

Speculum Juris



University of Fort Hare
Together in Excellence

Vol 32 No 1 (2018)
ISSN 2523-2177

Reflecting on Landowners' Right to Exclude and Non-Owners' Access to Quasi-Public Property: *Victoria and Alfred Waterfront v Police Commissioner, Western Cape*^{*}

Privilege Dhliwayo^{**}
Senior Lecturer, School of Law,
University of Limpopo

Abstract

The main focus of this note is on the Cape High Court decision in *Victoria and Alfred Waterfront (Pty) Ltd v Police Commissioner, Western Cape (Legal Resources Centre as Amicus Curiae)* 2004 4 SA 444 (C). The *Victoria and Alfred Waterfront* case dealt with an application for an interdict restraining the respondents (non-owners) from entering the Waterfront premises. The applicants (landowners) had secured an interdict prohibiting the non-owners from entering and engaging in certain objectionable conduct on the Waterfront premises. The issue before the court, on the return day, was whether the interdict being sought would limit the non-owners' non-property constitutional rights, such as the right to life, dignity and the right to freedom of movement. The court decided that the landowners' right, as owners of the premises, to exclude non-owners from the Waterfront premises was qualified. The court correctly confirmed that the landowners' right to exclude can be limited in instances where the exercise of non-owners' non-property constitutional rights depends on reasonable access to quasi-public land. This note explores whether the exercise of the non-property constitutional rights, is compatible with the normal use of the quasi-public space in question. It furthermore considers how the right to exclude is limited, and whether the limitation is justifiable, taking into account the nature of the property and the access rights involved. The conclusion is that the right to exclude is sometimes constitutionally and statutorily limited or regulated to allow exercise of the non-property rights and such limitation is valid and constitutionally justifiable. Landowners

^{*} This note is partly based on sections of Dhliwayo *A Constitutional Analysis of Access Rights that Limit Landowners' Right to Exclude* (LLD dissertation, US, 2015).

^{**} LLB (UFH); LLM (US); LLD (US).

cannot exercise their right to exclude when it affects non-owners whose right to life, dignity and freedom of movement depend on reasonable access to the land.

1 INTRODUCTION

*Victoria and Alfred Waterfront (Pty) Ltd v Police Commissioner, Western Cape (Legal Resources Centre as Amicus Curiae)*¹ (*Victoria and Alfred Waterfront*) is a South African judgment that shows how landowners can be prevented from excluding non-owners from quasi-public land.² More specifically, the *Victoria and Alfred Waterfront* case involves landowners who sought to exclude non-owners who wished to use the owner's Waterfront premises for purposes that move outside the permission to enter, such as to exercise the right to life, dignity and freedom of movement on such property. The ability to exercise these rights depends on whether non-owners have access to the quasi-public spaces or places of public accommodations.³ The case also brings out the effect that these rights have on the landowners' right to exclude; shows the different types of origins of limitations that can be imposed on the right to exclude; and highlights the importance of considering context and the nature of property in a property dispute. Although the case is already a couple of years old, it is necessary to consider the case afresh because of the particular focus of the case on the different consequences that emerge as a result of the intersection between property rights and other constitutional rights. This aspect of the decision is particularly unique and has not yet been addressed by scholarship in South Africa. *Victoria and Alfred Waterfront* is the only case that dealt specifically with the landowners' protection and limitation of the right to exclude in the context of quasi-public land and there has not been a similar and/or recent case that deals specifically with the landowners' right to exclude and non-owners' competing rights and interests to be on property of such a nature. The aim of this discussion is to highlight and discuss the court's confirmation that the landowner's right to exclude can be limited in instances where the exercise of non-owners' non-property constitutional rights depends on reasonable access to quasi-public land.

In *Victoria and Alfred Waterfront* the Western Cape High Court considered an application for an order to ban the second and third respondents permanently from entering the commercial Waterfront premises belonging to the applicants.⁴ The commercial property in this context was a large shopping complex.⁵ The applicants applied for a permanent interdict to prohibit the respondents from entering into and engaging in certain conduct on the Waterfront premises. The application was based on evidence that the respondents had been misbehaving themselves on the Waterfront premises over a period; interfering, harassing, threatening and assaulting employees and visitors of establishments on the premises.⁶ The applicants, as private landowners of the quasi-public property, relied on their allegedly absolute right to exclude non-owners from their Waterfront premises.⁷ They argued that the power to exclude others and exercise control over the use of property lies at the core of the entitlements of private ownership, which accrues to a property owner under the common law.⁸ Furthermore,

1 2004 4 SA 444 (C).

2 The term "quasi-public land" refers to publicly used private land. Gray and Gray "Civil Rights, Civil Wrongs and Quasi-public Space" 1999 *European Human Rights LR* 46 57 (with reference to fn 65) explain that the term "quasi-public" is widely used, particularly in North America, to denote land that, although nominally subject to private property rights, has been opened up to a public use zone.

3 Public accommodations consist of individual private establishments that are open to and serve the public, such as restaurants, inns, gas stations and places of entertainment. See Dhliwayo *A Constitutional Analysis of Access Rights that Limit Landowners' Right to Exclude* (LLD dissertation US 2015) ch 3; Singer "No Right to Exclude: Public Accommodations and Private Property" 1996 *Northwestern University LR* 1286 1288; Singer *Introduction to Property* 2 ed (2005) 31.

4 The court also briefly considered whether a prohibition against begging on the Waterfront premises was unconstitutional. Mr De Waal, appearing on behalf of the applicants, sought to amend para 1.2 of the order granted by Davis J by inserting a specific clause prohibiting the respondents from begging at the premises. Even though this application was abandoned, Desai J decided to consider the constitutional validity of prohibiting the respondents from begging. See *Victoria and Alfred Waterfront (Pty) Ltd v Police Commissioner, Western Cape (Legal Resources Centre as Amicus Curiae)* 2004 4 SA 444 (C) 447-448.

5 The Waterfront commercial premises is more than a shopping complex, it is a commercial harbor and it includes entertainment venues, craft markets, restaurants, theatres, office locations, hotels, luxury apartments, and public amenities like a police station and post office.

6 *Victoria and Alfred Waterfront* 447.

7 *Ibid* 449.

8 *Ibid* 449.

the applicants submitted that a property owner is protected against arbitrary deprivation of property rights, including the right to exclude, in terms of section 25 of the Constitution of the Republic of South Africa, 1996.⁹

The court decided that landowners do not have an absolute right of exclusion and refused to grant a permanent interdict.¹⁰ Instead, the court granted an order that prohibited the respondents from behaving in certain specified ways on the Waterfront premises.¹¹ The court held that the applicants' right to exclude non-owners from the Waterfront premises was qualified. In the court's view, the Waterfront premises had practically become a suburb of Cape Town.¹² Owners of private premises that are open to the public could not exclude, on a permanent basis, members of the public who were causing a nuisance on their premises, unless there is no other way of achieving a lawfully justifiable goal such as protecting employees and customers from nuisance.¹³

Normally, access rights to land involve a limitation of the right to exclude, but not all limitations create or imply access rights. Some limitations on the right to exclude involve only access rights, for example cases on the right to roam and access to the beach. These cases involve legislation that explicitly creates access rights that limit the landowner's right to exclude.¹⁴ The legislation stipulates when and how access rights should be exercised and determines the extent of the limitation imposed on the right to exclude. Other cases also involve access and denying access but they do not involve access rights in the technical legal sense, meaning that non-owners do not have a right to claim access to land. For example, in *Victoria and Alfred Waterfront* it was decided that the landowners cannot deny others access to their land, but that does not mean that the respondents have acquired rights to gain access to the land in the technical sense. The access rights involved here relate to non-property constitutional rights like life, dignity and freedom of movement, to be exercised on quasi-public spaces.

The right to exclude others from quasi-public spaces is not as broad as the functioning of the right in the context of a private home, even though the property is privately owned in both contexts.¹⁵ The landowner's right to exclude is already qualified in the context of quasi-public property because the landowner voluntarily opened his property to the public to use for designated purposes, and this imposes a duty on him to give access to and serve the public.¹⁶ In some instances, the relativity of the right to exclude from premises that are open to the public may be underscored by laws that prohibit discrimination such as the Promotion of Equality and Prevention of Unfair Discrimination¹⁷ (PEPUDA).

The question addressed here is whether the exercise of the non-property constitutional rights, namely the right to life, dignity and freedom of movement is compatible with the normal use of the quasi-public space in question. Addressing this question entails determining how the right to exclude is limited and whether the limitation is justifiable, taking into account the nature of the property and the access rights involved. The *Victoria and Alfred Waterfront* case that dealt with the use of quasi-public land shows that, the right to exclude is sometimes constitutionally and statutorily limited or regulated to allow exercise of the non-property rights and such limitation is valid and constitutionally justifiable.

9 *Victoria and Alfred Waterfront* 449.

10 *Ibid* 449.

11 *Ibid* 452.

12 *Ibid* 449, 451.

13 *Ibid* 451.

14 See legislation regulating the right to roam such as the Countryside and Rights of Way Act 2000 and the Land Reform (Scotland) Act 2003, and legislation regulating beach access in the South African context such as the National Environmental Management: Integrated Coastal Management Act 24 of 2008.

15 Opperwall "Shopping for a Public Forum: *Pruneyard Shopping Center v Robins*, Publicly Used Private Property and Constitutionally Protected Speech" 1981 *Santa Clara LR* 801 812; Gray and Gray *European Human Rights LR* 90; Alexander and Peñalver *An Introduction to Property Theory* (2012) 131.

16 As reflected in the sections below, the right to exclude in cases of businesses that are open to the public is limited by non-property constitutional rights or regulatory laws.

17 Act 4 of 2000.

2 THE COURT'S DECISION TO LIMIT LANDOWNERS' RIGHT TO EXCLUDE

In the first part of the decision, the court confirmed that the issue of begging raises a direct tension between a non-property constitutional right, namely the right to life, and property rights, adding that property rights must give way to protection of the right to life.¹⁸ The right to life and human dignity are the most important of all human rights and they must be valued and protected.¹⁹ In the context of denying an application for an order to prohibit the respondents from begging on the Waterfront premises, the court referred to the Supreme Court of India decision in *Olga Tellis v Bombay Municipal Corporation AIR*²⁰ to substantiate the view that the right to life is more than "mere animal existence"; it includes the right to livelihood.²¹ The court refused to grant a prohibition against entry on the Waterfront premises because, among other reasons, the respondents required access to the premises for begging purposes.

The second part of the decision in *Victoria and Alfred Waterfront* shows that the right to exclude is limited by the fact that exclusion of the respondents would amount to a limitation of their non-property constitutional right to freedom of movement.²² The applicants' right to exclude and the respondents' freedom of movement are both limited. The court recognised that the applicants have a right to protect their custom and business interests as well as an interest in the physical integrity and security of their customers.²³ However, effective protection of this right does not justify a blanket exclusion of the respondents. The court had to resolve the conflict between the landowners' right to exclude (property rights under section 25) and the non-owners' non-property constitutional rights, namely freedom of movement in terms of section 21(1) and (3) of the Constitution, in a way that vindicates both rights to the greatest extent possible.²⁴ The court concluded that this could be achieved by a prohibition of specified unlawful behaviour on the Waterfront premises rather than a blanket prohibition against access to the premises.²⁵

The court to some extent followed the reasoning of the US Supreme Court in *PruneYard Shopping Center v Robins*.²⁶ In *PruneYard*, the Supreme Court had to decide whether state legislation required the owners of PruneYard Shopping Center to allow access to people who wanted to exercise their right of freedom of speech and petition inside the shopping centre. The majority confirmed that the right to exclude others from property is one of the essential sticks in the bundle comprising ownership. However, the owners of PruneYard Shopping Center had failed to show that the exclusion of non-owners was important to the use or economic value of their property. This resulted in the landowners' right to exclude being limited in favour of others' right to exercise free speech and petition rights on privately owned property. In both cases, the respective courts rejected the claim that private owners of premises that are generally open to the public have an absolute right to exclude persons who have been causing a nuisance on their premises. The outcome in both decisions was therefore to uphold a limitation of the right to exclude others so as to secure a non-property constitutional right.

3 SIGNIFICANCE OF THE VICTORIA AND ALFRED WATERFRONT DECISION

The *Victoria and Alfred Waterfront* case is interesting for a number of reasons. Firstly, the court did not decide the case simply based on the property rights of the landowner, particularly the right to exclude. Instead, the court ruled in favour of the respondents, based on their non-property rights that are protected under the Constitution.²⁷ In other words, the right to

18 *Victoria and Alfred Waterfront* 448.

19 *Ibid* 448. See also *S v Makwanyane* 1995 3 SA 391 (CC) paras 144, 146, 214, 217. Currie and De Waal *The Bill of Rights Handbook* 6 ed (2013) 250-253, 258-259 argue that the right to life and dignity are unqualified and are given stronger protection than other rights. See also Woolman "Dignity" in Woolman and Bishop (eds) *Constitutional Law of South Africa* vol 3 (2 ed 2005) 19-24; Van der Walt "The Modest Systemic Status of Property Rights" 2014 *Journal for Law, Property and Society* 15 49.

20 1986 SC 180.

21 *Victoria and Alfred Waterfront* 448. See also Liebenberg *Socio-economic Rights: Adjudication under a Transformative Constitution* (2010) 122-123.

22 *Victoria and Alfred Waterfront* 451.

23 *Ibid* 452.

24 *Ibid*.

25 *Ibid*.

26 447 US 74 (1980).

27 The court had to consider whether prohibition from entering the Waterfront premises would offend against the entrenched constitutional provisions guaranteeing the right to life (s 11) and the right of freedom of movement

exclude was not upheld absolutely. The court did not entirely reject the common-law right to exclude, but limited its exercise so as to protect non-property constitutional rights of members of the public. The right to exclude was qualified in several respects. In this case, the court distinguished the large Waterfront shopping complex from ordinary restaurants or shopping malls, noting that the location, size and composition of the privately owned shopping complex rendered it for all practical purposes a suburb of Cape Town, to which members of the public had a general invitation to visit.²⁸ The right to freedom of movement applies to large shopping malls and other quasi-public spaces that function as public spaces, although this right cannot be exercised in ordinary restaurants or shops because access in such places is limited. On this basis, the court pointed out that the landowners did not have an absolute right to exclude and as a result non-owners were not prohibited from entering the quasi-public premises; only specific conduct can be prohibited on the Waterfront premises. The nature and function of the property limited, or at least qualified, the landowners' right to exclude. Therefore, one might conclude that members of the public have a right of reasonable access to quasi-public premises under certain circumstances and the landowners' right to exclude is limited accordingly.²⁹

Secondly, the case involved a clash between the landowners' right to exclude and non-owners' constitutional rights, namely the right to life, human dignity and freedom of movement. The court's decision not to issue a blanket prohibition upon entry and freedom of movement ensured that the respondents have access to the Waterfront premises for life-supporting activities such as begging, which is encompassed in the right to life.³⁰ The case thus confirms the importance of the right to life and human dignity *vis-à-vis* the importance of property rights. In view of the court's decision, when there is a direct tension between the right to life and human dignity, and the right to exclude, the latter cannot necessarily be regarded as absolute. In such instances, the right to exclude must give way to protect the right to life and human dignity, which are generally not subject to democratic deliberation, regulation and limitation.³¹ Van der Walt argues that

[t]he life-dignity-equality rights obviously are limited in the sense that they do not allow beneficiaries freely to enter upon and use property belonging to another person at will, but they are normally not restricted and regulated in legislation because of the intractable political problems surrounding any democratic effort to determine their outer limits.³²

It is therefore not surprising that the main issue here would be whether landowners can exclude others from their property in the process of exercising their property rights when non-owners use the land to exercise their non-property constitutional rights. Having the Constitution as the supreme law, the right to exclude and other private property rights cannot be regarded as unqualified rights.³³ The right to exclude is thus subject to limitations, even without a balancing process, because the non-property constitutional rights to life and dignity are unqualified rights that cannot be balanced against property rights.³⁴ As appears from the *Victoria and Alfred Waterfront* decision, the limitation on the right to exclude originates directly from non-property rights embodied in the Constitution.

A third point of interest is the court's distinction, albeit not explicitly stated, between non-property constitutional rights that are not generally subject to limitation,³⁵ such as the right to life and dignity, and those that are subject to limitations and statutory regulations, such as the right to freedom of movement. The difference is relevant because when the right to exclude clashes with unlimited non-property constitutional rights, like life and dignity, the right to exclude must simply give way to secure these rights. On the other hand, when the right to exclude clashes with other non-property constitutional rights like freedom of movement that are subject to democratic deliberation, regulation and limitation, a balancing approach is

(s 21(1) and (3)). See *Victoria and Alfred Waterfront* 451.

28 *Victoria and Alfred Waterfront* 451.

29 Singer *Introduction to Property* 30-32.

30 *Victoria and Alfred Waterfront* 448. See also Liebenberg 122-123; Van der Walt *J Law, Property and Society* 45.

31 Van der Walt *J Law, Property and Society* 45, 62; Currie and De Waal 250-253, 258-259.

32 Van der Walt *J Law, Property and Society* 45-46.

33 Van der Walt *Constitutional Property Law* 3 ed (2011) 215; Van der Walt *Property and Constitution* (2012) 29.

34 In the part of the decision dealing with the right to freedom of movement, the court does seem to engage in a balancing process. See *Victoria and Alfred Waterfront* 451-452.

35 Van der Walt *J Law, Property and Society* 45.

usually adopted to determine the most suitable outcome.³⁶

The *Victoria and Alfred Waterfront* decision provides a good illustration of some of the issues relating to non-owners' right to be on someone else's land for various purposes and the effect that those rights have on landowners' right to exclude. The decision confirms that the right to exclude is not absolute; instead, it is subject to limitation by law, and in particular by the Constitution. The decision also shows that courts take into account the nature of the property involved in a dispute concerning access rights and exclusion, as well as the circumstances of the relevant parties. This is an indication that context plays a role in considering whether a landowner can in fact exercise his right to exclude. Other relevant considerations include: the strength of the right to exclude; statutory or legal recognition of access rights to land; when and how the right to exclude is limited; reasons for the limitation; and whether the effect of a limitation is proportionate.

4 JUSTIFYING THE EFFECT OF THE LIMITATIONS ON LANDOWNERS

The constitutional protection of fundamental rights justified the limitation of the right to exclude in *Victoria and Alfred Waterfront*,³⁷ where the court dismissed the argument that the landowners have a right to exclude that needs to be protected. In South African law, fundamental rights are not ranked hierarchically, but the Constitutional Court has established that the right to life and dignity are the most important human rights and the source of all other rights in the Bill of Rights.³⁸ The *Victoria and Alfred Waterfront* decision strengthens the argument that when the right to exclude clashes with a fundamental right such as the right to life, the question is not a justification for limiting the right to exclude, but instead for the view that property is inherently limited (in a legal and constitutional system) and that the right to exclude is relative.

A fundamental right such as the right to life justifiably imposes limitations on the landowner's right to exclude non-owners from the Waterfront premises, which practically forms a suburb of Cape Town. The right to life includes the right to a livelihood and, in this case, the right to beg for a living. To ratify a blanket entry-prohibition against the affected persons would interfere with their source of livelihood and would impact on their right to life. The court referred to *Olga Tellis v Bombay Municipal Corporation*,³⁹ where the Supreme Court of India held that the right to life, which encompasses the right to a livelihood, is a fundamental constitutional right that cannot be waived.⁴⁰ The exclusion of the pavement and slum dwellers in the *Olga Tellis* case would have amounted to a deprivation of their means of a livelihood and consequently their right to life. Since the right to life must be protected without qualification, the right to exclude had to give way.

A similar result appears in the cases where the right to exclude clashes with the right to freedom of movement. The *Victoria and Alfred Waterfront* case highlights the fact that the affected persons' right to freedom of movement requires limiting the right to exclude because permanent exclusion of the respondents from the Waterfront premises would clash with their constitutional right to freedom of movement.⁴¹ Unlike the right to life, the right to freedom of movement is limited and consequently the tension between the right to exclude and freedom of movement should be resolved "in a manner which permits the rights of both parties to be vindicated to the greatest extent possible".⁴² In the court's view, the landowners could prohibit certain unlawful behaviour on their land, but they could not place a blanket entry prohibition on the affected persons.⁴³ The protection of the right to free movement prohibits landowners from simply excluding the affected persons.

The court recognised the tension between property rights of landowners, in particular the

³⁶ Van der Walt *J Law, Property and Society* 62-63.

³⁷ [2004] 1 All SA 579 (C) 448. Alexander *The Global Debate over Constitutional Property: Lessons from American Takings Jurisprudence* (2006) 11-12 states that "the South African Constitution recognises duties as well as rights and stresses as its core value human dignity rather than individual liberty." He adds that the Constitution recognises specifically enumerated social and economic rights as positive constitutional rights.

³⁸ Makwanyane; Currie and De Waal 250-253, 258-259; Woolman 19-24; Van der Walt *J Law, Property and Society* 49.

³⁹ (1986) SC 180 para 32. See also *Tellis v Bombay Municipal Corporation* [1987] LRC (Const) 351.

⁴⁰ The right to life is entrenched in art 21 of the Constitution of India 1949.

⁴¹ *Victoria and Alfred Waterfront* 451.

⁴² *Ibid* 452.

⁴³ *Ibid*.

right to exclude, and the affected persons' freedom of movement. The court did not apply the *First National Bank v Commissioner, South African Revenue Service; First National Bank v Minister of Finance*⁴⁴ methodology to ascertain whether the limitation of the landowner's right to exclude amounts to a deprivation and whether the deprivation complies with the non-arbitrariness requirement of section 25(1) of the Constitution. The *FNB* decision prescribed a methodology, which proposes that all limitations of property rights will be regarded as deprivations and tested against the requirements of section 25(1) of the Constitution. The methodology entails a seven-stage inquiry that is set out as follows:

- (a) Does that which is taken away from [the property holder] by the operation of the law in question] amount to 'property' for purposes of section 25?
- (b) [If yes,] has there been a deprivation of such property [by the organ of state involved]?
- (c) If there has, is such deprivation consistent with the provisions of section 25(1)?
- (d) If not, is such deprivation justified under section 36 of the Constitution?
- (e) If it is, does it amount to expropriation for purpose of section 25(2)?
- (f) If so, does the deprivation comply with the requirements of section 25(2)(a) and (b)?
- (g) If not, is the expropriation justified under section 36?⁴⁵

Any property dispute that has a bearing on section 25 would generally proceed according to the *FNB* methodology.⁴⁶ In this note, I look at how the court's decision limits the landowners' right to exclude, taking into account the steps set out in the *FNB* decision, to determine whether the limitations are valid in terms of section 25. The methodology introduced in *FNB* proposes that all limitations of property will be regarded as deprivation and tested against the requirements of section 25(1) first, before the next question: whether a particular limitation also constitutes expropriation in line with section 25(2). For this reason, I first focus on the non-arbitrariness test (section 25(1)) and thereafter (to the extent that it is at all necessary) I consider section 25(2) pertaining to expropriation.

In terms of section 25(1) of the Constitution, the deprivation must be in terms of law of general application and the law may not permit an arbitrary deprivation of property. Instances where the right to exclude is limited by operation of law to protect a non-property constitutional right constitutes a deprivation of the landowner's right to exclude in the sense of section 25(1). However, a deprivation in the sense of section 25(1) does not take place in the first part of the decision where the right to exclude is limited directly by a non-property constitutional right such as life and dignity. These non-property constitutional rights are generally unqualified and not subject to regulation, which implies that when these rights are in conflict with a property right (which is subject to limitation) the issue is not whether the limitation on the right to exclude is justifiable or whether exclusion is at all allowed and justifiable, but that the right to exclude must simply give way to a direct constitutional right. At least for life and dignity

44 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (FNB).

45 Roux "Property" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* vol 3 (2 ed 2003) 3, list these steps in accordance with the questions formulated in *FNB* para 46.

46 Van der Walt "Section 25 Vortices (Part 2)" 2016 *TSAR* 597 616-617, mentions that as far as identification of the parts of a section 25 challenge is concerned, the *FNB* list of seven questions is a good starting point. However, Van der Walt suggested small amendments to the *FNB* list in view of subsequent case law. The amended list might look as follows:

- "1. Beneficiaries: is the complainant a beneficiary of section 25 protection?
2. Property: is the alleged property interest constitutional property for purposes of section 25?
3. Deprivation or expropriation: is the alleged interference with the protected property interest:
 - a. a deprivation of property covered by section 25(1)?
 - b. an expropriation of property covered by section 25(2)-(3)?
- 4a. Deprivation: if the interference is a deprivation of property, is it:
 - a. authorized by law of general application?
 - b. if it is authorized by law of general application, does the law permit arbitrary deprivation of property?
- 4b. Expropriation: if the interference is an expropriation, is the expropriation:
 - a. authorized by law of general application?
 - b. for a public purpose or in the public interest?
 - c. accompanied by provision for just and equitable compensation?
5. Justification: if the law of general application
 - a. permits arbitrary deprivation of property
 - b. authorizes expropriation without providing for just and equitable compensation is, it justifiable in terms of section 36(1)?"

this is a direct constitutional limitation that brings about an *ex ante* truncated property right⁴⁷ and there is no deprivation in terms of section 25(1) or limitation in terms of section 36(1) that requires any justification. It results from the supremacy of the Constitution over any law or entitlement that conflicts with these rights.

The public accommodations limitations on landowners' right to exclude can be understood as deprivation of property.⁴⁸ In *Victoria and Alfred Waterfront*, the right to exclude is limited by laws that regulate public accommodations. South African law does not have specific public accommodations laws that regulate access to places that serve the public.⁴⁹ However, general anti-discrimination legislation, PEPUDA was enacted to give effect to the constitutional right to equality, with the comparable result of prohibiting exclusion from privately owned land that is open to the public on the basis of unfair discrimination. PEPUDA makes provision for a general prohibition against unfair discrimination and prevention of exclusion of persons on the grounds of race, gender and disability. In *Victoria and Alfred Waterfront*,⁵⁰ the court mentioned that excluding the respondents from the Waterfront premises might discriminate against them on the grounds of poverty and that would inevitably lead to indirect discrimination on the grounds of race. The laws that regulate access rights to public accommodations constitutes deprivation of the landowners' right to exclude, especially where the right to exclude is limited by a non-property constitutional right, namely freedom of movement. This statutory deprivation of the right to exclude is subject to section 25(1) analysis.

In terms of section 25(1), a deprivation must first of all be in terms of law of general application and secondly the law may not permit arbitrary deprivation of property. This implies that even when the deprivation is authorised by law of general application, namely legislation, it would be unconstitutional if it does not comply with the non-arbitrariness requirement in section 25(1). The first requirement in terms of section 25(1) insists that a deprivation must be authorised by "law of general application" for it to be valid. The first enquiry in terms of this requirement should be whether the deprivation is authorised by a law that is formally valid, in the sense that it was properly enacted and promulgated.⁵¹ The legislation involved such as PEPUDA, that limits the right to exclude, constitutes law of general application for purposes of section 25(1). PEPUDA, which pursues valid and legitimate goals, determines the limits imposed on the right to exclude to protect the right to freedom of movement and to prevent the possibility of indirect discrimination on the ground of race.

The second requirement is that the relevant law of general application may not permit arbitrary deprivation of property.⁵² There are two criteria, in terms of *FNB*, that determine whether a deprivation is arbitrary.⁵³ A deprivation of property will be arbitrary if there is insufficient reasons for the deprivation (substantive arbitrariness) or if the deprivation is procedurally unfair (procedural arbitrariness).⁵⁴ A deprivation of property that is effected in terms of legislation will be procedurally arbitrary if a court adjudicates a dispute and makes an order without being allowed to exercise a discretion that takes into account what is just and equitable in the particular case.⁵⁵ Therefore, a deprivation of the landowner's right to exclude would be procedurally unfair if the law of general application in a particular case does not provide the court with a discretion based on justice and equity. The question of procedural arbitrariness would probably not arise in cases where the legislation leaves the

47 In instances where the right to exclude is restricted constitutionally and directly, it results in an *ex ante* truncated right that never included the ability or entitlement to effect the relevant exclusion, because no principle or entitlement can exist that directly contradicts a constitutional right or provision. The limitation of the right to exclude in these cases is *ex ante* and therefore no deprivation in the sense of s 25(1) takes place. See Dhliwayo ch 4.

48 Van der Walt *Constitutional Property Law* 301.

49 The United States (US) has public accommodations laws that, regulate non-owners' access rights to privately owned land. These laws together with rights and freedoms protected under the United States Constitution, represent a significant limit on the right to exclude. For example, non-owners have a right under the US public accommodations laws to access public accommodations for particular services offered in those places, free from discrimination.

50 *Victoria and Alfred Waterfront* 448.

51 Van der Walt *Constitutional Property Law* 232, citing Woolman and Botha "Limitation" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* vol 2 (2 ed 2006) 51-52.

52 Section 25(1) of the Constitution.

53 *FNB* para 100.

54 *Ibid* para 100. See also Van der Walt *Constitutional Property Law* 245.

55 *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) para 69.

court the necessary discretionary space.

A deprivation is arbitrary and in conflict with section 25(1) of the Constitution if the law in question (in terms of which the deprivation is effected – PEPUDA) does not provide sufficient reasons for the deprivation.⁵⁶ In the context of the *Victoria and Alfred Waterfront* case it needs to be established whether the reason(s) for the court's order to only prohibit certain unlawful behaviour rather than a blanket entry prohibition would be sufficient under the circumstances to justify the deprivation in question. According to the *FNB* decision, the relationship between the means employed and the ends sought to be achieved, must be assessed. In *Victoria and Alfred Waterfront* the means employed to protect the right of free movement in quasi-public places is not to allow a blanket exclusion of the affected persons from the Waterfront premises. The reason why the court made this order was to protect the right of freedom of movement. The purpose of the deprivation of the landowner's right to exclude is to ensure that the right to freedom of movement is not compromised. Furthermore, the nature of the property and the circumstances are relevant factors to consider. The Waterfront premises in this case is quasi-public in nature because it is generally used for a purpose that is open to the public. Members of the public are invited to visit the Waterfront premises whether they intend to conduct business there or not. The court took into account the location, size and composition of the Waterfront premises and held that it was for all practical purposes a suburb of Cape Town and should be distinguished from an ordinary shop or restaurant.⁵⁷

The factors in *FNB* suggest that the court might take into account less invasive means to achieve the intended outcome before considering more invasive measures. In *Victoria and Alfred Waterfront* the court stated that a prohibition of unlawful behaviour instead of a blanket entry prohibition would optimise the landowners' property right (the right to exclude) and non-owners' freedom of movement on the Waterfront premises. The court's ruling allows landowners an effective way of exercising reasonable control over unlawful behaviour on the Waterfront premises and reflects the fact that only one entitlement of ownership is affected by the deprivation, namely the right to exclude. This suggests that ownership is not totally taken away from the landowners; they can impose reasonable entry, use and conduct regulations on the Waterfront premises. In this sense, the limitation imposed on the right to exclude is justified in that it is not unjustly harsh. Since the deprivation affects only one entitlement of ownership and since the public purpose involved is significant, namely to protect and promote the right to freedom of movement, the deprivation is not arbitrary as it complies with the section 25(1) requirements. The depriving law in this case constitutes a deprivation of the landowners' right to exclude but it does not necessarily take away the ownership of property. This view excludes the possibility of expropriation.⁵⁸ In this context it may well never be necessary to raise the expropriation issue or to proceed to the section 25(2) stage of the *FNB* analysis unless the deprivation in question (limiting the landowner's right to exclude) specifically arises from legislation⁵⁹ that explicitly or at least clearly and implicitly authorises expropriation of the affected rights, for a public purpose or in the public interest, against compensation. The outcome in the *Victoria and Alfred Waterfront* decision cannot be described as expropriation because of the absence of legislation to authorise expropriation.⁶⁰

⁵⁶ *FNB* para 100.

⁵⁷ Access to and right of admission to places of public accommodation like shops and restaurants is more limited. Public accommodations laws or PEPUDA might prevent shop and restaurant owners from excluding non-owners if the exclusion is based on discriminatory grounds. The right of freedom of movement does not apply in these places because shop and restaurant owners can impose blanket entry prohibitions provided they are not discriminatory.

⁵⁸ Expropriation is usually defined in contrast with deprivation, which is seen as a less intrusive limitation of property that generally occurs when the state regulates the use and enjoyment of property in the interest of the public, and compensation is not generally required. See Van der Walt *Constitutional Property Law* 335.

⁵⁹ There is no common law authority for expropriation in South African law. See Van der Walt *Constitutional Property Law* 346, 453-454, citing *Gildenhuys Onteieningsreg* 2 ed (2001) 93. All expropriations are effected in terms of legislation, most notably the Expropriation Act 63 of 1975.

⁶⁰ Slade "The 'Law of General Application' Requirement in Expropriation Law and the Impact of the Expropriation Bill of 2015" 2017 *De Jure* 346-362.

5 CONCLUDING REMARKS

In *Victoria and Alfred Waterfront*, the court did not enforce the landowners' right to permanently exclude non-owners who had been creating a nuisance on private premises that are generally open to the public. A blanket refusal of access to the quasi-public premises in *Victoria and Alfred Waterfront* in favour of the owner was likely to constitute a significant restriction on the right to freedom of movement. Access to the Waterfront premises in this case was important for non-owners to realise their constitutional rights. What becomes clear from the case is that with regard to certain types of property, landowners of quasi-public premises do not have an unqualified right to exclude others. To some degree, the landowner's right to exclude is limited on the basis of the constitutional protection and enforcement of the right to freedom of movement on quasi-public premises. In appropriate instances, an owner is prevented from denying access to non-owners who seek to exercise their freedom of movement on his premises. The exercise of the right to freedom of movement also impacts on the right to life and dignity. Therefore, exclusion of the public resulting in the interference with their exercise of free movement amounts to a derogation of fundamental human rights and freedoms. The right to exclude should therefore give way to the right to freedom of movement and other fundamental rights like the right to life, particularly where the type of property involved is such that access to it is necessary for the realisation of these rights.

The *Victoria and Alfred Waterfront* decision shows that the right to exclude is not prioritised abstractly and that exclusion of non-owners is not always a preferred outcome. The landowner's right to exclude is limited when it concerns a quasi-public space or even private property (with restricted access), if access to the land is reasonably necessary to secure important non-property constitutional rights. Upholding the right to exclude absolutely and abstractly may in practice derogate from fundamental human rights. Therefore, the court refused to grant a blanket prohibition against entry so as to protect the respondents' right to life, dignity and freedom of movement.

The right to life and dignity cannot be balanced against the right to exclude because they are fundamental constitutional rights and the constitutional obligation to uphold them is stronger than the right to exclude. This has implications for constitutional analysis in that there is no need for section 25(1) analysis in these cases. In the part of the *Victoria and Alfred Waterfront* decision dealing with the right to freedom of movement, the court seems to engage in a balancing process to determine the appropriate outcome that would optimise the respondents' freedom of movement without necessarily causing disproportionate effects for the landowners. However, the balancing process does not involve balancing the constitutional right to freedom of movement and the right to exclude, but rather a weighing of different factors to determine whether the effects of the limitation would be proportionate in the specific case. In this context and because of the applicability of mediating legislation,⁶¹ the section 25(1) analysis is applicable to test whether the limitation complies with the Constitution. The *Victoria and Alfred Waterfront* decision also shows that different sources of law impose limitations on the right to exclude, for different reasons, and that the limitations consequently require different kinds of justification. Furthermore, the decision indicates the importance of context and the qualified nature of the right to exclude.

⁶¹ Such as the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.