CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 110/08
[2009] ZACC 24

REFLECT-ALL 1025 CC	First Applicant
SIXBAR TRADING 667 (PTY) LTD	Second Applicant
BICCARD REALTY CC	Third Applicant
ROY MOUNTJOY	Fourth Applicant
PATRICIA ROSAMUND NAOUMOFF	Fifth Applicant
TOWNSHIP REALTORS (SA) (PTY) LTD	Sixth Applicant
STELLA VERNA WORSLEY	Seventh Applicant
MNANDI PROPERTY DEVELOPMENT (PTY) LTD	Eighth Applicant

versus

MEMBER OF THE EXECUTIVE COUNCIL FOR PUBLIC TRANSPORT, ROADS AND WORKS, GAUTENG PROVINCIAL GOVERNMENT	First Respondent
PREMIER OF THE PROVINCE OF GAUTENG	Second Respondent

Heard on : 5 May 2009

Decided on : 27 August 2009

JUDGMENT

NKABINDE J:

Introduction

[1]This case concerns the constitutionality of legislation pertaining to the planning of provincial roads. The primary issue is whether the impugned provisions arbitrarily deprive owners of their property contrary to section 25(1) of the Constitution. The Court is also called upon to determine whether, contrary to the Constitution, the impugned legislative provisions amount to expropriation without just and equitable compensation; whether they fail to facilitate co-operative governance; and whether conduct in terms of the impugned provisions constitutes unjust administrative action.

[2]These proceedings involve three applications. First is an application for confirmation of a declaration of constitutional invalidity[1] of section 10(3) of the Gauteng Transport Infrastructure Act 8 of 2001 (the Infrastructure Act) by Hutton AJ in the South Gauteng High Court, Johannesburg (High Court).[2] Second is an application for leave to appeal against the High Court decision not to declare section 10(1) of the Infrastructure Act unconstitutional and invalid, and set aside Provincial Notice 2625. The application is accompanied by a request for condonation for the late filing of their application for leave to appeal. The applicants also seek an order directing the respondents to pay the costs of their appeal and the confirmation proceedings. Third is an application by the respondents for leave to cross-appeal the costs order against them made by the High Court.

[1] Section 172(2)(a) of the Constitution provides that:

> "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[2] *Reflect-All 1025 CC and Others v Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government and Another* Case No 14629/2004, South Gauteng High Court, Johannesburg, 2 December 2008, as yet unreported.

[3]Essentially, sections 10(1) and 10(3)[3] are challenged on the basis that they impose restrictions on the use, enjoyment and exploitation of privately owned property in a manner that amounts to arbitrary deprivation of property contrary to section 25 of the Constitution.[4] The case also concerns, although to a lesser degree, the constitutional obligations each sphere of government has to act in a manner that is in accordance with the principles of co-operative governance as contained in the Constitution.[5]

[4]As appears from what follows, I conclude that the impugned provisions are not inconsistent with section 25 of the Constitution or any of the provisions of the Constitution dealing with the co-operative governance obligations of the Gauteng Province. The publication of the notices in question under sections 10(1) and 10(3) of the Infrastructure Act, respectively, do not constitute administrative action and should not be set aside.

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[3] These sections are discussed fully at [19] – [24] below.

[4] Section 25, in so far as herein relevant, provides:

> "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
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> (2) Property may be expropriated only in terms of law of general application—
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> (a) for a public purpose or in the public interest; and
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> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
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> (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
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> (a) the current use of the property;
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> (b) the history of the acquisition and use of the property;
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> (c) the market value of the property;
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> (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
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> (e) the purpose of the expropriation."

[5] These sections are discussed fully at [73] – [76] below.

Parties

[5]The applicants are registered owners of land in Gauteng[6] and are affected by sections 10(1) and 10(3). The first respondent is the Member of the Executive Council for Public Transport, Roads and Works, Gauteng Provincial Government (the MEC) and the second respondent is the Premier of the Province of Gauteng (the Premier). The respondents have filed joint submissions, as well as a joint cross-appeal on the issue of costs.

Facts

[6]There are over twenty properties in question in this matter. All but one of these properties was purchased before the Infrastructure Act came into force. The only applicant to have bought one of the affected properties after the commencement of this Act is the second applicant, which purchased one of its two properties on 25

[6] The first applicant is a registered owner of several residential properties in Gauteng**.** The proposed roads which overlap its properties will allegedly deny access to the properties on which it plans to construct a shopping centre. The second applicant wishes to develop its two properties and has submitted a township application. If the application is approved it hopes to construct 600 luxury cluster houses. Its land is affected by two proposed roads which will prevent it from developing a significant part of its land. The third applicant has applied to the relevant municipality to establish a township on its property. The property is flanked by a proposed provincial road, which if constructed will allegedly constitute 60% of its property. The fourth applicant applied to the relevant authority to establish a township. His property is flanked by a proposed road that if constructed will allegedly take approximately 50% of his land. The fifth applicant was in the process of selling her property which is flanked by a proposed provincial road. The sale of the property for R3.5 million has fallen through because the impugned provisions and the proposed road network means that a potential developer will be unable to have the property rezoned. She alleges that the property is unlikely to be sold for more than R800 000. The sixth applicant owns three properties which are overlapped by the proposed provincial roads. It wished to develop a township, however, the number of stands on which it wished to develop a township has been reduced considerably due to the proposed road network. This will allegedly result in it losing more than R7 million in profits. The seventh applicant wishes to sell her land to a developer who wants to build a township. However, because the property is overlapped by a proposed provincial road, the rezoning of the portion of the property within the road reserve is prohibited. The eighth applicant's property is affected by a proposed road that will allegedly limit the number of stands available for development.

August 2003.[7] Some applicants, for example the seventh applicant, have owned their land since 1968, while others, for example the fourth applicant, have only owned their land since 2002. Regardless, each of the applicants is affected by the new regulatory scheme in the Infrastructure Act because a route determination or preliminary design for a provincial road or highway affects their land. Each of these applicants has either taken steps or would like to take steps to change the land use rights applicable to their respective properties.

Litigation history

[7]The applicants challenged the constitutional validity of sections 10(1) and 10(3) in the High Court on the following grounds:

(1) That the said provisions deprive them of their property in a manner that is procedurally and substantively arbitrary and inconsistent with section 25(1) of the Constitution;

(2) That the provisions are inconsistent with sections 25(2) and 25(3) of the Constitution in that their properties are expropriated without just and equitable compensation; and

(3) That section 10(3) is inconsistent with the province's co-operative governance obligations under sections 41(1), 151(4) and 154 of the Constitution.

The applicants also challenged the validity of Provincial Notices 2625 and 2626 published pursuant to sections 10(1) and 10(3), respectively.

[7] This property was registered in the name of the second applicant on 22 April 2004. The second applicant also claims that another of its properties is affected by the Infrastructure Act. This property was purchased before the Act came into force on 16 September 2002 and was registered in its name on 23 October 2003.

[8]The High Court declared section 10(3) to be inconsistent with the Constitution and invalid, and set aside its corresponding Notice 2626.[8] The Court declined to declare section 10(1) invalid, or to set aside its corresponding Notice 2625. It reasoned that while both provisions deprived the applicants of their properties by imposing legal restrictions on their land, only the deprivations in respect of section 10(3) were arbitrary. In holding that section 10(1) was consistent with section 25(1) of the Constitution, the High Court found that landowners had been adequately consulted in terms of the consultative processes which were in place under the previous regulatory legislation, the Transvaal Roads Ordinance (the Ordinance).[9] In so deciding the Court considered whether the historic consultation processes should be ignored and whether the applicants should be treated in the same way as landowners who would be subject to future route determinations. That, the court remarked, would be unrealistic and not in the public interest as it would stultify the building of roads in respect of which the

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[8] The relevant portions of the High Court order read as follows:

> "1. It is declared that subsection (3) of section 10 of the Gauteng Transport Infrastructure Act 8 of 2001 is inconsistent with the Constitution of the Republic of South Africa, Act 108 of 1996.
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> 2. The order in paragraph 1 is referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution.
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> 3. Notice No 2626 of 2003 published in Provincial Gazette Extraordinary No 331 on 20 August 2003 is set aside.
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> 4. In terms of section 172(1)(b) of the Constitution:
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> (i) the said section referred to in paragraph 1 hereof and the notice referred to in paragraph 3 shall remain in force pending the correction of the defects or the expiry of the period specified in (ii) below;
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> (ii) the government of Gauteng Province is required to correct the defects specified above not later than twelve months from the date of confirmation of this order by the Constitutional Court.
>
> 5. The respondents are ordered to pay the applicants' costs including the costs occasioned by the employment of two counsel."

[9] 22 of 1957 (Transvaal).

preliminary work had already been completed. The court held that the consultative processes were reasonably fair. Thus, it held that section 10(1) did not deprive the applicants of their property in a manner that was procedurally arbitrary and was therefore not invalid.

[9]The High Court found that the respondents made out a compelling case for the protection of the preliminary designs of roads that were historically approved.[10] However, it found the means adopted by the provincial legislature, in respect of the designs in terms of section 10(3), to be unreasonably "disproportionate to the end sought to be achieved".[11] The High Court remarked that the respondents had not demonstrated why the MEC required "an absolute prohibition on the grant of town planning applications in respect of land within the road reserve"[12] in order to protect his interests in the designs. It found that they had also not demonstrated why less intrusive means such as those under section 7 of the Infrastructure Act could not be utilised. It concluded that section 10(3) amounted to arbitrary deprivation. The High Court did not address the applicants' arguments on expropriation or co-operative governance.

In this Court

[10]The applicants challenged the constitutional validity of sections 10(1) and 10(3) on the same grounds as those raised in the High Court. They also raised the question whether the promulgation of Notices 2625 and 2626 constituted administrative action

[10] Above n 2 at para 44.

[11] Id at para 45.

[12] Id.

under the Promotion of Administrative Justice Act[13] (PAJA). They contended that the impugned provisions empower the MEC to give legal force retrospectively to the hypothetical road network in a manner that undermines the property rights of owners whose land would be traversed by this road network. The applicants argued that the provisions interfere with their rights to exploit their properties[14] and that the respondents have proffered insufficient reasons for the deprivations.

[11]The applicants contended that the deprivations in section 10(1) are procedurally arbitrary because the MEC may proclaim the route determinations without affording landowners any process by which their interests can be considered. They argued that the alleged consultations were unsatisfactory because: the original designs were made when there were no obligations to consult; the consultations did not necessarily comply with the requirements of procedural fairness under PAJA; the consultations took place more than thirty years ago, did not necessarily involve the current property owners and did not consider the current circumstances of the land in question; and the original determinations had no legal effect.

[12]With regard to section 10(3), the applicants argued that the provision ought to be interpreted in a manner that gives the MEC discretion to consider individually each preliminary design before deciding whether to publish a notice. On this interpretation, it was contended that the procedural fairness requirements in section 3 of PAJA[15]

[13] 3 of 2000.

[14] See n 6 above.

[15] Section 3 of PAJA provides for procedurally fair administrative action affecting any person. It is set out fully at n 49 below.

apply. They contended that if this interpretation is rejected section 10(3) is procedurally and substantively arbitrary.

[13]Further, the applicants argued that section 10(3) amounts to expropriation without just and equitable compensation, contrary to sections 25(2) and 25(3) of the Constitution. They argued that they are thus forced to shoulder the financial burden of constructing public roads. It was contended further that section 10(3) violates the provincial government's co-operative governance obligations under sections 41(1), 151(4)[16] and 154(1)[17] of the Constitution. From their perspective, municipalities are vested with original executive authority over town planning and must undertake this process with the needs of their community in mind.[18] Provincial governments, they contended, are obliged to support local governments in these endeavours and cannot impede the performances of such duties in the manner in which section 10(3) does.[19]

[14]We are urged to confirm the declaration of invalidity of section 10(3) and uphold the appeal in respect of section 10(1), as well as set aside the corresponding Provincial Notice to the latter section. The applicants contended that even if this Court were to find neither provision unconstitutional, Notices 2625 and 2626 should nevertheless be set aside for two reasons. First, the MEC engaged in no public consultation before publishing either notice, which is not in accordance with his obligation to take

[16] Section 151 is quoted in full later in this judgment in n 79 below.

[17] Section 154(1) is quoted in full later in this judgment in n 80 below.

[18] The applicants based this argument on section 156(1)(a) of the Constitution, read with Part B of Schedule 4 and Schedule 5 as well as section 153(1) of the Constitution.

[19] The applicants claimed that section 10(3) was introduced in a deliberate attempt to interfere with town planning because the provincial authorities believed that the local authorities did not give the road network the importance it required and were approving planning, thereby compromising it.

decisions that are procedurally fair. Second, the MEC incorrectly understood himself to be obliged to publish all preliminary designs accepted by his predecessors in Notice 2626 and did not exercise any discretionary power in this regard. He thereby misdirected himself and was materially influenced by an error of law, namely that he was obliged to publish all the designs.

[15]The respondents took issue with all the applicants' constitutional attacks. They contended that the applicants have not been deprived of any property or rights in property. It was argued that even if this Court were to find that the provisions in question deprived the applicants of some aspects of their property rights, the deprivations were not procedurally or substantively arbitrary. They argued that the regulatory measures under section 9 of the Infrastructure Act do not amount to an absolute limitation of the applicants' property rights. They maintained that section 10(3) did not amount to expropriation. Regarding the co-operative governance challenge, the respondents contended that provincial roads are within the exclusive sphere of the provincial government. They submitted that neither Notice 2625 nor Notice 2626 can be set aside on administrative law grounds because neither provision gives any discretion to the MEC. The action of the MEC in publishing the list of routes and designs, they argued, does not constitute administrative action, and is therefore not subject to PAJA.

[16]Before identifying the issues, it is important to contextualise the applicants' complaints by giving a brief overview of how the Infrastructure Act regulates provincial road planning.

Legislative scheme

[17]Prior to the enactment of the Infrastructure Act, the provincial authorities had the power to plan and construct roads pursuant to the Ordinance.[20] Under the Ordinance, route determinations and preliminary designs for future provincial roads were published in the Provincial Gazette with some, though not obligatory, consultation with affected landowners and without legislative compulsion to consider their environmental impact. There were no legal restrictions on the use of land within the routes determined or preliminarily designed.[21]

[18]While the provincial authorities have constructed certain roads within this road network, most roads have not been built.[22] Some of the routes and designs implemented under the Ordinance are over three decades old and, since road construction is driven by need, it is unclear when, if ever, such roads will be built. What is clear is that a significant amount of public money has gone into the development of these route determinations and preliminary designs.[23]

[20] See section 20 of the Ordinance. See also *Administrator, Transvaal, and Another v J van Streepen (Kempton Park) (Pty) Ltd* 1990 (4) SA 644 (A) at 649H, 655D and 657A-F.

[21] See for example above n 2 at para 15.

[22] Of the 4 650 km of route determinations made in respect of K routes, only 850 km have actually been constructed or proclaimed in the last three decades; similarly, of the 2 180 km of route determinations made in respect of provincial freeways, only 800 km have actually been constructed or proclaimed in the last three decades.

[23] While there is no precise figure suggested by either the applicants or the respondents, there can be no doubt that "[h]undreds of millions of Rands of public money", as the High Court found, has gone into the development of these route determinations and preliminary designs. See above n 2 at para 14.10.

[19]The Infrastructure Act repealed and replaced the planning regime established in terms of the Ordinance.[24] Its purpose is to provide for the planning, design, development, and construction, amongst other things, of transport and infrastructure within the Gauteng Province.[25] The process of road planning has multiple stages, including those which establish route determinations and preliminary designs. Of particular interest for our purposes is that the Infrastructure Act has changed the procedures for the establishment of route determinations and preliminary designs as well as the legal restrictions imposed on land which overlaps such routes and designs. Sections 10(1) and 10(3) impose legal restrictions upon land affected by route determinations and preliminary designs accepted under the Ordinance. Upon publication of a notice, the consultation and other procedures that would otherwise be compulsory are deemed to have taken place.[26]

[20]Route determinations in terms of section 10(1) are now regulated by sections 6 and 7 of the Infrastructure Act. Section 6 outlines the procedures before a route may be published. The MEC must cause an environmental investigation to be completed. He or she must consult with the municipality as well as the affected and interested persons before the final determination of a route. Section 6(11) then requires the

[24] The Infrastructure Act came into force on 31 January 2003.

[25] The long title of the Infrastructure Act reads as follows:

> "To consolidate the laws relating to roads and other types of transport infrastructure in Gauteng; and to provide for the planning, design, development, construction, financing, management, control, maintenance, protection and rehabilitation of provincial roads, railway lines and other transport infrastructure in Gauteng and to provide for matters connected therewith."

[26] Section 10 of the Infrastructure Act only authorises this procedure to apply to route determinations and preliminary designs properly accepted under the previous legislation, the Ordinance.

MEC to publish a notice in the Provincial Gazette containing, amongst other things, a notification that the regulatory measures in section 7 take effect from the date of publication.

[21]Section 7 includes the restriction that applications for certain changes to affected land, such as the establishment of a township, must be accompanied by a civil engineering report.[27] This report must be forwarded to the MEC with the corresponding application. The MEC then has the right to comment, and his or her comments must be considered by the municipality, and the right to appeal any decision with regard to such an application. Further, no service provider may lay services over or below the route, except with the written permission of the MEC or in terms of an existing registered servitude.

[22]Preliminary designs in terms of section 10(3) are regulated by sections 8 and 9 of the Infrastructure Act. Section 8 prescribes the procedure for the establishment of such designs in relation to routes published under section 6(11). It requires the MEC to draft a report on the design and undertake additional environmental investigations.

[27] Section 8(1) indicates the areas which are restrained by section 7. It provides:

> "After publication of the route by notice contemplated in section 6(11), the MEC may cause the preliminary design of the future provincial road or railway line to be carried out in the areas falling within—
>
> (a) a distance of 200 metres measured from either side of the centre line of the route;
>
> (b) a distance of 500 metres from the intersection of the centre line of the route with the centre line of—
>
> (i) any other route published in terms of section 6(11) or deemed to have been published in terms of section 10(1);
>
> (ii) a preliminary design, the acceptance of which has been published in terms of section 8(7) or deemed to have been published in terms of section 10(3); or
>
> (iii) any other road or railway line."

Before accepting a design for implementation, the MEC must inform interested parties of key issues relating to the design[28] and consider their views and the environmental impact report. Section 8(7) requires the MEC to publish a notification in the Provincial Gazette that the regulatory measures in section 7 cease to have effect while those in section 9 take effect from the date of publication. More importantly for our purposes, section 8(8) and (9) gives the MEC the power to amend preliminary designs at the instance of anyone who desires that such amendment be effected.

[23]The legal restrictions in section 9 on land affected by a preliminary design appear sweeping. The restrictions in section 9 apply only to areas within road or rail reserve boundaries[29] of the preliminary design, with the exception of the restrictions in section 9(1)(c), which only apply to a road reserve boundary of a preliminary design. The restrictions in section 9 prohibit the granting of applications for the establishment of townships, the subdivision of land, any change of land use in terms of any law or town planning scheme, or any authorisation contemplated in the Environmental Conservation Act 73 of 1989 or the National Environmental Management Act 107 of 1998.[30] Additionally, as under section 7, no service provider may lay, construct, alter or add certain services over or below the affected area, except with the written permission of the MEC or in terms of an existing registered servitude.[31] Effectively,

[28] Pursuant to section 8(5), these key issues include the content of the preliminary design, the environmental report, the MEC's intentions regarding the design, and the regulatory measures which will come into effect under section 9 of the Act.

[29] Section 1 of the Infrastructure Act defines "road reserve" as "the full width of a road made and intended or used for traffic or reasonably usable by traffic in general". "Rail reserve" is defined as "the full width of a railway line, including stations and signalling and marshalling facilities, and other related facilities."

[30] Section 9(1)(a) of the Infrastructure Act.

[31] Section 9(2) of the Infrastructure Act. These services include pipelines, electricity lines, cables and telephone lines or cables.

the area within the road or rail reserve is frozen. It can only be used for its designated purpose at the time the MEC chooses to publish notification of a preliminary design. As I have indicated above, section 8(9) makes provision for an application, accompanied by payment of a prescribed fee, for the amendment of a preliminary design.

[24]Sections 10(1) and 10(3) thereby impose a series of legal restrictions on affected land when the MEC publishes notice of the previously accepted route determinations and preliminary designs respectively.

[25]I now turn to identify the issues.

Issues

[26]These proceedings raise the following questions:

a) Do sections 10(1) and 10(3) deprive the applicants of their properties in terms of section 25(1) of the Constitution? If so:
    (i) Is the deprivation procedurally arbitrary in respect of both sections 10(1) and 10(3)?
    (ii) Is the deprivation substantively arbitrary in respect of section 10(3)?
b) Does section 10(3) amount to expropriation without just and equitable compensation contrary to sections 25(2) and 25(3) of the Constitution?

c) Does section 10(3) offend the principles of co-operative governance in terms of sections 41(1) of the Constitution?

d) Does the promulgation of Provincial Notices 2625 and 2626 constitute administrative action under PAJA?

e) What is the appropriate relief, if any?

f) What is the appropriate costs order?

Before addressing these issues, it is important not to lose sight of the appropriate approach when determining these kinds of constitutional challenges.

[27]Section 39(2) of the Constitution[32] enjoins every court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. In determining the issues before us the impugned provisions must be construed in a manner that will avoid their unconstitutionality if they are capable of being construed in that way.[33]

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[32] Section 39 provides:

> "(1) When interpreting the Bill of Rights, a court, tribunal or forum—
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> (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
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> (b) must consider international law; and
>
> (c) may consider foreign law.
>
> (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[33] See *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, Gauteng and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC) at para 27; *De Beer NO v North-Central Local Council and South-Central Local Council and Others (Umhlatuzana Civic Association Intervening)* [2001] ZACC 9; 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 (CC) at para 24; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 22-6.

[28]I now turn to the determination of the issues raised.

Do sections 10(1) and 10(3) deprive the applicants of property in terms of section 25(1) of the Constitution?

[29]The relevant provisions of section 10 read as follows:

> "(1) Any route within the Province which has been accepted as such by—
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> (a) the Administrator as defined in the Roads Ordinance, 1957 (Ordinance No. 22 of 1957);
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> (b) the Premier of the Province; or
>
> (c) the MEC,
>
> under that Ordinance before the date of commencement of this section shall be deemed to have been determined and published in terms of section 6(11) as soon as the MEC has published a notice in the *Provincial Gazette* to the effect that the centre line thereof has been determined, from which date the relevant provisions of sections 5 to 8 apply to such a route as though it has been published in terms of section 6(11).
>
> . . .
>
> (3) Every preliminary design of a provincial road within the Province, including such design in the form of basic planning, which has been accepted by—
>
> (a) the Administrator as defined in the Roads Ordinance, 1957 (Ordinance No. 22 of 1957);
>
> (b) the Premier of the Province; or
>
> (c) the MEC,
>
> under that Ordinance before the date of commencement of this section and which is mentioned in a notice published in the *Provincial Gazette*, shall as from the commencement of this section, be deemed to have been accepted by the MEC for implementation in terms of sections 8(6), (8) and (9) and section 9 shall as from the commencement of this section be applicable to such preliminary design, provided that for purposes of application of the said sections, section 8(7) shall be deemed to have been complied with at the date of commencement of this section."

[30]Section 25(1) of the Constitution provides:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[31]In determining whether sections 10(1) and 10(3) amount to deprivation of property it is important to understand the constitutional conception of property and its jurisprudential framework.

[32]Our Constitution, like many democratic constitutions,[34] contains a property clause,[35] which guarantees the protection of private property and creates a constitutional framework within which it is possible to limit regulatory exercises of state power and to justify payment of compensation for regulatory measures that amount to expropriation.[36] The conception of property rights under our constitutional dispensation cannot be properly understood outside its historical context, formulation and social framework.

[33]The protection of the right to property is a fundamental human right, one which for decades was denied to the majority of our society. However, property rights in our new constitutional democracy are far from absolute; they are determined and afforded by law and can be limited to facilitate the achievement of important social purposes.[37]

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[34] For example, Australia (section 51(xxxi)); Japan (article 29); Mauritius (section 3(c) and section 8); Malaysia (section 13) and India (article 31).

[35] Above n 4.

[36] Regulatory measures that amount to expropriation are described in some jurisdictions as "regulatory takings". See in this regard Van der Walt "Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings (1999) 14 *SAPR/PL* 272 at 278.

[37] See *Mkontwana* above n 33 at para 82.

Whilst the exploitation of property remains an important incident of landownership,[38] the state may regulate the use of private property in order to protect public welfare, e.g. planning and zoning regulation[39] but such regulation must not amount to arbitrary deprivation. The idea is not to protect private property from all state interference but to safeguard it from illegitimate and unfair state interference.

[34]The historical context within which the strategic forward planning of roads in the Gauteng Province has developed is noteworthy. Rapid urbanisation in the late 1960s and 1970s in the area formerly known as Pretoria–Witwatersrand–Vereeniging (the PWV complex), and the danger of an inadequate transport system, necessitated a holistic planning policy framework for an orderly long term spatial development pattern. The layout of the major transport routes for long term planning had to be determined to avoid their subsequent expensive routing through built-up areas. The need for providing such transportation infrastructure would also prevent piecemeal decisions and optimise investment benefits. Also, the density of development and the complex patterns of traffic movements in the region made it unproductive to plan single routes in isolation. The planning of a transport system was therefore based on fundamentally sound planning policy principles.

[35]In determining whether sections 10(1) or 10(3) amount to deprivations of property, regard must be had to what this Court said in *First National Bank*,[40] the

[38] See *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* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

[39] Van der Walt *Constitutional Property Clauses: A comparative analysis* (Juta, Cape Town 1999) at 333-5.

[40] Above n 38.

leading judgment regarding the property clause in the Constitution. This Court, per Ackermann J, held that "[i]n a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation".[41] In *Mkontwana*,[42] this Court expanded the notion of deprivation of property for the purposes of section 25. This Court, per Yacoob J remarked:

> "Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. . . . [S]ubstantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.[43]

[36]And in her concurring judgment, O'Regan J remarked:

> "[S]ome deprivations of property rights, although not depriving an owner of the property in its entirety, or depriving the holder of a real right of that real right, could nevertheless constitute a significant impairment in the interest that the owner or real right holder has in the property. The value of the property in material and non-material terms to the owner may be significantly harmed by a limitation of the rights of use or enjoyment of the property. *If one of the purposes of s 25(1) is to recognise both material and the non-material value of property to owners, it would defeat that purpose were, 'deprivation' to be read narrowly.*"[44] (Emphasis added.)

[37]Section 10(1) invokes the legal restrictions under section 7. The affected land cannot have services laid over or below the route (on the road reserve) except with the written permission of the MEC or in terms of a registered servitude. The owners can only apply for certain changes to affected land if the application is accompanied by a

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[41] Id at para 57.

[42]Above n 33.

[43] Id at para 32.

[44] Id at para 89.

report by a civil engineer. The legal restrictions invoked by section 10(3) in section 9 which, among other things, prohibit the granting of applications for the establishment of townships and/or any change of land use in terms of any law or town planning, adversely affect the applicants.[45]

[38]Accordingly, I agree with the conclusion by the High Court that sections 10(1) and 10(3) of the Infrastructure Act deprive the applicants in some respects of the use, enjoyment and exploitation of their properties. To hold otherwise would unduly narrow the concept of deprivation of property.

[39]Deprivation in itself is not sufficient for interference to fall foul of section 25(1) of the Constitution. It must also be arbitrary. Ackermann J in *First National Bank* concluded that a deprivation will be arbitrary if—

> "the 'law' referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair."[46]

It thus follows that for the applicants to ground a successful challenge to sections 10(1) and 10(3), they will have to show that the impugned provisions are either procedurally unfair, or that insufficient reason is proffered for the deprivation in question; in other words it is substantively arbitrary.

Is section 10(1) procedurally arbitrary?

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[45] See [23] above.

[46] Above n 38 at para 100.

[40]Procedural fairness in the context of section 25(1) of the Constitution was described in *Mkontwana* as "a flexible concept and that the requirements that must be satisfied to render an action or a law procedurally fair depends on all the circumstances."[47]

[41]Essentially, when a route which has been previously accepted under the Ordinance by the appropriate authority is published in the Provincial Gazette pursuant to section 10(1), the legal restrictions in section 7 apply and the consultation procedures and environmental impact assessments under section 6 are deemed to have taken place. Here, there is no process for affording consultation before the land is restrained by section 7.

[42]Pursuant to section 10(1) of the Act, the MEC published a list of routes for which centre lines had been determined in Notice 2625; these routes would from then on be subject to sections 5 to 8 of the Infrastructure Act. The applicants argued that although section 6 of the Infrastructure Act requires detailed public engagement to precede any route determination, section 10(1) obliges the MEC to proclaim the route determination without affording landowners any process whatsoever by which their interests can be considered. Some of the applicants had in the past seemingly been consulted and given comments which, according to the respondents, are on record.

[43]The applicants contended that the historical consultative processes would not necessarily now comply with the requirements of procedural fairness under PAJA. It

[47] *Mkontwana* above n 33 at para 65.

is correct, as the applicants contended, that the consultations took place many decades ago. But as correctly pointed out by the High Court, it would be unrealistic and not in the public interest to simply disregard these processes. As the High Court correctly found, that would stultify the building of roads for which preliminary work had already been completed. Furthermore sight should not be lost of the fact that section 7 of the Infrastructure Act makes provision for applications for land use change, thus allowing aggrieved property owners to have their concerns adequately addressed.[48] The procedural attack on the validity of section 10(1) must therefore fail.

Is section 10(3) procedurally arbitrary?

[44]As outlined above, the applicants contended that section 10(3) ought to be interpreted in a manner that requires the MEC to individually consider each preliminary design before deciding whether or not to publish it. On this interpretation, they argued, the procedural fairness protections of section 3 of PAJA[49] would apply

[48] See [21] above.

[49] Section 3 of PAJA provides:

> "(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.
>
> (2) (a) A fair administrative procedure depends on the circumstances of each case.
>
> (b) In order to give effect to the right of procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1)—
>
> (i) adequate notice of the nature and purpose of the proposed administrative action;
>
> (ii) a reasonable opportunity to make representations;
>
> (iii) a clear statement of the administrative action;
>
> (iv) adequate notice of any right of review or internal, appeal where applicable; and
>
> (v) adequate notice of the right to request reasons in terms of section 5.
>
> . . .
>
> (4) (a) If it is reasonable and justifiable in the circumstances, an administrator may depart from any of the requirements referred to in subsection (2).

and section 10(3) would not violate the procedural guarantee of section 25(1) of the Constitution. Otherwise, so it was contended, section 10(3) is procedurally arbitrary in the same manner as section 10(1).

[45]The consultative processes undertaken when the routes and designs were initially determined must, as this Court said in *Masetlha v President of the Republic of South Africa and Another*,[50] be considered in light of "the exigencies and practicalities of the circumstances."[51]

[46]In this case, more than 841 preliminary designs were accepted over the years in terms of the Ordinance and stretched over 2 593 kilometres. It would be unrealistic, impractical and not in the public interest to revisit such a considerable number of designs now published under section 10(3) because numerous owners must have been affected by the road network.[52] Consulting each and every property owner likely to have been affected prior to enactment of the Infrastructure Act would not only have involved exponential costs but would also have been practically impossible. It was

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(b) In determining whether a departure as contemplated in paragraph (a) is reasonable and justifiable, an administrator must take into account all relevant factors, including—

(i) the objects of the empowering provision;

(ii) the nature and purpose of, and the need to take, the administrative action;

(iii) the likely effect of the administrative action;

(iv) the urgency of taking the administrative action or the urgency of the matter; and

(v) the need to promote an efficient administration and good governance."

[50] [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (CC).

[51] Id at para 190. See also *Mkontwana* above n 33 at para 65.

[52] Items accepted under the Ordinance in respect of route determinations stretched over a distance of 5 180 km.

therefore sensible to conform maximally to the exigencies and practicalities of the circumstances at the time. Section 8(9) is a reasonable measure to address individual concerns.

[47]Accordingly, I conclude that section 10(3) is not procedurally arbitrary. The question then remains whether section 10(3) is substantively arbitrary.

Is section 10(3) substantively arbitrary?

[48] Considerations relevant to the determination whether the deprivations constitute arbitrariness for the purpose of section 25(1) are set out in *First National Bank*[53] as follows:

> "[I]t is concluded that a deprivation of property is "arbitrary" as meant by section 25 when the "law" referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question . . . . Sufficient reason is to be established as follows:
>
> (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.
> (b) A complexity of relationships has to be considered.
> (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
> (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
> (e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute

[53] Above n 38 at para 100.

sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.

(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of the deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.

(h) Where there is sufficient reason to warrant the deprivation is a matter to be decided on all the facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under section 25."[54]

[49]The applicability of these considerations depends on the facts and circumstances of each case. Central to the arbitrariness enquiry is the relationship between the law in question, the ends it seeks to achieve and the impact restrictions have on the use and enjoyment of property. In some instances a deprivation will escape arbitrariness if a rational connection between the means adopted and the ends sought to be achieved is present. In other instances, however, the means adopted will have to be proportional to the ends in order to justify the deprivation in question.[55] Marginal deprivations of

[54] Id.

[55] See in this regard *First National Bank* above n 38 at para 66 where the Court the remarked:

> "It is important in every case in which section 25(1) is in issue to have regard to the legislative context *to which* the prohibition against 'arbitrary' deprivation has to be applied; and also to the nature and extent of the deprivation. In certain circumstances the legislative deprivation may be such that no more than a rational connection between means and ends would be

property will ordinarily not be arbitrary if they are rationally connected to a legitimate purpose. More severe deprivations will ordinarily have to be shown to be proportionate. In this case, the deprivations are sufficiently serious to require a proportionality analysis. For present purposes, therefore, the following questions arise: does section 10(3) protect the hypothetical road network and if it does, is it proportional? In determining that, a court must have due regard to the purpose of the law in question,[56] the nature of the property involved,[57] the extent of the deprivation and the question whether there are less restrictive means available to achieve the purpose in question.[58]

[50]I have already referred to the importance of the historical context of the strategic forward planning scheme.[59] That need not be repeated. It suffices to say that there is no evidence to suggest that the Gauteng road network was based on unsound road planning policy. It cannot be gainsaid that the regulation of the use of property in this case is for the public good. As I have indicated earlier inadequate transport systems that could stifle economic growth, extensive routing through built-up areas and the density of developments and the complex pattern of traffic movements are some of the factors that necessitated the enactment of the Infrastructure Act. I therefore agree with the finding of the High Court that:

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required, while in others the ends would have to be more compelling to prevent the deprivation from being arbitrary."

[56] For example whether the 'purpose' is aimed at the achievement of a public good.

[57] Above n 38 at para 100. The Court remarked that where the property in question is land or immovable a compelling purpose or reason will have to be established for the law in question to constitute sufficient reason for the deprivation.

[58] Id. The court remarked further that where the deprivation in question embraces all the incidents of ownership compelling reasons will have to be proffered.

[59] See [34] above.

> "[T]he respondents made out a compelling case for the protection of the preliminary designs of roads that were historically approved. It cannot be doubted that some adequate measure of protection is required in order to prevent the socially undesirable consequence of consigning more than thirty years of road planning to the dustbin."[60]

[51]The High Court, however, went on to hold that the means adopted entailed the effective prohibition of any future exploitation of the affected land and that such means were unreasonably disproportionate to the end sought to be achieved. The Court went on to say that:

> "A careful consideration of the reasons proffered . . . does not demonstrate that the MEC requires an *absolute prohibition on the grant of town planning applications* in respect of land falling within the provincial road reserve of the designed routes in order to protect his legitimate interests."[61] (Emphasis added.)

[52]I agree with the reasoning of the High Court to the extent that the facts of this case require more than the presence of a rational connection between the law in question and the ends sought to be achieved. In terms of the considerations identified in *First National Bank,* the present case deals with land upon which section 10(3) imposes extensive restrictions. Compelling reasons will therefore have to be advanced to save the provision from unconstitutionality. However, I do not agree with the High Court's conclusion that the means adopted are disproportionate to the ends sought to be achieved by section 10(3).

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[60] Above n 2 at para 44.

[61] Id at para 45.

[53]The applicants are not deprived of the entirety of their properties. Only the portions of their land that fall within the road reserve are directly affected by the regulatory measures in section 9. There can be no doubt that section 10(3) has the effect of creating obstacles to the exploitation and alienation of the applicants' land, which were not present in the law before the Infrastructure Act. As I will demonstrate, the obstacles are, in the circumstances of this case and on a proper construction of section 10(3), not insurmountable.

[54]Section 10(3) should not be read in isolation but must be read in conjunction with other provisions in the Infrastructure Act.[62] Section 10(3), which reads:

[62] See section 8(6), (7) and (8) of the Infrastructure Act which provides:

> "(6) The MEC must thereafter consider the draft preliminary design with due regard to—
>
> (a) the environmental report contemplated in subsection (4)(b) or section 6(3)(a), as the case may be; and
>
> (b) such comments of interested and affected parties as may have been submitted in consequence of the notice contemplated in subsection (5);
>
> and may then accept the preliminary design with such amendments as the MEC may deem necessary.
>
> (7) The MEC must thereafter publish for general information, his or her acceptance of the preliminary design for implementation by notice in the *Provincial Gazette* containing—
>
> (a) an address where the preliminary design is available for inspection;
>
> (b) such information, whether by way of sketch plan or reference to a plan available for inspection at a given address, as the MEC may deem sufficient to indicate the direction and alignment of the provincial road or railway line according to the preliminary design;
>
> (c) a notification that the regulatory measures provided for in section 7 in respect of the route cease to apply from the date of the notice to the extent of the route along or over which the preliminary design was accepted by the MEC in terms of subsection (6);
>
> (d) a notification that the regulatory measures in section 9 apply from the date of the notice with relation to the preliminary design; and
>
> (e) a notification that the reasons for the acceptance may be requested by interested and affected parties within the prescribed period after the date of publication of the notice.
>
> (8) A preliminary design in respect of which a notice in terms of subsection (7) has been published, or sections thereof, may be amended by the MEC and in that event the provisions of subsections (1) to (7) apply, with the necessary changes, provided that where such amendment deviates from the said preliminary design to the extent that

"(3) Every preliminary design of a provincial road within the Province, including such design in the form of basic planning, which has been accepted by—

(a) the Administrator as defined in the Roads Ordinance, 1957 (Ordinance No. 22 of 1957);

(b) the Premier of the Province; or

(c) the MEC,

under that Ordinance before the date of commencement of this section and which is mentioned in a notice published in the *Provincial Gazette*, *shall as from the commencement of this section, be deemed to have been accepted by the MEC for implementation in terms of sections 8(6), (8) and (9) and section 9 shall as from the commencement of this section be applicable to such preliminary design,* provided that for purposes of application of the said sections, section 8(7) shall be deemed to have been complied with at the date of commencement of this section." (Emphasis added.)

Section 8(9) provides:

"The power of the MEC contemplated in subsection (8), may also be *exercised on written application by anyone who desires that such preliminary design be amended*, accompanied by payment of a prescribed fee, and in that event the provisions of sections 38(2) to (6) apply to such application." (Emphasis added.)

[55]From the reading of the above provisions, it cannot be said that section 10(3) absolutely prohibits the applicants from exploiting their land. As correctly stated by the respondents, the designs under Notice 2626 have not obtained the status of a blueprint for development which admits of no deviation. Any of the applicants may, if they desire, invoke section 8(9) of the Infrastructure Act and ask the MEC to revisit the preliminary designs that affect portions of their properties within the road

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both road or rail reserve boundaries of the amendment fall outside the road or rail reserve boundaries of the said preliminary design, a route determination in terms of sections 6(1) to (11) must first be done to the extent that such road or rail reserve boundaries of the amended design so fall outside."

reserve.[63] If they do so, the MEC must properly apply his or her mind whether to accede to the request.

[56]It was correctly conceded on behalf of the applicants during oral argument that the designs could indeed be revisited through the amendment procedures in section 8(9). It was argued, however, that the payment of the prescribed fee required to accompany any such amendment application places a burden on the property owner. It is noteworthy that, in terms of the regulations under the Infrastructure Act, the said prescribed fee is R1000.[64] Even though the applicants did not explain in what manner the payment of the fee is onerous, it was not suggested that R1000 is exorbitant. Assuming that their concern relates to the amount itself, it is doubtful that the cost can be said to be excessive relative to the expense incurred in relation to the completed designs.

[57]The record shows that applications for amendment of a preliminary design were granted at the instance of landowners: the design of Road K54 between Rietvlei Nature Reserve and the Albertina Sisulu Highway (R21) at the request of the developer M&T Development (Pty) Ltd and the City of Tshwane Metropolitan Municipality; the design of Road K145, the former district road known as Simon Vermooten Road in Pretoria, at the request of the City of Tshwane Metropolitan Municipality; and the design of Road K73 between Road K56 and Road K54, at the request of Sage Properties (Pty) Ltd. As is evident from the record, none of the

[63] Section 8(9) read with section 8(8) of the Infrastructure Act above n 62.

[64] Schedule 1 to the Gauteng Transport Infrastructure Regulations, 2002, GN R219, GG 29, 29 January 2003.

applicants have applied to amend the preliminary designs that affect their properties. Moreover, no cogent suggestion of the inadequacies, if any, of the mechanisms in section 8(9) was advanced.

[58]In making provision for property owners to apply for amendments to route designs accepted under section 10(3), the Infrastructure Act strikes a balance between the Province's legitimate interest in protecting the hypothetical road network on the one hand, whilst ensuring that individual property rights are protected, on the other. Section 10(3) is therefore not unreasonably disproportionate to the end sought to be achieved.

[59]Moreover, sight should not be lost of the fact that, in addition to applying for an amendment of a preliminary design, a property owner affected by section 10(3) is not, as contended by the applicants, completely barred from applying for a land use change in the land adjoining the road reserve. Section 9(1)(c) is instructive in this regard, it provides:

> "[N]o application for a change in land use in respect of a portion of land adjacent to the road reserve boundary of a preliminary design in an urban area may be granted without the written comments of the MEC first having being obtained and considered in accordance with the applicable planning procedure by the authority empowered to grant changes in land use, which must duly consider such comments, and section 7(6), (7) and (8) applies in such a case, with the necessary changes."

This section allows for applications for the change of land use of the land adjacent to the road reserve to be submitted to the relevant authority, the approval of which will be granted if the specified requirements are met.

[60]Furthermore, these mechanisms safeguard the applicants' property interests because any decision made in terms of section 8(9) and section 9(1)(c) must be procedurally fair. Accordingly, I conclude that section 10(3) of the Infrastructure Act does not amount to an arbitrary deprivation of property under section 25(1) of the Constitution.

[61]Next, I determine whether section 10(3) amounts to expropriation without compensation.

Does section 10(3) amount to expropriation of the applicants' property without just and equitable compensation?

[62]Section 25(2) and 25(3) of the Constitution provide as follows:

> "(2) Property may be expropriated only in terms of law of general application—
>
> (a) for a public purpose or in the public interest; and
>
> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
>
> (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
>
> (a) the current use of the property;

(b) the history of the acquisition and use of the property;
(c) the market value of the property;
(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) the purpose of the expropriation."

[63]This Court in *Harksen v Lane NO and Others*[65] commented on the meaning of "expropriation" in section 28 of the interim Constitution, the predecessor to section 25 of the Constitution. It remarked that:

> "The distinction between expropriation (or compulsory acquisition as it is called in some other foreign jurisdictions) which involves acquisition of rights in property by a public authority for a public purpose and the deprivation of rights in property which fall short of compulsory acquisition has long been recognised in our law."[66]

The purpose of the distinction between expropriation and deprivation by regulatory measures is to enable the state to regulate the use of property for public good without the fear of incurring liability to owners of property affected in the course of such regulation.[67]

[64]The applicants argued that section 10(3) is inconsistent with the constitutional guarantee against uncompensated expropriation of property. I do not agree. Although it is trite that the Constitution and its attended reform legislation must be interpreted purposively, courts should be cautious not to extend the meaning of expropriation to situations where the deprivation does not have the effect of the property being

[65] [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

[66] Id at para 33.

[67] See *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA) at para 4. See also Van der Walt *Constitutional Property Law* 1ed (Juta, Cape Town 2005) 123-5.

acquired by the state. It must be emphasised that section 10(3) does not transfer rights to the state. What it does is this: it deprives the land owner of rights to exploit the affected part of the land within the road reserve and thus protects part of the planning process which has economic value and is in the long run in the public interest.[68] Remarkably, while the applicants accepted the distinction drawn by this Court in *Harksen*,[69] they nevertheless contended that section 10(3), read with sections 8 and 9 of the Infrastructure Act, enables the state to "acquire" land for the construction of public roads. As I have said, the state has not acquired the applicants' land as envisaged in sections 25(2) and 25(3) of the Constitution. For that reason, no compensation need be paid.

[65]I emphasise that the effect of either section 10(1) or section 10(3) does not, in my view, amount to expropriation. The Supreme Court of Appeal correctly stated in *Steinberg*,[70] a case I find instructive, that a determination of claims under sections 25(2) and 25(3) does give rise to complex and difficult problems. Cloete AJA considered the possibility that there may be room to develop a narrow doctrine of constructive expropriation for the South African context, especially in cases where a

[68] See *Harksen* above n 65 at para 32.

[69] Between expropriation on the one hand, which involves acquisition of rights in property by a public authority for public purpose, and the deprivation of rights in property on the other, which falls short of "compulsory acquisition".

[70] *Steinberg* above n 67 at paras 6-8. In that case, the effect of the regulatory measures was the permanent immobilisation of economic activity involving a certain piece of land. The Supreme Court of Appeal had to decide whether to order a municipality to complete the process of expropriation foreseen for property belonging to the appellant. The appellant was aware, upon purchasing the land, that the property would be affected by a proposed road scheme that was approved but not yet implemented by the municipality. If the road scheme were to be implemented, expropriation of the specific land would become necessary for the purpose of constructing the proposed road. The appellant essentially argued that uncertainty surrounding the implementation of the road scheme renders it impossible to develop or improve the property and that it immobilises any alienation of the land, thereby depriving her of the economic value of her land. The Court considered the possibility of treating severe imposition on property that was not intended to be expropriation as "constructive expropriation", but did not answer the question because of the concern that it would introduce confusion into the law and adversely affect the constitutional imperative of land reform.

public body utilises its power to regulate private property so excessively that it may be characterised as expropriation; in other words, when the regulation in a particular case goes too far. I am not sure whether this would be appropriate in our constitutional order. This in any event is not such a case. If regulation in cases such as the present were to be characterised as amounting to expropriation, government would be crippled in discharging its obligations in regulating the use of private property for public good.

[66]The applicant argued that there is a "value benefit" which falls to the state whereby land becomes cheaply available for road construction in the interest of the public. Relying on *Malan and Another v Ardonnel Investments (Pty) Ltd*[71] and *Cape Explosives Works (Ltd) and Another v Denel (Pty) Ltd and Others*,[72] the applicants contended that section 10(3) expropriates a "servitude akin to a restrictive condition to title."[73] These arguments effectively raise claims under the doctrine of "constructive expropriation,"[74] which give rise to debatable questions in the context of South Africa and our law of property. In the view I take of the matter, these questions need not be resolved or debated here given the circumstances of this case. They should be left for another day.

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[71] 1988 (2) SA 12 (A).

[72] 2001 (3) SA 569 (SCA).

[73] See Van der Walt above n 67 at 69-70. The author refers to this as "conceptual severance" (a theoretical practice by which claimants construct constitutional compensation claims for state interferences that take away an aspect of their property holdings which in effect is nothing more than a regulatory deprivation). The concern, however, is that this practice could be used to frustrate reform efforts by subjecting all interference to compensation claims. He warns that the arguments for this "conceptual severance" have to lead to the acceptance of constructive expropriation in South African law for it to have any effect.

[74] Although the Supreme Court of Appeal in *Steinberg* above n 67 at para 8 suggested that there may be a room for the development of a doctrine that is similar to constructive expropriation, the Court cautioned that the doctrine creates a middle ground and blurs the distinction between deprivation and expropriation.

[67]It is sufficient to mention that the respondents have pointed out that it is impossible to predict when or even whether the designed roads will ultimately be proclaimed along the determined routes. It is manifest from the record that although the road scheme has been approved, it has not yet been implemented in respect of the designed roads that affect the applicants' properties. There is no principle under South African law that obliges the state to implement a road scheme merely because its planning has been approved. In *Steinberg,* the Supreme Court of Appeal held that even if the approval of the road scheme did affect the value of the appellant's property, it was nothing more than advance notification of a possible intention to construct a road, which, if implemented, would result in a "taking". It was not in itself a "taking".[75] I could not agree more. Forward planning and good governance, as the Supreme Court of Appeal correctly stated, would become impossible if the state had to pay compensation every time it proposed a project in the public interest, irrespective of whether the project would be implemented or not.[76]

[68]It is clear that far more planning entailing enormous expense has been completed in respect of the preliminary designs of the roads affected by section 10(3), as compared to route determination. Both the expense and the fact that less land is ordinarily affected than in route determination renders tolerable a greater limitation on property rights. I am thus satisfied that the limitation is proportionate.

[75] *Steinberg* above n 67 at para 12.

[76] Id at para 11.

[69]There is another matter: it relates to the indefinite aspect of the deprivation. While we should not underestimate the economic value of planning and its public interest as well as the fact that significant expense has gone into the road network, especially in the preliminary designs, the indefinite extent of the deprivation in respect of section 10(3) is a matter of concern. Many of the preliminary designs were determined over two decades ago and, on the respondent's own admission, it is impossible to predict when or even whether the designed roads will ultimately be proclaimed along the determined routes. This has the effect of indefinitely freezing the land use of the portions of the applicants' land that fall within the road reserve.

[70]The question then arises whether the indefinite aspect of section 10(3) would by itself, in the circumstances, warrant the striking down of section 10(3) to enable the legislature to create some process whereby the preliminary designs can be subjected to periodic review. I do not think so, particularly given the fact that section 10(3) is not absolute and rigid as suggested by the applicants.[77] An obligation to review all completed designs periodically might well cripple the government and frustrate the very object of the Infrastructure Act, in light of the enormous public funds that have already been expended on those designs. In any event, I think that the mechanisms

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[77] See *Sporrong and Lönnroth v Sweden* Series A No 52 [1982] EHRR 35 at 61-2 in the joint dissenting opinion of Zekia J and others. The European Court of Human Rights was narrowly divided on a similar question. The Court had to determine whether restrictions in terms of Swedish legislation which remained in force for two decades were contrary to the property clause in the Convention for the Protection of Human Rights and Fundamental Freedoms. The minority judgment is instructive in this regard:

> "We do not find that their duration exceeded the periods which could reasonably be deemed by the authorities of the State to be in the general interest. *Modern town planning requires, especially in big urban areas, most difficult considerations and evaluations, and its implementation often needs considerable time*. . . . It is also relevant to take into account the legal and factual position of the owners during the period of the restrictions. *They remained in ownership and retained the use of the properties in their existing state. They had the right to dispose of their properties*". (Emphasis added.)

created by section 8(8) and 8(9) do cater for review as and when applications for amendment by affected landowners are submitted to the MEC for his consideration.[78]

[71]When all is said and done, I conclude that section 10(3) does not violate sections 25(2) and 25(3) of the Constitution.

[72]The next question for determination is whether section 10(3) offends the co-operative governance provisions of the Constitution.

Does section 10(3) of the Infrastructure Act offend the principles of co-operative governance contained in section 41 of the Constitution?

[73]The applicants complained that the Infrastructure Act constituted an impermissible invasion of municipal authority. This must be understood in light of the provisions of the Constitution regulating municipal and provincial powers as well as co-operative governance. Section 41(1) of the Constitution must be read with

[78] See for example the practical and salutary effect of the flexible mechanism created by section 8(8) and 8(9) as illustrated by the examples referred to in [57] above.

sections 151,[79] 154(1),[80] 156(1)(a),[81] 156(4) and (5)[82] and 155(7)[83] of the Constitution. Under the Constitution, the local sphere of government vests in municipalities to be established for the whole territory.[84] A municipality has the right to govern, on its own initiative, the local government affairs of its community subject to national and

[79] Section 151 deals with the status of municipalities. It provides:

> "(1) The local sphere of government consists of municipalities, which must be established for the whole of the territory of the Republic.
>
> (2) The executive and legislative authority of a municipality is vested in its Municipal Council.
>
> (3) A municipality has the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.
>
> (4) The national or provincial government may not compromise or impede a municipality's ability or right to exercise its powers or perform its functions."

[80] Section 154(1) provides:

> "The national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions."

[81] Section 156(1)(a) of the Constitution provides:

> "(1) A municipality has executive authority in respect of, and has the right to administer —
>
> (a) the local government matters listed in Part B of Schedule 4 and Part B of Schedule 5".

This provision vests executive authority, in respect of local government matters listed in Part B of Schedule 4 and Part B of Schedule 5, in municipalities. However, the authority of municipalities in respect of matters listed in these parts is not exclusive. The executive authority held by other spheres of government, in respect thereof will remain. Municipalities therefore have the right to administer their affairs subject to national and provincial legislation.

[82] Section 156(4) and (5) provides:

> "(4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if—
>
> (a) that matter would most effectively be administered locally; and
>
> (b) the municipality has the capacity to administer it.
>
> (5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its function."

All the municipalities can do is to insist that functions mentioned in the Schedules referred to in section 156(4) be assigned to them under that section. This section clearly illustrates that the Constitution did not seek to confer unlimited plenary powers on municipalities in respect of all matters relating to government affairs. See in this regard *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2008 (4) SA 572 (W) at para 49.

provincial legislation as provided for in section 156(1) of the Constitution.[85] In terms of section 155(7) the national and provincial governments have legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5. Section 41(1) provides:

> "All spheres of government and all organs of state within each sphere must—
>
> (a) preserve the peace, national unity and the indivisibility of the Republic;
>
> (b) secure the well-being of the people of the Republic;
>
> (c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
>
> (d) be loyal to the Constitution, the Republic and its people;
>
> (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
>
> (f) *not assume any power or function except those conferred on them in terms of the Constitution;*
>
> (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
>
> (h) co-operate with one another in mutual trust and good faith by—
>
> (i) fostering friendly relations;
>
> (ii) assisting and supporting one another;
>
> (iii) informing one another of, and consulting one another on, matters of common interest;
>
> (iv) co-ordinating their actions and legislation with one another;
>
> (v) adhering to agreed procedures; and
>
> (vi) avoiding legal proceedings against one another."(Emphasis added.)

[83] Section 155(7) provides:

> "The national government, subject to section 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by *regulating* the exercise by municipalities of their executive authority referred to in section 156(1)." (Emphasis added.)

[84] See above n 79.

[85] See above n 81.

[74]The powers of municipalities must be read and understood subject to their competence. Municipalities amend town-planning schemes and approve the establishment of townships not by virtue of their own by-laws, but by virtue of the Town-Planning and Townships Ordinance[86] which is provincial legislation. They have no executive competence with respect to provincial roads. The road network that forms the subject of this litigation comprises of provincial roads. The Constitution vests authority with regard to municipal planning in the local government.[87]

[75]The applicants lost sight of the fact that provincial roads are, in terms of Part A of Schedule 5 to the Constitution, an exclusive provincial sphere of activity in respect of which it has legislative competence. These functional areas (provincial roads and traffic), as they have been included in the Constitution by its drafters, remain under the exclusive provincial sphere until they are assigned to municipalities. There is no indication in the record to suggest that those functional areas have been assigned to the relevant municipalities. In any event, the Infrastructure Act requires the MEC to consult with municipalities whose areas will be affected by route determinations and preliminary designs.[88]

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[86] Ordinance 15 of 1986. It applies to local authorities by virtue of item 2 of Schedule 6 of the Constitution, dealing with continuation of existing legislation.

[87] Above n 81.

[88] See in this regard section 6(4) of the Infrastructure Act which states the following with regard to route determinations:

> "The MEC must also *consult* with all municipalities in whose areas the route will be situated and request them . . . to submit written comments on the preliminary route report and environmental report with specific reference also to the effect which the proposed route may have on any spatial framework or other strategic municipal development planning of the municipality concerned." (Emphasis added.)

[76]Having analysed the relevant constitutional provisions, I conclude that sections 7 and 9 of the Infrastructure Act do not therefore interfere with the performance by local governments of their constitutionally ordained functions. The applicants' challenge must therefore fail.

[77]I turn now to determine whether the promulgation of Notices 2625 and 2626 constitutes executive or administrative action.

Does the promulgation of Provincial Notices 2625 and 2626 constitute administrative action?

[78]The question whether the promulgation of these notices amounts to administrative action turns on the proper interpretation of sections 10(1) and 10(3). The applicants argued that properly construed section 10(1) gives the MEC a discretion as to when to publish the notice, though no discretion as to which route determinations should be published. They argued that, in contrast section 10(3) gives the MEC the discretion to decide which preliminary designs are to be published as well as a discretion as to when. They argued that because the MEC had a discretion in each case, the decision to publish constitutes administrative action and attracts the obligation to act procedurally fairly as contemplated in PAJA, which would require offering affected landowners an opportunity to be heard, at least by way of a public notice and comment procedure.

[79]During argument, counsel for the applicants accepted that the argument was stronger in relation to section 10(3) if their proffered interpretation of the discretion conferred by that section is correct. The respondents dispute that section 10(3) confers a discretion on the MEC to choose which basic designs to gazette and they note that the MEC simply gazetted all route determinations and all basic designs.

[80]In considering the applicants' argument, it is necessary first to place sections 10(1) and 10(3) in their proper context. They are transitional provisions, as the respondents argue, directed at bringing route determinations and basic designs, adopted before the Infrastructure Act came into force, within its legislative scheme. The provisions contemplate that, upon publication, the route determinations and preliminary designs will be deemed to have been adopted after the procedures provided in the Infrastructure Act have been followed. The very purpose of sections 10(1) and 10(3) is thus to expedite the recognition of previously determined routes and basic designs without the full consultation process provided for in the Infrastructure Act for routes and designs determined after it came into operation.

[81]The text of section 10(3) is indeed different to that of section 10(1) and thus may be read to confer a discretion upon the MEC as to which basic designs should be gazetted. However, to do so would place a conflict at the heart of the section: for the applicants must be correct that if the MEC did have a discretion as to which basic designs should be gazetted, that decision would in all probability constitute administrative action and attract an obligation to act fairly. But that would defeat the

purpose of the section. As I have said, the section seeks to provide a transitional measure whereby existing route determinations and basic designs can be deemed to have been adopted in terms of the Infrastructure Act without following the process provided for in that Act.

[82]The interpretation of section 10(3) proposed by the respondents avoids this self-defeating result. It must therefore be preferred. The decision to gazette the basic designs thus permits a discretion only as to the date of publication, entailing that all existing designs are included. The effect of section 10(3) therefore mirrors that of section 10(1) in relation to routes. It is therefore a narrow discretion to determine the date only.

[83]The narrow scope of the discretion thus conferred by both section 10(1) and section 10(3) is analogous to the discretion conferred upon members of the executive branch of government to determine the date on which legislation will come into force. This Court has held that the power conferred by legislation upon a member of the executive to determine the date upon which legislation shall come into force is not administrative action because bringing a law into force is neither making it (thus the power is not legislative) nor is it administering the law. The power lies somewhere between the legislative and administrative functions.[89] Properly construed, the discretionary powers conferred by section 10(1) and section 10(3) are similar to the power to bring legislation into force in that their exercise merely brings transitional

[89] See *Pharmaceutical Manufacturers Association of South Africa and Another: In Re: Ex Parte Application of the President of the Republic of South Africa and Others* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 79.

provisions into force. It does not involve any administration of those provisions. The exercise of those discretionary powers, therefore, does not constitute administrative action.

[84]Accordingly I am of the view that the publication of Notices 2625 and 2626 in terms of sections 10(1) and 10(3), properly construed, did not constitute administrative action. The applicants' contention that the decision made by the MEC to gazette existing routes and basic designs constituted administration action therefore fails.

Conclusion

[85]The applicants applied for condonation of the late filing of their appeal against the High Court's refusal to declare section 10(1) of the Infrastructure Act invalid. The application is unopposed. I am of the view that condonation should be granted.

[86]Having concluded that section 10(3) of the Infrastructure Act does not amount to an arbitrary deprivation of property under section 25(1) or expropriation under sections 25(2) and 25(3) of the Constitution, the application for confirmation of the declaration of constitutional invalidity of section 10(3) must be refused. It follows, therefore, that the order of the High Court with respect to Provincial Notice 2626 should be set aside. I have not overlooked the applicants' contention that the province failed to lodge a separate appeal against the decision declaring this Notice to be

invalid. But that order was clearly and solely premised on the associated declaration of statutory invalidity, and must fall with it.[90]

[87]Similarly, having found that section 10(1) of the Infrastructure Act does not amount to an arbitrary deprivation of property under section 25(1) of the Constitution, the appeal in respect of section 10(1) and its corresponding Notice 2625 must fail. The order of the High Court must therefore stand.

What is the appropriate costs order?

[88]There are two issues relating to costs before this Court. The first relates to a cross-appeal filed by the respondents in relation to the costs order made by the High Court. The second relates to the costs in this Court. In relation to the former, the respondents were ordered to pay the applicants' costs including the costs occasioned by the employment of two counsel. The respondents have asked for that costs order to be set aside and replaced with an order that each party pay its own costs *a quo*. Despite the fact that the parties had agreed that any party achieving substantial success in the High Court would be entitled to costs,[91] the applicants have, in the view I take of the matter, not been successful. However, given the fact that the respondents do not seek costs against them and that the applicants did not litigate frivolously and vexatiously in vindicating their constitutional rights, I am inclined to agree with the respondents that each party should pay its own costs in the High Court.

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[90] *East Zulu Motors (Proprietary) Limited v Empangeni/Ngwelezane Transitional Local Council and Others* [1997] ZACC 19; 1998 (2) SA 61 (CC); 1998 (1) BCLR 1 (CC) at para 32.

[91] See above n 2 at para 58.

[89]Regarding the costs incurred in this Court the respondents prayed also that each party should pay its own costs of all the proceedings in this Court. For the reasons advanced above, I agree. Accordingly, I would uphold the cross-appeal and order that each party pay its own costs in the High Court and in this Court.

Order

[90]The following order is made:

1. The order of constitutional invalidity in respect of section 10(3) of the Gauteng Transport Infrastructure Act 8 of 2001 made by the South Gauteng High Court, Johannesburg is not confirmed.

2. The application for condonation of the late filing of the application for leave to appeal by the applicants is granted.

3. The appeal by the applicants against the order of the South Gauteng High Court, Johannesburg in respect of section 10(1) of the Gauteng Transport Infrastructure Act 8 of 2001 and Provincial Notice 2625 is dismissed.

4. The cross-appeal by the respondents against the costs order made by the South Gauteng High Court, Johannesburg is upheld.

5. The order made by the South Gauteng High Court, Johannesburg is set aside and paragraph 5 is replaced with the following order:

"Each party is to pay its own costs."

6. Each party is ordered to pay its own costs in this Court.

Moseneke DCJ, Mokgoro J, Ngcobo J and Skweyiya J concur in the judgment of Nkabinde J.

O'REGAN J:

[91]I have had the pleasure of reading the careful and comprehensive judgment written in this matter by my colleague, Nkabinde J. I agree with her identification of the issues at paragraph 26 of her judgment; as well as her reasoning and conclusion in respect of section 10(1) of the Gauteng Transport Infrastructure Act 8 of 2001 (the Infrastructure Act). I also agree with her reasoning and conclusions in respect of the applicants' arguments concerning the powers of provinces and municipalities and the question of whether the promulgation of Provincial Notices 2625 and 2626 constituted administrative action. I only have one point of disagreement with her and that relates to whether section 10(3) of the Infrastructure Act conflicts with the applicants' property rights. In my view it does, though only in a narrow respect as this judgment elucidates.

[92]Section 10(3), like section 10(1), is a transitional provision in the new legislation to bring existing planning in Gauteng within the framework for transport infrastructure now provided by the Infrastructure Act. Although the Infrastructure Act deals with both road and rail transport, the focus in this case has been its regulation of roads and I shall, for ease, refer only to road planning in this judgment.

[93]Before the enactment of the Infrastructure Act, the provincial authorities had over many years developed a set of plans for roads in the province. Some of the roads were approved only as route determinations, in terms of which a line indicating the route of the road across land was approved. Some had proceeded to approved preliminary designs, at which stage the extent of road reserve has been identified, and the basic planning for the road, including intersections, culverts and the like has been completed.

[94]In essence, section 10(3) provides that preliminary designs for roads that have been approved in terms of the Roads Ordinance[92] will be deemed to have been accepted by the MEC in terms of section 8(6), (8) and (9) of the Infrastructure Act and section 9 of the Act shall be applicable to those designs.[93] Section 8(6) provides for a notice and comment procedure and an environmental report prior to the approval of basic designs.[94]

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[92] 22 of 1957 (Transvaal).

[93] Section 10(3) provides:

> "Every preliminary design of a provincial road within the Province, including such design in the form of basic planning, which has been accepted by—
>
> (a) the Administrator defined in the Roads Ordinance, 1957 (Ordinance 22 of 1957);
>
> (b) the Premier of the Province; or
>
> (c) the MEC,
>
> under that Ordinance before the date of commencement of this section and which is mentioned in a notice published in the *Provincial Gazette*, shall as from the commencement of this section, be deemed to have been accepted by the MEC for implementation in terms of sections 8(6), (8) and (9) and section 9 shall as from the commencement of this section be applicable to such preliminary design, provided that for purposes of application of the said sections, section 8(7) shall be deemed to have been complied with at the date of commencement of this section."

[94] Section 8(6) provides:

> "The MEC must thereafter consider the draft preliminary design with due regard to—

[95] Section 9(1) provides that once a preliminary design has been published, no application for the establishment of a township, for the subdivision of land or for any change in land use may be granted in respect of land falling within the road reserve boundary as identified in the preliminary design.[95] There is a narrow let-out allowing

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(a) the environmental report contemplated in subsection (4)(*b*) or section 6(3)(*a*), as the case may be; and

(b) such comments of interested and affected parties as may have been submitted in consequence of the notice contemplated in subsection (5);

and may then accept the preliminary design for implementation with such amendments as the MEC may deem necessary."

[95] Section 9(1) provides:

"As from the publication of the notice in respect of the acceptance of a preliminary design as contemplated in section 8(7), and despite the provisions of any law to the contrary—

(a) no application for the establishment of a township, for subdivision of land, for any change of land use in terms of any law or town planning scheme or for any authorisation contemplated in the ECA or NEMA may be granted—

(i) in respect of an area within the road or rail reserve boundaries of the preliminary design, provided that the MEC may on written application by the applicant relax the provisions of this subsection in respect of an access road on such conditions as the MEC may deem fit, including—

(aa) a condition that the access road be substituted by another road or street serving the same function as the access road; and

(bb) a condition for amending the preliminary design requiring the applicant to pay all or any of the costs incurred by the MEC in the process, in which case section 38 applies;

(ii) on the basis of future access to the provincial road to which the said preliminary design relates, except on the basis of access provided for in the said preliminary design, or amendment thereof on application in terms of section 8(9) or otherwise;

(b) sections 46, 48 and 49 apply, with the necessary changes, to a building restriction area which exists in respect of the road and rail reserve boundaries, as shown in the preliminary design, inasmuch as these sections are applicable to building restriction areas, but sections 46(4), (5), and (9) and sections 48(7) and (8), do not apply; and

(c) no application for a change in land use in respect of a portion of land adjacent to the road reserve boundary of a preliminary design in an urban area may be granted without the written comments of the MEC first having been obtained and considered in accordance with the applicable planning procedure by the authority empowered to grant changes in land use, which must duly consider such comments, and section 7(6), (7) and (8) applies in such a case, with the necessary changes."

the MEC to relax the prohibition in respect of access roads on such basis as the MEC considers fit. Section 9(2) provides in turn that once the preliminary design has been published no service provider may lay any pipeline or cable across land falling within the road reserve boundaries as shown on the preliminary design or erect any structure on the land without the permission of the MEC.[96]

[96]The applicants raise two issues. First, they complain that by exempting existing preliminary designs from the processes provided for in section 8 of the Infrastructure Act, the Act sanctions limitations on property owners' rights without affording them procedural fairness. Second, they complain that the impairment of the right to enjoy property created by the bar on development in section 9 is substantively disproportionate and thus arbitrary and, therefore, in conflict with section 25(1) of the Constitution which provides that:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

[97]Nkabinde J accepts that the effect of section 10(3) is to deprive landowners whose land falls within a road reserve in a preliminary design of their rights to use and enjoy their property within the meaning of "deprivation" in section 25(1). For the reasons

[96] Section 9(2) provides:

> "After the publication of the notice contemplated in section 8(7) and despite any law to the contrary, no service provider may after commencement of this section, lay, construct, alter or add to any pipeline, electricity line or cable, telephone line or cable, or any other structure on, over or under the area within the road or rail reserve boundaries as shown in the preliminary design or may construct, alter or add to any structure of any nature whatsoever on, over or under such area, except—
>
> (a) if the written position of the MEC has been obtained and in terms of such conditions as the MEC may determine; or
>
> (b) in terms of an existing registered servitude."

she gives, I agree. Nkabinde J then considers whether that deprivation is arbitrary within the meaning of section 25(1) of the Constitution. She considers first whether it is arbitrary for its want of procedural fairness and concludes that it is not. I agree. She then considers whether it is arbitrary because the purpose for which the deprivation is imposed is disproportionate to the extent of the deprivation and concludes that it is not. Here lies the nub of our disagreement.

[98]The limitation of landowners' rights occasioned by section 10(3) is quite weighty. Like Nkabinde J, on the approach established by this Court in *First National Bank*,[97] I consider the deprivation in question to be sufficiently weighty to require that it be proportionate to the purpose giving rise to the deprivation and not merely rationally connected to the purpose of the deprivation. The real question then is whether that deprivation is proportionate to the purpose for which the deprivation is claimed.

[99]To determine whether the deprivation is proportionate, it is necessary to consider carefully the precise reach of the deprivation. Having done that, it is necessary to look closely at the purpose of the deprivation and the extent to which section 10(3) is closely tailored to that purpose and then to consider whether the purpose of the deprivation and the manner in which it is achieved is proportionate to the limitation of rights it occasions.

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[97] *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* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC).

[100]This approach is comparable to the approach that has been adopted by the European Court of Human Rights in its jurisprudence on article 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms which protects the enjoyment of property.[98] The European Court of Human Rights has said that a "fair balance" needs to be struck between the demands of the general interests of the community and the protection of an individual's fundamental rights.[99]

[101]I turn first to consider the extent of the deprivation occasioned by section 10(3) read with section 9. As stated above, the effect of the publication of Notice 2626 is that owners of land falling within the road reserves identified in the preliminary designs are, in terms of section 9(1)(a), prevented from seeking planning permission to establish a township on the affected land, to subdivide it or to change the permitted land use. This prohibition is restrictive particularly in the context of the rapid social and economic development in Gauteng, which is a province that has seen and continues to see rapid rates of urban development and densification. Section 9(1)(a)(i)

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[98] Article 1 provides:

> "Every natural person or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

I should add that the use of the verb "deprive" here might give cause for confusion. In European jurisprudence, the second sentence of this Protocol has been taken to refer to deprivation of ownership in its entirety, not merely of one or more of the incidents of ownership. In our jurisprudence consistently with most common law jurisdictions, however, this Court has held that "deprive" in section 25(1) does not refer to loss of ownership but to a loss of one or more of the incidents of ownership, whether legal or factual. The loss of aspects of ownership less than ownership itself is generally considered under the first sentence of article 1 of the Protocol, the right to peaceful enjoyment of possessions in the third sentence. See *Handyside v The United Kingdom* Series A No 24 [1976] 1 EHRR 737 at para 62. See also the useful discussion in Allen *Property Rights and the Human Rights Act* (Hart, Oxford 2005) at 112.

[99] See *Sporrong and Lönnroth v Sweden* Series A No 52 [1983] EHRR 35 at 69.

and (ii) relax the stringency of the restriction marginally by granting the MEC the power to vary the design in relation to access roads.

[102]A second restriction imposed by the publication of Notice 2626 arises from section 9(2) which provides that from the date of its publication, no service provider may lay any pipeline or cable over or under the land falling within the road reserve; nor may any service provider construct any structure on the land without the written permission of the MEC or in terms of an existing servitude. The scope of this restriction, although logistically burdensome, must be assessed on the basis that when the MEC determines a request in terms of section 9(2), the MEC must do so procedurally fairly and reasonably within the meaning of section 33 of the Constitution[100] and the Promotion of Administrative Justice Act 3 of 2000.

[103]One further restriction arises from section 9(1)(c) which prevents an owner whose land is adjacent to the road reserve boundary from applying for any change in land use without obtaining the written comments of the MEC. Again, this restriction (though logistically a burden) is far less severe than the restriction contained in section 9(1)(a).

[100] Section 33 of the Constitution reads:

> "(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
>
> (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
>
> (3) National legislation must be enacted give effect to these rights, and must—
>
> (a) provide for the review administrative action by a court or, where appropriate, an independent and impartial tribunal;
>
> (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
>
> (c) promote an efficient administration."

[104]A further relevant consideration in assessing the extent of the deprivation caused by section 10(3) is the question of the possibility of obtaining an amendment of the preliminary design. This is a matter provided for in section 8(8) and section 8(9) of the Infrastructure Act.[101] These sections provide that the MEC may, on application, amend the preliminary design and the procedures for the redrawing of the preliminary design will be those provided for the drawing of the design in the first place as set out in sections 8(1) to (7) of the Infrastructure Act which would include a notice and comment procedure. Section 8(8) also provides that if the new design deviates from the original design to the extent that the new road reserve falls entirely outside the original road reserve, it will require a new route determination process in terms of section 6 of the Infrastructure Act.

[105]Nkabinde J considers that section 8(8) read with section 8(9) reduces the extent of the deprivation occasioned by section 9(1)(a) quite significantly. I am not so sure. The preliminary design of a road involves first the determination of a route, and then after thorough survey and drafting, the drawing of the road itself in such a manner as

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[101] Section 8(8) of the Infrastructure Act reads as follows:

> "A preliminary design in respect of which a notice in terms of subsection (7) has been published, or sections thereof, may be amended by the MEC and in that event the provisions of subsections (1) to (7) apply, with the necessary changes, provided that where such amendment deviates from the said preliminary design to the extent that both road or rail reserve boundaries of the amendment fall outside the road or rail reserve boundaries of the said preliminary design, a route determination in terms of sections 6(1) to (11) must first be done to the extent that such road or rail reserve boundaries of the amended design so fall outside."

Section 8(9) reads:

> "The power of the MEC contemplated in subsection (8), may also be exercised on written application by anyone who desires that such preliminary design be amended, accompanied by payment of a prescribed fee, and in that event the provisions of sections 38(2) to (6) apply to such application."

to ensure the road is a coherent and continuous route. The room for piecemeal variation of the design of that road on application by individual landowners seems to me to be scant. The MEC will surely (and rightly) be reluctant to amend a preliminary design on the application of one landowner when it may have the consequence of threatening the viability of the road design in its entirety or of imposing burdens on other landowners. Road design is something, by and large, which requires comprehensive determination in one process at one time. Piecemeal amendment thereof in a manner that significantly reduces the burdens on landowners affected by the proposed road is likely to be rare.

[106]In assessing the deprivation caused, I also accept that landowners do not have the right to develop their land as they choose. The ownership of land is not an absolute right. In our constitutional order, we recognise the social value of land to the community as a whole and accept that by affording people the right to own land, their rights are necessarily limited by the rights of the broader community.

[107]The deprivation occasioned by section 10(3) is therefore significant in that it deprives a landowner of the right to seek permission to develop the land, to subdivide it or to change its land use. In a rapidly urbanising environment, this is particularly weighty. That weight is further increased by the fact that there is no temporal limit on the deprivation as the Infrastructure Act makes no provision for the future review of preliminary designs. Finally, the deprivation affects many hundreds of landowners. The record before us establishes that there are at present 2 593 km for which there are

approved preliminary road designs where the roads have not yet been built. This number should be viewed against the 1 220 km of provincial roads that currently exist. It seems probable that given the sharp budgetary constraints emphasised by the respondents, many of the roads that have reached preliminary design may never be built.

[108]Turning now to the purpose sought to be achieved by the deprivation, which must be to protect the integrity of the planning system. The legitimacy of this purpose is indisputable.[102] Once expensive planning has been undertaken (and there can be no doubt that the preparation of preliminary designs is an expensive exercise, requiring land surveys, town planning reports and a range of other expert contributions), it makes eminent sense to prevent landowners from changing the use of their land in a manner which would render the implementation of the planning economically or otherwise impossible. Moreover, planning by its very nature must take place far in advance and may often take years, if not decades, to be brought to fruition. And finally I should add that property owners as a class benefit from the information that good planning affords them, as indeed does our broader society. Accordingly, it is clear that the purpose sought to be achieved by advance planning for road infrastructure is of indisputable public value and importance.

[109]The purpose in designing an infrastructural plan is self-evident, but in considering whether the legislation has been crafted in a manner to achieve that

[102] See the partly dissenting opinion of Judge Walsh in *Sporrong*, above n 8 at 68-9, which emphatically recognises the legitimacy of the planning process.

purpose without undue invasion of landowners' rights, one nagging concern presents itself. The legislation fails to provide for any review of the preliminary designs. Many of these road designs date back to the 1970s and 1980s and in many cases it is not clear if the proposed roads will be built at all. All the while, landowners are prevented from developing their land in the light of changing circumstances. This limitation on landowners is proportionate while it is clear that there is a reasonable possibility that the proposed road will indeed be built, but as soon as it becomes clear that a particular road will not be built, the public purpose in restricting the use of land disappears. In that circumstance, the deprivation will be disproportionate and accordingly arbitrary. Yet there is no process in the legislation at all that provides for the abandonment of proposed roads that have become unnecessary or undesirable.

[110]Given the thousands of kilometres of roads that have reached the preliminary design level over the last thirty years, the rapidly changing urban patterns of the province and the acute budget pressures provincial government faces, it seems to me probable that it may already be clear to the province that some of the planned roads will never eventuate. And yet landowners are prevented from developing their land at all. This disproportionate effect can best be eschewed by providing a framework for the periodic and public review of the infrastructure network, perhaps every twenty years. That review would not require individualised hearings for every affected landowner, but could be conducted by way of a notice and comment procedure. Such a process would permit landowners and all interested members of the public to comment on the network as planned. It would afford a public opportunity for the

province to provide clarity on its plans with regard to the designed infrastructure network and an opportunity to announce that events have overtaken certain preliminary designs in such a manner that requires them to be abandoned, or materially altered.

[111]In my view, the harshness of the deprivation imposed by the current legislation would significantly be ameliorated by a periodic public review of the proposed infrastructure network. Such a review would restore proportionality between the purpose of the legislation and the extent of the deprivation of the rights of landowners. This reasoning echoes, in some respects, the concerns expressed by Hutton AJ in the judgment in the High Court. In my view however the disproportionally could be cured in a less invasive way than that proposed by the High Court.

[112]For this reason, then, unlike Nkabinde J, I would make an order of constitutional invalidity in respect of section 10(3) of the Infrastructure Act to the extent that it does not provide for a periodic public review of the infrastructure network. I would suspend that order and propose that the Gauteng legislature be given eighteen months to enact legislation amending the Infrastructure Act to cure this defect in the current legislation. Given that the order of invalidity I propose would be suspended, all action taken in terms of section 10(3) would remain valid during the period of the suspension which would include Notice 2626.

Cameron J and Van der Westhuizen J concur in the judgment of O'Regan J

[113]For the Applicants:	Advocate D Unterhalter SC and Advocate M Chaskalson instructed by Coetsee van Rensburg.
For the Respondents:	Advocate GL Grobler SC and Advocate NJ Louw instructed by the State Attorney.