker the prospects of success, the greater is the need for the balance to favour the applicant.[493] When deciding a case, one has to show that there would exist a *prima facie*[494] right of irreparable harm and should show that the prospects of success are in your favour. Looking at section 28 of the *National Environmental Management Act*[495]*,* it is difficult to escape the fact that any development in a proclaimed nature area would leave irreparable harm to the environment.

In the case of *Ferreira v Levin NO and Others; Vryhoek and Others v Powell NO and Others*[496] judge Heher followed a different approach to the question of whether a *prima facie* right existed. Judge Heher considered an alternative test to decide when alternative relief should be granted and also considered the nature of constitutional disputes.[497] One could prove through this test that there is a "serious question to be

489 Penfold and Du Plessis 2007 *SALJ* 568.
490 Penfold and Du Plessis 2007 *SALJ* 568–569.
491 1993 1 SA 853 (C)858E.
492 2007 3 ALL SA 552 (C).
493 *Olympic Passengers Service (Pty) Limited v Ramlagan* 1957 2 SA 382 (D) at 383 C–F.
494 The threshold of the *prima facie* right was lowered in cases such as *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 2 SA 382(D) and *Ericson Motors (Welkom) Limited v Protea Motors Warrenton and Another* 1973 3 SA 685 (A).
495 107 of 1998; referred to as *NEMA*.
496 1996 1 SA 984 (CC); hereafter referred to as the *Ferreira* case.
497 Penfold and Du Plessis 2007 *SALJ* 565.

tried."[498] It is, however, unclear whether the courts favour the use of the *prima facie* right to prove their case, or the test formulated in the *Ferreira* case.[499]

The second requirement for an interim interdict to be granted is that there will be irreparable harm if interim relief is not granted, which is later granted.[500] In *National Council of SPCA v Openshaw,*[501] the court stated the following:

> An interdict is not a remedy for past invasion of rights but is concerned with present or future infringements. It is appropriate only where future injury is feared. Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated.

It is clear that, should a private property holder require to develop on his/her property situated in or adjacent to a protected area, there will be irreparable harm. If a development took place, the area can never be in the same condition as it had been previously.[502] Upon proof that there will be the apprehension of irreparable harm and there exists no other ordinary remedy, the court may grant the interdict.[503]

When considering whether there is irreparable harm, one has to look at the nature of the harm and not necessarily the magnitude.[504] This harm cannot be quantified in monetary terms or it cannot be cured. This is mostly because one party cannot collect damages from the other.[505] A party will, for example, suffer damages if he/she is put out of business by the decision of the court, where he/she will suffer market loss or where there is permanent loss of natural resources.[506] It is said that financial loss could, in itself, amount to irreparable harm, but it will not be sufficient to tip the balance of convenience.[507] When looking at the nature of a right, one has to

498 Penfold and Du Plessis 2007 *SALJ* 565; the *Ferreira* case at 825 A–C and 835I–835F; also see cases such as *American Cyanamid* Ltd 1975 1 ALL ER 504 (HL) and *Chief Nchabeleeng v Chief Phasa* 1998 3 SA 578 (LCC).
499 The *Ferreira* case.
500 Penfold and Du Plessis 2007 *SALJ* 560.
501 2008 5 SA 339 (SCA).
502 See s 28 of *NEMA*, which states that any harm to the environment should be remedied in such a way as to put the environment in the same condition as it were previously, or where harm cannot be remedied, to keep any harm to a minimal. When a development in a protected area takes place, the environment will never be placed in the same condition as it was before any development took place.
503 *Olympic Passengers Service (Pty) Limited v Ramlagan* 1957 2 SA 382 (N) at 383F.
504 Penfold and Du Plessis 2007 *SALJ* 573.
505 Penfold and Du Plessis 2007 *SALJ* 575.
506 Penfold and Du Plessis 2007 *SALJ* 575.
507 Judge Conradie implied in the *Corium* case that the financial harm that the Respondents would suffer, was not enough to tip the balance in their favour, he can merely sympathise with them.

establish the strength and intensity of a certain right.[508] It is again necessary to look at the provisions of section 28 of *NEMA*.[509] A person who will cause degradation of the environment should repair such harm or if the harm is authorised by law, such harm should be kept minimal.[510] The effect of any development can be of such a nature that the harm cannot be repaired of even kept at a minimal. It would leave permanent damage and irreparable harm to any plans of eventually incorporating an area into a protected area.

Thirdly, the balance of convenience favours the granting of the interim relief and no other remedy should be available to the applicant,[511] meaning that all other remedies should first have been exhausted before applying for an interim interdict. The most important requirement to be discussed is that of the balance of convenience. It is often this requirement with regard to interdicts that will determine the result when resolving constitutional cases.[512] Referring to the Canadian Supreme Court, in *RJR-Macdonald Inc v Canada,*[513] it is held that the interests of the public should be taken into account when considering the balance of convenience, in addition to the alleged damages that the parties will suffer.[514] The parties may rely on the effect that the interdict application will have on the public interest. Also in the *Ferreira* case, the court applied the approach of taking the broad public interests into account when assessing the balance of convenience.[515] If an applicant wants to rely on the public interests, he/she should demonstrate that the suspension of legislation would in itself provide a public benefit.

Smit refers to Woolman[516] when he says that there are two distinct formats with regard to the balancing of rights.[517] One is that the balance is found in an either or determination. This means that one right outweighs the other or is stronger than the

508 Bilchitz 2010 *SAPL* 432.
509 General duty of care provision.
510 S 28(1) of *NEMA*.
511 Penfold and Du Plessis 2007 *SALJ* 560; also see *Steel and Engineering Industries Federation and Others v National Union of Metalworkers South Africa* 2 1993 4 SA 196 (T) at 199G–205; *Hix Networking Technologies v System Publishers (Pty) Limited and Another* 1997 1 SA 391 (A) at 398–399.
512 Penfold and Du Plessis 2007 *SALJ* 573; *RJR-Macdonald v Canada (Attorney General)* 1995 3 SCR 199.
513 1995 3 SCR 199 (Canadian case)
514 Penfold and Du Plessis 2007 *SALJ* 573; *RJR-Macdonald v Canada (Attorney General)* 1995 (3) SCR (Canadian case).
515 The *Ferreira* case; Penfold and Du Plessis 2007 *SALJ* 573.
516 Woolman and Botha "Limitations" 95;Smit 2008 *Acta Academia* 216.
517 Smit 2008 *Acta Academia* 216.

other.[518] Balance does thus not necessarily mean that there has to be a "middle point" between two aspects.[519] The balance with regard to the first format lies in the fact that there exists a stronger right.[520] The most common and well-known case in this regard is the first constitutional case in South Africa, namely the *S v Makwanyane*[521] case where it is stated that the right to life will always outweigh the state's interest. The second format is that one right has to be in harmony with another. One does not necessarily have to decide in favour of one right above another. Here an equal balance has to be achieved.[522] Woolman and Botha refer to this as "the striking of a balance."[523] Smit [524] states, "the balancing of rights would require that the equilibrium is re-established." This means bringing important rights to an even keel.[525] To bring different and important, rights to an even keel could be difficult to achieve. This is probably because some authors are of the opinion that different constitutional rights cannot be judged by the same standard.[526] Bilchitz , however, is of the opinion that this is not true. He states that any conflicting interest should be assessed against the "perspective of the *Constitution*."[527] I agree with Bilchitz. Although the environmental clause[528] and the property clause[529] are on the face different, they are both constitutional rights and should be judged by the same standard, namely "the perspective of the *Constitution*."[530]

The result of the balance of convenience might be problematic and the reasonability of the outcome should also be justified.[531] It is here where it is necessary to explain the limitation clause found in section 36 of the *Constitution*. It is important to understand that the limitation clause in the *Constitution* makes provision for actions to be justified and reasonable if such actions could be detrimental to the

518 Smit 2008 *Acta Academia* 216.
519 For example, the right to have your property protected (one point) and the right to have the interests in the environment protected (second point).
520 Woolman and Botha "Limitations" 95.
521 1995 3 SA 391 (CC).
522 Smit 2008 *Acta Academia* 216.
523 Woolman and Botha "Limitations" 95.
524 Smit 2008 *Acta Academia* 216.
525 Smit 2008 *Acta Academia* 216.
526 See Bilchitz 2010 *SAPL* 21.
527 Bilchitz 2010 *SAPL* 21.
528 S 24 of the *Constitution*.
529 S 25 of the *Constitution*.
530 Bilchitz 2010 *SAPL* 21.
531 Smit 2008 *Acta Academia* 216.

environment.[532] The limitation clause can also prohibit certain developing activities. The limitation clause in the *Constitution* may thus be a balancing tool in order to bring conflicting rights to an even keel.

If one looks at the facts in the case study, namely, the *Corium* case, which outlines the constitutional problem in South Africa with regard to property rights and protection of the environment, the question to be answered is whether section 25 or section 24 is the stronger right, or how one can achieve an equal balance between the two constitutional rights. As both these rights are constitutionally protected rights, it cannot be said that either one of the constitutional provisions is stronger or even more important than the other. The balancing process can now begin and is assisted by the limitation clause in the *Constitution*.

4.2 Section 36 of the *Constitution*

The question appears to establish how a democratic society can limit a constitutional right. The answer is found in the proportionality test.[533] According to South African Law,[534] a limitation of a constitutional right will be accepted if it is proportional.[535] One of the most important elements that has to be present is that a party should show that a limitation is reasonable and also justified.[536] The notion behind an equal equilibrium forms the essence of proportionality.[537] Section 36 of the *Constitution* implies the proportionality principle.[538] A balance should be struck between the interests of society with the interests of individuals or a group of people,[539] thus achieving an equilibrium between the competing principles.

According to Van der Walt, section 36(1) of the *Constitution* is based on the Canadian general limitation provision.[540] Section 36(1) amounts to a general proportionality test, ensuring that the rights in the Bill of Rights are limited by general

532 An example would be to establish a factory in an ecologically sensitive area, if the establishment would create many job opportunities.
533 See 4.2.2 regarding proportionality.
534 As well as Canadian and German Law.
535 Barrie 2013 *SAPL* 47.
536 Barrie 2013 *SAPL* 48.
537 Barrie 2013 *SAPL* 52.
538 Roux "Property" 69; Barrie 2013 *SAPL* 51; *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC).
539 Barrie 2013 *SAPL* 48; for example where is the balance in order to, on the one hand protect property and on the other recognise that the right to property may be appropriately infringed upon – Joubert and Faris (eds) *The Law of South Africa* (LexisNexis Durban 2012) 133.
540 Van der Walt *Constitutional Property Law* 74.

law only and in a reasonable and justifiable manner.[541] With regard to deprivations and expropriations, it cannot be argued that if a law does not adhere to the arbitrary requirement in section 25(1) of the *Constitution* it can be saved by section 36. This will make any limitation of an right unreasonable and unjustifiable.[542] As all expropriations should first adhere to the requirements of deprivations, the same statement is applied to expropriations.[543]

Before a limitation can be justified, all the factors listed in section 36 of the *Constitution* should be met. Together with the listed factors, one also has to look at the proportionality test.[544] Before the proportionality test can be applied, it is necessary to make the following preliminary enquiries. Firstly, has a fundamental right been infringed upon? The applicant here bears the onus to prove that his/her constitutional right is infringed.[545] If it has been infringed, has a law of general application limited the fundamental right? At this stage, the applicant has to prove the legitimacy statute and that the infringement of a constitutional right can be justified in terms of a law that applies to the general public.[546] Regarding the first question, if it is found that there is no fundamental right infringed upon, there is no need to test the constitutionality according to section 36 of the *Constitution*. If the environment and property are involved, a fundamental right will always come into question. Section 32 of *NEMA* and section 38 of the *Constitution* make it possible for the public to institute a claim on behalf of the environment and therefore, if any environmental right is infringed upon, it is a fundamental right of the public that is infringed upon and an applicant may institute a claim to protect his/her fundamental right. If any infringement regarding property takes place, section 36 of the *Constitution* will always come into play, as a property right is a fundamental right.

The second part of the question is whether a law of general application has limited the fundamental right. Only a law of general application can limit a fundamental right.[547] This also entails that a law should apply to all persons generally and not only to a specific person or group of people.[548] When deciding when an Act can be

541 S 36(1) of the *Constitution*.
542 Roux "Property" 26.
543 Roux "Property" 36.
544 Smit 2008 *Acta Academia* 217.
545 Van der Walt *Constitutional Property Law* 75.
546 Van der Walt *Constitutional Property Law* 75.
547 Smit 2008 *Acta Academia* 218.
548 Roux "Property 21."

regarded as a law of general application, the following factors can be considered: the law should and must apply generally to every person; the law must be non-arbitrary;[549] all persons should be able to find out what the rule in question entails; it should thus be accessible and available to all persons and should be clear in order for a person, with no background of the law, to understand the law.[550]

The Minister of Environmental Affairs and Tourism or MEC may from time to time publish regulations regarding the activities in and surrounding protected areas. It is necessary to understand that certain administrative decisions may also be regarded as a law of general application, if such an administrative action is taken in accordance with the environmental laws and *PAJA* and it also complies with the requirements of proportionality.[551] Any administrative decision will be seen as reasonable if such action is taken for a good reason and in accordance with the provisions of *PAJA.* The Minister of Environmental Affairs and Tourism, for example, may publish a list of activities that will require an EIA for the "good reason" to protect and preserve the environment. The interest that is protected should be of sufficient importance. With regard to the environment, the interest is a constitutionally recognised right and the protection thereof for present and future generations is, according to my opinion, important enough to limit property rights in the *Constitution.*

4.2.1 Section 36 Limitation procedure

In order to analyse whether there has been a limitation of rights, one has to answer to questions. Whether a law infringes a right contained in the Bill of Rights, and secondly, if such an infringement can be justified.[552] *Prima facie,* the procedure that is followed with regard to section 36 seems simple. On further investigation it does however prove to be incoherent and not necessarily of strong value and it can also be argued to be misleading.[553] As previously discussed, the *FNB* case is the most used precedent regarding the limitation procedure, and a deprivation or expropriation that does not fulfil the requirements of section 25(1), (2) and (3) of the *Constitution*

549 No heavy burden should be placed on a person in question; it must not be random, capricious illegal, to name a few examples.
550 Woolman and Botha "Limitations" 65-67.
551 Smit 2008 *Acta Academia* 219.
552 De Vos and Freedman (eds) *South African Constitutional Law in Context* (Oxford Southern Africa 2014) 354; De Vos and Freedman refers to this as the two-stage approach to the limitation of rights.
553 See explanation in Roux "Property"; Van der Walt *Constitutional Property Law* 76-77;; also see *Khoza and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others* 2004 6 SA 505 (CC) par 83, 105 and 106.

may be justified under section 36 of the *Constitution*.[554] Courts, after the decision in *FNB,* follow a less strict approach to the procedure of specifically non-arbitrariness, making it possible for section 36 of the *Constitution* to be applicable.

4.2.2 Proportionality test

The proportionality test, according to Van der Walt ,[555] is similar in spirit to the non-arbitrariness test discussed in the decision in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*.[556] According to Barrie,[557] one of the tests regarding proportionality is "the rational connection test." According to this test, the reason for the any limitation should be rationally connected to the purpose of the limitation,[558] meaning that the limitation should make sense.[559] It is thus of utmost importance that a proportionality analysis always accompanies a deprivation or an expropriation, as a person's rights may be limited. It has the effect of avoiding any imbalance of any administrative or other decision.[560] The purpose of this test is to use mechanisms, which are not drastic for the general public in order to

554 Van der Walt *Constitutional Property Law* 78; also see *Nhlabati and Others v Fick* 2003 7 BCLR 806 (CC) – in this case, s 6(2)(dA) of the *Extension of Security and Tenure Constitution*97 expropriated an occupier of property without the payment of compensation, which was justified under s 36 of the *Constitution*. According to this case, it may be possible for property to be expropriated without the payment of compensation and that such an irregularity may be justified under s 36 of the *Constitution*. It is important to note that the court never decided whether there was an expropriation. The court only made the assumption for the sake of argument. The arguments might follow a different course on closer scrutiny.

555 Van der Walt *Constitutional Property Law* 74.

556 2002 4 SA 768 (CC); See Chapter 3 on Deprivation for a discussion of the non-arbitrariness test.

557 Barrie *Southern African Public Law* 48.

558 Barrie *Southern African Public Law* 48.

559 S 21(1)(a)(i) of the *Drugs and Drug Trafficking Act* 140 of 1992 states that when a person is in possession of an illegal drug, it is presumed that the possession of the drug was for the purpose of drug trafficking. A person is always innocent until proven guilty and the provision in the *Drugs and Drug Trafficking Act* does not adhere to this statement. In *S v Bhulwana* 1996 1 SA 388 (CC), the court stated that there is no rational connection between the possession of the illegal drug and the presumption that the possession of the drug was with the intention to sell it. The court thus could not see a justification to limit the accused's right of presumption of innocence. Also see the case of *S v Mbatha* 1996 2 SA 464 (CC), where a statute declared that a person on the premises where unlawful weapons are found is presumed to be the owner thereof. The court also here stated that it disproportionally limits the right to the presumption of innocence and that it is neither rational nor constitutional. There is no rational connection between the campaign against the possession of illegal weapons and a person being present on the location where the weapons are found. In the case of *Prince v President of the Law Society* 2002 2 SA 794 (CC), the applicant argued that there was no exception to the statutory ban to be in possession of dangerous drugs for religious reasons and that there was a disproportional limitation on his right to religion. The court however stated that the ban was proper, as it battles against the ongoing battle of drugs – the limitation thus made sense.

560 Ndzengu and Van Bonde 2011 *Obiter* 95.

achieve a certain goal or desired end. It is a balancing tool to reconcile certain conflicting interests.[561] In this study, the conflicting interests were those of a right to enjoy private property as well as any right to private property[562] and the right to have the environment conserved and protected for present and future generations.[563]

Bilchitz examines the theory of Robert Alexy[564] when explaining the concept "proportionality". According to Alexy, proportionality has certain sub-principles. The first being whether a certain measure should restrict a right to be adhered to or to be realised. It should be narrowly tailored to achieve a certain purpose or to be connected to the realisation of another right or principles.[565] This notion is also embodied in section 36(1) of the *Constitution*. Section 36(1)(c) states that there should be a connection between the limitation of a right and the purpose why the right is limited. The second principle is that of necessity.[566] The test of necessity, according to Barrie,[567] is "an inherent element of the doctrine of proportionality". This entails that there exist a number of measures that can be used to limit a certain right and the measure that is chosen should be the least restrictive.[568] This entails that an interest may be restricted or limited, but that the law which is used should be the least restrictive on a person's rights.[569] This notion is also embodied in section 36 of the *Constitution*. Section 36(1)(e) states that there should be less restrictive means to achieve a purpose.[570] Bilchitz states that, in order to find the least restrictive means to limit a right, a court should consider the following: the degree of interference; whether there exists alternative measures in order to reach a certain

561 Ndzengu and Van Bonde 2011 *Obiter* 95.
562 S 25 of the *Constitution*.
563 S 24 of the *Constitution*.
564 Robert Alexy's theory regarding proportionality is that rights should be seen as principles that should be adhered to, and not rules. He strengthens his theory by implying that rules should strictly be adhered to and that they cannot be limited, where in the case of principles, it is norms that can be realised and limited. If there exists a conflict between principles, one principle can outweigh the other and this process is governed by the process of proportionality. ; see Bilchitz 2010 *SAPL*.
565 Woolman and Botha "Limitations" 85; Bilchitz 2010 *SAPL* 426.
566 Bilchitz 2010 *SAPL* 426; many authors do not agree with Alexy, as the necessity requirement is too strong to follow; see Bilchitz 2010 *SAPL* 439.
567 Barrie 2013 *SAPL* 50.
568 It should be kept in mind that the *Constitution* does not mention "least" restrictive means, but rather "less" restrictive means. A provision that limits a right can pass constitutional scrutiny even if it is not the least intrusive measure that can be conceived. The key word to be used is that of reasonableness. The limitation should only bear the requirement that it should not be too severe.
569 Woolman and Botha "Limitations" 85.
570 *NEMPA* makes provision for less restrictive means by enabling the community, through integrated management plans, to work with government to protect the environment and also be able to use environmental resources in a sustainable manner.

objective; and lastly all the measures which interfere with a right to achieve the objective should be assessed and the one chosen should not too severely intrude upon the right which is limited.[571]

The conclusion is that the best measure is not necessarily adopted, rather the one that is not too severe, in other words, keeping the public interest in mind. When looking at a development in or adjacent to a protected area, the best measure to be adopted will be to interdict the developers from conducting any developments; however, this will not be in the public interest. A measure that will not be too severe would allow the public to take part in environmental conservation through management plans. These plans will make it possible for the public to have access to protected areas,[572] occupy the protected area,[573] as well as to develop in the protected areas,[574] subject to the terms in the management agreement.

The two principles above give the impression of balancing. The degree of non-satisfaction with one law should be balanced with satisfying another.[575] The greater the degree of non-satisfaction, the greater the importance of satisfying another right should be.[576] If one thus limits a right to property to protect the environment, such protection should be greater and more important that the right to private property. The question therefore: is the preservation of national parks more important than using and enjoying private property as one deems fit? This, in my opinion, is justified. National parks hold valuable natural resources that should be protected for present and future generations. The preamble to *NEMA* also highlights the importance of the environment stating that every person has the right to have the environment protected, through legislative and other measures that prevent pollution and environmental degradation, conserve the environment and secure ecologically sustainable development.[577]

In the first constitutional cases in South Africa, the court relied on the Canadian finding of *R v Oakes.*[578] South African courts gave three important components to the proportionality test. The first of these is that measures should be put in place to

571 Bilchitz 2010 *SAPL* 439.
572 S 42(2)(d) of *NEMPA*.
573 S 42(2)(e) of *NEMPA*.
574 S 42(2)(f) of *NEMPA*.
575 Bilchitz 2010 *SAPL* 427.
576 Woolman and Botha "Limitations" 70; Bilchitz 2010 *SAPL* 427.
577 Preamble to *NEMA*.
578 1986 1 SCR 103 (Canada).

achieve the objective in question.[579] The second component is that the means should impair as little as possible the right in question. Thirdly, there should be a proportionality between the effects of the measures which are responsible for limiting the rights in question and the objective identified as "sufficient importance".[580] With regard to this study, the effect of an interdict to restrain the developers from continuing with developments should be measured against the effect that the interdict would have on the conservation of the environment.[581] According to Smit there are three questions that can be formulated based on the latter. The first of these questions is whether the objective of the law can warrant the infringement and whether the objective of the law limiting the right is legitimate.[582] *NEMA* and *the National Environmental Management: Protected Areas Act*[583] have many objectives which can justify the property problem. *NEMPA* contains several objectives which should be met in order to warrant the continued existence of national parks in South Africa and also to warrant that they be preserved for present and future generations. *NEMPA* specifically states in section 2(e) that it is an objective of *NEMPA* to promote sustainable utilisation of protected areas for the benefit of people, in a manner that would preserve the ecological character of the area.[584] It further provides in section 2(f) that it is an objective of *NEMPA* to promote participation of local communities in the management of protected areas, where appropriate.[585]

It is thus a very important objective in *NEMPA* to manage protected areas in such a way as to accommodate the general public. In some instances, as mentioned earlier ,[586] members of the public have private property situated in or near a protected environment and may be restricted from conducting any developments or similar activities on their property. In order to achieve means to impair the right to property as little as possible, *NEMPA* provides in section 42 for the co-management of protected areas where an agreement may be entered between the local communities or the individual person and the managing authority in order to co-manage the

579 The measures should also not be arbitrary, unfair or based on irrational considerations.
580 Smit 2008 *Acta Academia* 217.
581 The protection and conservation of the environment are constitutionally protected rights and it cannot be said that the protection of the environment by way of deprivation of property rights is insufficient or unimportant.
582 Smit 2008 *Acta Academia* 220.
583 57 of 2003; referred to as *NEMPA.*
584 S 2(e) of *NEMPA*.
585 S 2(f) of *NEMPA*; see s 42 of *NEMPA*.
586 See 2.3.1 of this dissertation.

area.[587] In my opinion, the co-management of an area creates a deprivation of an owner's right as he/she is confined to the terms of the agreement. However, the occupant still has use of the property and may still reside in or adjacent to the protected area.

The last requirement is that there should be a proportional balance between the effects of the measures which are responsible for limiting the rights in question and the objective identified as "sufficient importance". In my opinion, the measure according to *NEMPA*, to accommodate the general public, is the implementation of management plans. The effects of these management plans are to enable the public to take part in conserving the environment, while still being able to enjoy their private property situated in or near the protected area.[588] It should be noted that the environment is "important enough" to warrant a limitation on the use of property in order to conserve the environment. In this regard it is important to note the principles in *NEMA*. Apart from the fact that all developments should be economically and socially viable and also environmentally friendly,[589] the disturbance of ecosystems as well as the loss of biodiversity should be avoided, or if it cannot be avoided, it should be kept to the minimum and be remedied,[590] and degradation to the environment should be avoided or kept to the minimum.[591] All social, environmental and economic effects to the environment should be assessed and evaluated, including disadvantages and benefits.[592] In evaluating the disadvantages and the benefits, it is clear that *NEMPA* tries to establish a balance between the rights of people and the effect that peoples' rights might have on the environment.

NEMA and *NEMPA* are legitimate infringements on fundamental rights, more specifically, property rights. They are legitimate, as they cannot be seen as arbitrary and because the *Constitution* in itself protects the right to the environment. *NEMPA* also tries to accommodate the general public by including provisions for the community to be involved in environmental conservation, while at the same time, still enjoying property protection. Although the *Corium* case cannot be used as case law in current problems, it is necessary to point out that judge Conradie, already at that

587 S 42(1)(a)(i) of *NEMPA*.
588 See S 41 of *NEMPA* regarding a management plan.
589 S 2(3) of *NEMA*.
590 S 2(4)(a)(i) of *NEMA*.
591 S 2(4)(a)(ii) of *NEMA*.
592 S 2(4)(i) of *NEMA*.

stage highlighted the importance of nature conservation and held that national parks are of immense importance, the most valuable natural resource that we have. Since the finding in the *Corium* case, this position has not changed. The promulgation of *NEMA* and *NEMPA* verifies judge Conradie's position regarding the importance of protected areas. One should always ask whether less restrictive means could have been used to limit a person's right,[593] and the answer to that question will always play an important role in the balancing procedure.

593 Smit 2008 *Acta Academia* 220.

5 Conclusion

Environmental protection as well as the right to have one's private property protected are both included in the *Constitution* as fundamental rights.[594] It is also a common fact that both these rights may be limited[595] to the extent where such limitation is reasonable and justifiable. Section 24 in the *Constitution* is seen by authors as a directive principle which obliges the state to take positive measures to secure environmental protection through reasonable legislative and others measures, adhering to section 7(2) of the *Constitution*. Environmental conservation has therefore become increasingly important in South Africa. This is also evident in environmental statutes that have evolved,[596]for example *NEMA* and *NEMPA*.[597] *NEMA* is the framework legislation to which all other environmental statutes are subject.[598] *NEMPA* is mainly concerned with the establishment and protection of protected areas in South Africa.[599] The problem that authorities are facing, however, is that communities hold private property rights in and adjacent to protected areas. Environmental statutes have to place certain restrictions on private property holders in and adjacent to protected areas in order to give effect to section 24 of the *Constitution* and to conserve the environment. The question that thus arises pertains to the constitutionality of section 24 to place such restrictions on private property holders. The answer to this question is made more difficult as the right to private property and to have such property protected is also included in section 25 of the *Constitution* as a fundamental right that is worthy of protection,[600] according to section 7(2) of the *Constitution*. According to section 7(2) of the *Constitution*, the state has a duty to respect, protect, promote and fulfil both sections 24 and 25 of the *Constitution*.

The *Corium* case (1993) was used as a case study to illustrate the above-mentioned problem. The facts of the case were that private property owners were interdicted from developing property adjacent to a protected area. The issue in the case was however that the authority that granted the developers a permit, did not have the

594 S 24 and s 25 of the *Constitution*.
595 S 36 of the *Constitution*.
596 See for example *ECA* and *NEMA*. Several provisions of the *ECA* have been repealed and *NEMA* has since came into force providing a more structured legal framework for environmental conservation.
597 See chapter 2 of this dissertation.
598 See 2.1.1 of this dissertation.
599 See 2.2 of this dissertation.
600 See chapter 3 of this dissertation.

proper authority to do so. The main concern of judge Conradie was that the development would leave irreparable harm to any plans to incorporate the land on which the developments were to take place, into the WCNP.[601] The facts in the *Corium* case highlight the problem that private property holders are deprived and could in some instances be expropriated of their property in order to conserve the environment.

Deprivation is included in section 25(1) of the *Constitution.* Section 25(1) entails that, firstly, no person may be deprived of his/her property, only in terms of a law of general application and secondly, that no deprivation may be arbitrary.

The issue regarding arbitrariness and that property may not be deprived arbitrarily, was described in the *FNB* case.[602] Stating that property may be deprived in terms of law of general application means that, amongst others, it may be deprived by certain statutes.[603] Section 42 of *NEMPA* deals with co-management in protected areas. This section entails that individuals living in or adjacent to protected areas may sign an agreement with the management authority to take part in the management of the areas in order to conserve the environment, and in turn, may still occupy the protected area or conduct certain activities in the area. This section further implies that an individual or a community within or adjacent to the protected area is deprived of doing with their property as they please. The provisions in *NEMPA*, specifically section 42 of *NEMPA,* are all laws of general application and cannot be seen as arbitrary as they do not put a heavy burden on a person regarding his/her property.

The case that gave most clarity regarding the fact that no deprivation should be arbitrary is found in the *FNB* case.[604] This case gave guidelines regarding the non-arbitrary test. A deprivation will be arbitrary if it does not give sufficient reason for the deprivation. It should therefore not put an unacceptably heavy burden or demand on an individual for the benefit of the public.[605] Protected areas are seen as a conservation tool. They are mainly used to protect the natural resources in South

601 See chapter 2 of this dissertation.
602 See *FNB* case 2002 4 SA 768 (CC) 100.
603 See chapter 3 of this dissertation; property may, for example be deprived in terms of s 40 and 42 of *NEMPA* by making use of a management plan and restricting the activities of private property holders within a protected area.
604 Also see 3.1.3.2 of this dissertation.
605 See 3.1.3.1 of this dissertation.

Africa.[606] Therefore, the deprivation of a person's property in order to conserve the environment cannot be seen as arbitrary or unfair.

If a person uses natural resources, as is provided for in *NEMPA*, such person has an obligation in terms of section 28 of *NEMA* to rehabilitate the area to its natural condition, or where this is not possible, to cause minimal damage to the environment. *NEMA* can therefore be seen as one of the most dedicated environmental statutes as it obliges natural and juristic persons to cause no or minimal damage to the environment. If a person does not comply with this section in *NEMA* such person should rectify his/her actions and report back to the managing authority. If a person fails to take reasonable measure to rectify his/her actions, such person may be expropriated from his/her right to the property in terms of section 28(6) of *NEMA*. It should also be noted that property may be expropriated by the Minister of Environmental Affairs and Tourism for environmental purposes, according to section 36(1) of *NEMA*.[607]

NEMPA also contains provisions which enable the state to expropriate property for environmental purposes.[608] Section 80(1) of *NEMPA* provides that the Minister responsible for national environmental management may acquire land or any right in or to land which has been or is proposed to be declared or is included in a national protected area. Section 81 of *NEMPA* deals with the acquisition of private property by SANParks. The property may be acquired if it has been or is proposed to be declared or is included in a national park.

Expropriation entails that property may be expropriated if it is expropriated in terms of a law of general application and such expropriation serves the public benefit and it is subject to compensation, which compensation does not have to be determined beforehand.[609] A person should be notified regarding the expropriation of his/her private property. The state may not abuse its power to expropriate property for reasons other than to serve the general public. It should be noted, however that the state may change the status of the land which was expropriated and to use the land in question for another purpose as the purpose it was previously used for.[610] In

606 See preamble of *NEMPA*.
607 See 2.1.1 of this dissertation.
608 See 2.1.2 of *NEMPA*.
609 See 3.5 of this dissertation; Boggenpoel 2012 *SALJ* 620.
610 See 3.2.2.2 of this dissertation.

Harvey v Umhlatuze Municipality and Others[611] the court held that the decision to use the property for another purpose than the purpose it was expropriated for was "in the exercise of its public power and in the ordinary course of administering the properties". To my opinion, a land adjacent to a protected area, which had previously been used for residential purposes, may be rezoned and changed to be incorporated into a national park. For the latter to be valid the state has to prove that the expropriation serves the public benefit. If land is expropriated adjacent to a protected area and such land is later used to mine, for example, this will no longer serve the public benefit and the state will have abused its powers.[612]

When saying that any deprivation or expropriation should be in the public interest, it is necessary to balance competing principles with one another.[613] According to section 24 of the *Constitution,* a person has the right to an environment that is not harmful to his/her well-being as well as the right to preservation of the environment for present and future generations. On the other hand, according to section 25 of the *Constitution,* one has the right to private property and to not be deprived of such property arbitrarily or to be expropriated of property without it serving the public benefit. The interests now have to be balanced in order to find an equal balance between competing interests. This is done through section 36 of the *Constitution*,[614] and the so-called proportionality test.[615] The reason for any limitation of a fundamental right should be rationally connected to the purpose of the limitation. Measures should be put into place to achieve the desired objective and less restrictive means should be used in order to achieve the desired end.[616]

To my opinion, *NEMPA* has put effective measures into place in order to achieve a sustainable outcome when the environment and property rights are concerned. Section 41 of *NEMPA* states that a management plan may be put into place in order to conserve the environment and also to adhere to the objectives of the Act. *NEMPA* encourages participation of local communities within a protected area as well as promotion of sustainable utilisation of protected areas for the benefit of people. The

611 2011 1 SA 601 (KZP).
612 See 3.2.2.2 of this dissertation.
613 See chapter 4 of this dissertation.
614 See 4.2.1 of this dissertation.
615 See 4.2.2 of this dissertation.
616 See 4.2.2 of this dissertation.

management agreement[617] enables the local community or an individual person to enter into an agreement with a management authority in order to take part in the conservation of the protected area and also to be able to use natural resources in the area and even to reside on the area, subject to the terms stipulated in the management agreement.

This, however, has the effect of a person being deprived of his/her property in accordance with sections 41 and 42 of *NEMPA*. *NEMPA* is however a law of general application and such a deprivation can therefore not be seen as arbitrary.

To answer the research question, the restrictions that environmental laws as well as section 24 of the *Constitution* place on land owners in respect of their private property, are legitimate and fair. The limitation clause in the *Constitution* makes provision for fundamental rights to be infringed upon to the extent that the infringements are not unfair and do not place heavy burdens on individuals. *NEMPA* still makes provision that local communities may reside in a protected area to the extent to which land owners' rights are limited, which provisions are constitutional, fair and not arbitrary.

617 The management agreement refers to the management agreement in s 40-42 of *NEMPA*.

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