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IN THE HIGH COURT OF SOUTH AFRICA
(WITWATERSRAND LOCAL DIVISION)

CASE NO: ***2004/14629***
P/H NO: ***0***

JOHANNESBURG, ***02 December 2008***
BEFORE THE HONOURABLE ***ACTING JUDGE HUTTON***

In the matter between:-

REFLECT - ALL 1025CC	***1st Applicant***
SIXBAR TRADING 667 PTY LTD	***2nd Applicant***
BICCARD REALTY CC	***3rd Applicant***
ROY MOUNTJOY	***4th Applicant***
PATRICIA ROSAMUND NAOUMOFF	***5th Applicant***
TOWNSHIP REALTORS SA PTY LTD	***6th Applicant***
STELLA VERNA WORSLEY	***7th Applicant***
MNYANDI PROPERTY DEVELOPMENT PTY LIMITED	***8th Applicant***

and

THE MEMBER OF THE EXECUTIVE COUNCIL FOR PUBLIC TRANSPORT, ROADS AND WORKS GAUTENG PROVINCIAL GOVERNMENT	***1st Respondent***
THE PREMIER OF THE PROVINCE OF GAUTENG	***2nd Respondent***

HAVING *read the documents filed of record and having considered the matter:-*

THE COURT GRANTS THE FOLLOWING ORDER:-

1. *It is declared that subsection (3) of section 10 of the Gauteng Transport Infrastructure Act 8 of 2001 is in consistent with the Constitution of the Republic of South Africa, Act 108 of 1996.*

2. *The order in paragraph 1 is referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution.*

3. *Notice No 2626 of 2003 published in Provincial Gazette extraordinary No 331 on 20th August 2003 is set aside.*

4. *ms of section 172(1)(b) of the Constitution:*

   (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.

(ii) the government of the 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 to pay the Applicants' costs including the costs occasioned by the employment of two counsel.

BY THE COURT

REGISTRAR

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IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
24/11/06
DATE SIGNATURE

Case No 14629/2004

In the matter between

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

and

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

THE PREMIER OF THE PROVINCE OF GAUTENG Second Respondent

JUDGMENT

HUTTON AJ:

Introduction

[1] Prior to the enactment of the Gauteng Transport Infrastructure Act 8 of 2001 ("the Infrastructure Act") the provincial authorities had created a hypothetical provincial road network by determining certain routes and performing the preliminary design of parts of these routes.

[2] Sections 10(1) and 10(3) of the Infrastructure Act empower the Member of the Executive Council for Public Transport, Roads and Works ("the MEC") to give legal force to the hypothetical road network prepared by his predecessors over the past three decades. Landowners whose land is traversed by or is adjacent to this hypothetical road network will be affected by the exercise of the MEC's powers in terms of sections 10(1) and 10(3).

[3] The applicants, alleging that they are such landowners, challenge the constitutionality of sections 10(1) and 10(3) of the Infrastructure Act on the grounds that:

3.1. both sections interfere unconstitutionally with their fundamental rights to property under section 25 of the Constitution; and

3.2. section 10(3) is inconsistent with the co-operative government obligations of the Gauteng province in terms of sections 41(1), 151(4) and 154 of the Constitution.

[4] The applicants also challenge the validity of Provincial Notices 2625 and 2626 of 20 August 2003[1] which the MEC issued in terms of sections 10(1) and 10(3) of the Infrastructure Act.

[5] The Respondents take issue with the full spectrum of the relief sought by the applicants.

The relevant provisions of the Infrastructure Act

[6] In order to contextualize the applicants' complaints it is necessary to understand how the Infrastructure Act regulates provincial road planning subsequent to its enactment. Part 2 of the Infrastructure Act deals with the determination of routes and the acceptance of preliminary designs of provincial roads which the MEC is entitled to construct in terms of section 50(2)(a) of the Infrastructure Act. It provides that the route determination and design of a provincial road or railway must be carried out in two phases: first, the determination of a route and secondly, a preliminary design.[2]

[1] Provincial Gazette Extraordinary No. 331
[2] Section 5 of the Infrastructure Act.

[7] Section 6 prescribes extensive procedures to be followed in the determination of a route, including a preliminary route alignment of which notice must be given inviting interested and affected parties to comment as well as an environmental investigation in relation to the route. The MEC must consult with all municipalities concerned after which the preliminary route report and environmental report as well as all written comments must be considered. In such consideration the MEC may refer specific issues arising from the reports or comments to a public commission of enquiry. After all of these procedures have been followed, the MEC must publish the route by reference to a central line by notice in the *Provincial Gazette* in terms of section 6(11) of the Infrastructure Act.

[8] Once publication has taken place, a set of regulatory measures contained in section 7 of the Infrastructure Act takes effect. These measures provide that:

> 8.1. Every 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 as well as for any authorization contemplated in the Environment Conservation Act[3], and the National Environmental Management Act[4], in respect of an area within a distance two hundred metres on either side of the centre of the route or five hundred metres from the intersection of the route with another route or preliminary

[3] Act 73 of 1989
[4] Act 107 of 1998

design, must be accompanied by a written report by a consulting civil engineering firm specializing in road design and transportation engineering. The report has to deal with the impact of the application to the route and the matters prescribed in section 7(1)(a) to (d).[5]

8.2. The application and the report must be forwarded to the MEC, who may comment in writing on the application and the report to the relevant authority.[6]

8.3. In considering the application, the authority must take into consideration the comments submitted by the MEC, the civil engineer's report and the additional costs which the granting of the application may cause to the State and the community concerned, weighed against the advantage to the applicant and the community of granting the application, as well as the extent to which sustainable development will be promoted by the granting of the application.[7]

8.4. The decision of the authority must be brought to the attention of the MEC, who has a right of appeal to the Townships Board.[8]

[5] S 7(1) read with S 8(1)
[6] S 7(3) and (4)
[7] S 7(5)
[8] S 7(6) and 7(7)

8.5. No service provider may lay services over or under the route, except with the written permission of the MEC or in terms of an existing registered servitude.[9]

[9] Section 8 of the Infrastructure Act prescribes the procedure for a preliminary design of a future provincial road to be carried out in relation to the route published in terms of section 6(11). Section 8 provides for a draft preliminary design and environmental investigations to be compiled[10], after which the MEC must notify interested and affected parties of the preliminary design and give them the opportunity to submit comments in regard thereto[11]. The MEC must thereafter consider the matter and may accept the preliminary design for implementation, whereafter it is published for general information in the *Provincial Gazette*[12].

[10] Upon such publication another set of regulatory measures, contained in section 9 of the Infrastructure Act, comes into operation. Section 9(1) provides, *inter alia*, that as from the date of publication of the notice, 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 authorization contemplated in the Environmental Conservation Act or the National Environmental Management Act may be granted in respect of an area within the road or rail reserve boundaries of the preliminary design.

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[9] S 7(8)
[10] S 8(4)
[11] S 8(5)
[12] S 8(6) and 8(7)

[11] Section 10 of the Infrastructure Act reads as follows:

"10. **Existing route planning and preliminary design of future provincial roads and railway lines –**

(1) Any route within the Province which has been accepted as such 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 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 route as though it had been published in terms of section 6(11).

(2) The MEC must keep a list of all such existing accepted routes which must be available for inspection by any interested and affected party, together with the plans depicting such routes, at prescribed times and places.

(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 section 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.

(4) The MEC must keep a list of all preliminary designs contemplated in subsection (3), which must be available for inspection by interested and affected parties, together with the plans in respect thereof, at prescribed times and places."

The historical position

[12] The Roads Ordinance[13] which was replaced by the Infrastructure Act, did not contain a procedure such as the one prescribed in Part 2 of the Infrastructure Act. The Administrator was authorized to construct provincial roads by section 20(a) of that Ordinance. Section 1 of the Ordinance included the following definition:

> **"construct", "construction"** includes planning, surveying, laying out, clearing of bush, forming and making of any road and the construction of any bridge, pontoon, ferry, or drift to serve such road or proposed road, all road signs and all necessary approaches, excavations, embankments, subways, furrows, drains, dams, curbs, weigh-bridges, fences, parapets, guards, drainage works within or outside such road, and any other work or thing forming part of or connected with or relating to such road; and further includes any alteration, deviation, widening or improvement of such road;"

The respondents submit that, in the light of this definition, the Ordinance, by necessary implication, gave the Administrator the power to plan roads. It seems to me that the respondents' submission is self-evidently correct.

[13] In their answering affidavit the respondents set out, in great detail, the historical manner, prior to the enactment of the Infrastructure Act, in which routes were determined and roads planned in what has now become the Gauteng Province. The applicants have placed many of the respondents' assertions in dispute. However, in as much as the applicants seek final relief in motion proceedings without recourse to oral evidence to resolve any of the disputes, I intend, upon

[13] Transvaal Ordinance No. 22 of 1957

an application of the rule in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[14] to proceed upon an acceptance of the facts as stated by the respondents where there is a dispute.

[14] The relevant aspects of that history can be summarized as follows:

14.1. The MEC and the department of which he is the head are the institutions within the Gauteng Provincial Government charged, *inter alia*, with the proclamation, construction and general maintenance of provincial roads within the Gauteng Province.

14.2. Within the department there is a sub-directorate for planning known as Gautrans.

14.3. Gautrans' predecessor was the Transvaal Provincial Administration: Department of Roads ("the TPA").

14.4. The Executive Committee of the TPA was in charge of planning and development within the region of what was then known as the Transvaal Province.

14.5. It was the TPA's responsibility to plan for the future provincial road requirements of the then Transvaal and to decide where such roads should be situated. In the 1970's the TPA decided to embark on

[14] 1984 (3) SA 623 (AD) at 634E-635C

holistic, pro-active planning of a transport system that would serve as a planning policy framework for the orderly long-term development of the region known as the PWV[15] area within the Transvaal Province. The pressing impetus for the commencement of planning was an avalanche of applications for the establishment of townships in terms of the Townplanning and Townships Ordinance 25 of 1965, which would have clogged the then existing roads infrastructure. The township applications were held in abeyance so that orderly and proper spatial planning could be done with respect to provincial roads before the establishment of townships could proceed.

14.6. This resulted in a functional grid pattern network of roads being planned, previously known as the PWV Future Road Network, but currently known as the Gauteng Strategic Road Network. In this grid pattern, every component has its specific function and should one of the components be compromised and not be constructed, other components will suffer.

14.7. The predecessor of the Infrastructure Act was the Road Ordinance. The Gauteng Strategic Road Network came about over a number of years against the background of the Roads Ordinance.

14.8. The planning under the Roads Ordinance provided for a layout of the major transport routes required for the short, medium and long term

[15] Pretoria – Witwatersrand - Vereeniging

future on the basis of fundamentally sound planning policy principles which involved a multi-disciplinary task team. An extensive and costly planning process was followed involving various role players to bring about the Gauteng Strategic Road Network. The role players included the University of the Witwatersrand, town planners, transport engineers, landowners, local authorities and service utility providers such as Eskom and the Rand Water Board.

14.9. The then Administrator of the province and his successor, the MEC, approved various routes and basic planning relevant to the Gauteng Strategic Road Network prior to the enactment of the Infrastructure Act.

14.10. Hundreds of millions of Rands of public money has gone into these route determinations and preliminary designs.

[15] The applicants correctly point out that prior to the enactment of the Infrastructure Act there was no statutory regime in terms of which route determinations or preliminary designs were given any protected status. Under the Roads Ordinance the Administrator of the Transvaal (and following 1994, the Premier and the MEC who succeeded to the powers of the Administrator) had no power to make route determinations or to publish preliminary designs. Until such time as a provincial road was proclaimed under the Ordinance, no legal status was accorded to a route determination or a route design. In particular, the fact of a route determination or a route design was no legal barrier

to a town planning application to change the land use of an area over which a route determination or preliminary design had been made.

[16] In *Mooikloof Estates (Edms) Bpk v Premier, Gauteng*[16], Van Dijkhorst J described the position that then prevailed in the following terms:

> "Dit is nie onredelike van 'n eienaar wat sy eiendom wil ontwikkel om die standpunt in te neem dat hy met sy ontwikkeling voortgaan op 'n wyse wat hom pas (uiteraard binne die beperkinge wat die reg hom oplê) ongeag die feit dat daar oor sy eiendom of in die nabyheid daarvan moontlik eendag 'n pad gaan kom (omdat daar reeds 'n dekade gelede 'n plan opgestel is wat dit aantoon) met inagname van die feit dat dit nog 'n aantal dekades kan duur voordat die pad 'n werklikheid word, indien ooit. Dit staan die owerheid vry om die ontwikkelaar aan bande te lê deur onmiddellike proklamering van die pad maar dit is onredelik aan die kant van die owerheid om alle ontwikkeling lam te lê vir die onafsienbare toekoms omdat 'n ingenieur 'n paar strepe op 'n stuk papier aangebring het."

[17] The respondents argue that the learned judge's remarks in *Mooikloof* supra arose in an unrelated context, that is in the assessment of compensation consequent upon the declaration of a public road, and have been misinterpreted. I do not think it necessary to enter into that particular dispute as it seems clear to me, from the totality of their argument, that the respondents accept that prior to the enactment of the Infrastructure Act any route determinations or preliminary designs arrived at by the Administrator or his successors-in-title did not have the legal status now conferred on them by section 10 of the Infrastructure Act.

[18] It does not however follow, according to the respondents, that fair and reasonable procedures were not conformed with in arriving at those route determinations and preliminary designs. They set out in their answering

[16] 2000 (3) SA 463 (T) at 490 C-E

affidavit the procedures that were followed in the planning and preliminary design of provincial roads prior to the enactment of the Infrastructure Act. They state that:

18.1. Notwithstanding the absence of statutorily entrenched procedures, the preliminary design of roads was done in an open and transparent manner. Extensive consultation processes were followed involving landowners, local authorities, specialists in their respective fields, all the authorities concerned, institutions and service providers concerned such as Eskom, the then Rand Water Board, professional interest groups as well as commercial associations. Property owners were individually consulted by the planning engineers and their comments were relayed to the Executive Committee through preliminary design reports for each route. A code of procedure for consulting engineers in respect of public participation in the planning and design of roads was issued and had to be adhered to.

18.2. The Strategic Road Network plan which was put in place, of which the routes now in issue formed a part, was thus well-known to municipalities and landowners alike. This enabled authorities, including municipalities, to plan for the provision of engineering and social services whilst the private sector used the plan to invest in land earmarked for specific land uses flowing from the plan.

[19] The respondents accordingly contend that the forward-planning of the future road network serves as a framework to guide the orderly long-term development of the Gauteng Province. It was based on fundamentally sound planning policy principles which comply with the legislation relevant to the post-1994 era. This planning has, they say, been incorporated in the post-1994 planning within the Gauteng Spatial Development Plan which guides all the various municipalities in their Integrated Development Planning in terms of the Municipal Systems Act[17]. As such, they argue, it is an indispensible building block in the spatial planning of the Gauteng Province.

The publication of notices in terms of section 10

[20] On 20 August 2003 the MEC published two notices in the Provincial Gazette. The first notice[18], given in terms of section 10(1) of the Infrastructure Act, recorded that prior to the commencement of the Act on 31 January 2003, the Administrator or his successors-in-title had accepted certain routes, listed in an accompanying schedule to the notice, and that the centre lines of such routes had

[17] Act 32 of 2000.

[18] Notice 2625 of 2003. The full text reads as follows:
"ACCEPTANCE OF ROUTES AND DETERMINATION OF THE CENTRE LINES THEREOF
In terms of section 10(1) of the Gauteng Transport Infrastructure Act, 2001 (Act 8 of 2001), notice is hereby given that the routes listed in the accompanying schedule, were accepted prior to the commencement on 31 January 2003 of this section of the Gauteng Transport Infrastructure Act, 2001 (Act 8 of 2001), by the Administrator as defined in the Roads Ordinance, 1957 (Ordinance No. 22 of 1957), the Premier of the Province, or the MEC for Public Transport, Roads and Works, in terms of the relevant empowering authorisation, and that the centre lines of these routes have been determined. The relevant provisions of sections 5 to 8 of the Gauteng Transport Infrastructure Act, 2001 (Act 8 of 2001), therefore apply to these routes as though they were published in terms of section 6(9) of the said Act.
The accepted routes concerned are depicted on key plan GRD 03/01 dated 23 January 2003 and the supporting 1:50 000 maps, 1:10 000 orthophotos and relevant route determination reports, which can be inspected during office hours at the Plan Room of the Department of Public Transport, Roads and Works, Sage Life Building, 41 Simmonds Street, Johannesburg."

been determined. The second notice[19], given under section 10(3), stated that preliminary designs of certain provincial roads, listed in an accompanying schedule, had been accepted prior to 31 January 2003 in terms of executive committee resolutions of the former Transvaal Province and the Gauteng Province, and were now deemed to have been accepted by the MEC for implementation.

The applicants' reliance on section 25 of the Constitution

[21] The relevant portion of section 25 of the Constitution states the following:

> "(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.
>
> (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;

[19] Notice 2622 of 2003. The full text reads as follows:
"ACCEPTANCE OF PRELIMINARY DESIGNS OF PROVINCIAL ROADS
In terms of section 10(3) of the Gauteng Transport Infrastructure Act, 2001 it is hereby notified for general information that the preliminary designs of the provincial roads, listed in the accompanying schedule, which have been accepted in terms of the corresponding Executive Committee Resolutions of the former Transvaal Province and Executive Council Regulations of the Gauteng Province, before the date of commencement on 31 January 2003 of the aforementioned section, be deemed to have been accepted by the MEC for implementation, and that the regulatory measures in terms of section 9 of the aforementioned act consequently have come into effect on the date the aforementioned Act came into operation, namely 31 January 2003, as contemplated in that section.
The accepted preliminary designs concerned are depicted on the plans referred to in the aforementioned schedule for the Metropolitan Areas of the City of Tshwane, City of Johannesburg and Ekurhuleni and the District Municipal Areas of Sedibeng, Metsweding and West Rand, and can be inspected during office hours at the Plan Room of the Department of Public Transport, Roads and Works, South Tower, Sage Life Building, 41 Simmonds Street, Johannesburg."

(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) the purpose of expropriation.

(4) For the purposes of this section –
(a) ...
(b) property is not limited to land."

[22] In *Board of Regents v Roth*[20] the United States Supreme Court stated the following:

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law..."

[23] Our law has traditionally ascribed a wide meaning to the concept *"property"*. In Roman law anything which was capable of constituting an asset in a person's estate was regarded as *"property"*. The concept included not only corporeal things, but also rights upon which a monetary value could be placed. Accordingly personal rights were regarded in Roman law, and continued to be regarded in Roman-Dutch law, as constituting *"property"*[21].

[24] The Constitutional Court has indicated that a generous approach must be taken to the interpretation of fundamental rights protected by the Constitution[22]. The leading judgment of the Privy Council on the subject, indicates that the

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[20] 408 US 564 at 577
[21] CG van der Merwe, Sakereg (2nd ed) 20-23; Hahlo and Kahn, The Union of South Africa 571; Maasdorp Institutes of South African Law: The Law of Property (10th ed) 1; Silberberg and Schoeman, The Law of Property (3rd ed) 19.
[22] S v Zuma 1995 (2) SA 642 (CC) at paras 13-15; S v Makwanyane 1995 (3) SA 391 (CC) at paras 9-10; S v Mhlungu 1995 (3) SA 867 (CC) at paras 8-9.

constitutional protection of property requires a generous interpretation of property:

> "A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction. "Property" in section 18(1) is to be read in a wide sense."[23]

[25] The concept of property involves the notion of a bundle of rights, which includes the right to exploit the thing that is owned. Thus, it has been held[24] that:

> "Ownership in a thing is not the right to prevent others from using it. That is merely an incident of ownership. It is the right, at common law, at least, ... to do what one pleases with the thing to which it relates, to use it, consume it or exploit it."

[26] The Constitutional Court has, on two occasions recognized the right to exploit property as an incident of property ownership. In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another*[25] it was stated that:

> "In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title to or right to or in the property concerned."

[27] In *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality*[26] it was said that:

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[23] Attorney General of the Gambia v Momodou Jobe [1984] 1 AC 689 at 700H-701A.
[24] Video Parktown North (Pty) Ltd v Paramount Pictures Corporation; Shelbourne Associates and Others; Century Associates and Others 1986 (2) SA 623 (T) at 631J.
[25] 2002 (4) SA 768 (CC) at para 57
[26] 2005 (1) SA 530 (CC) at para 32

"Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation."

Has there been a deprivation?

[28] The applicants point to a number of consequences arising from the invocation by the MEC of sections 10(1) and 10(3) of the Infrastructure Act to illustrate their contention that those sections directly interfere with their right to exploit the land owned by them. They say, by way of example, that:

28.1. The sixth applicant's low cost housing developments in Eikenhof, Protea Glen Extension 17 and Protea Glen Extension 18 will lose an aggregate of more than 700 stands to the notional K47 and PWV5 roads, costing the sixth applicant more than R7 million in lost profit.

28.2. Large vacant swathes must now also be cut through the middle of township developments planned by the third, fourth and eighth applicants for the road reserve which may ultimately be taken up by the as yet notional K47, K89 and K109 roads. In the case of the third and fourth applicants, this notional road reserve consumes approximately 60% and 50% of their respective developments. The eighth applicant will lose at least 23 stands out of a total development of 49 stands to the notional K47.

28.3. The fifth applicant's sale of her property for R3.5 million has fallen through because the combination of sections 10(1) and (3) in relation to the notional PWV5 road means that the developer who bought her property will be unable to have it rezoned. In the unlikely event that the fifth applicant will be able to find another buyer, she will now be unable to sell her property for more than R800 000.

[29] The applicants contend further that section 10 also indirectly interferes with the right to alienate land, as is illustrated by the case of the fifth applicant. The fifth applicant occupies Holding 55 Broadacres Agricultural Holdings Extension 2. This property is zoned residential but is surrounded by non-residential developments. It is undisputed that the *"Broadacres area has developed in such a way that no residential purchaser will consider the purchase of Holding 55. The only type of buyer available to the fifth applicant is a developer."* The effect of section 10(3) is that it is no longer possible for the property to be rezoned. As a result, the fifth applicant is extremely unlikely to find any developer willing to purchase the property. Section 10(3) has accordingly placed the fifth applicant in a position where she and her husband, who want to sell their property and relocate to KwaZulu Natal, may not be able to find any buyer.

[30] Although the respondents, in their answering affidavit, have placed certain of these assertions in dispute little, if anything, was made of this in argument. The

central thrust of the respondents' argument was rather that the Infrastructure Act did not deprive the applicants of any right to property which they actually had before the coming into operation of the Act.

[31] The argument was developed in the respondents' heads of argument in the following terms:

> "6.1.6 The applicants' case in this regard is premised on the assumption that the operation of section 10 of the Infrastructure Act deprives the applicants of their rights as it "directly interferes with the right to exploit land". With reference to the fifth applicant it is alleged that sections 10(1) and (3) "also indirectly interfere with the right to alienate land." The argument is that because the fifth applicant's land will have to remain zoned for residential purposes with non-residential type developments in the surrounding area, she would not be able to fetch a higher price than a price based on the current zoning which is an issue that also impacts on the third and fourth applicants.
>
> 6.1.7 What is immediately clear is that the Infrastructure Act did not take away any right to property which the applicants had before the coming into operation of the Infrastructure Act regarding the zoning applicable at that stage. Section 9 of the Infrastructure Act limits the public law power of planning authorities to grant additional rights to owners which they did not have when regulatory measures take effect.
>
> 6.18 The right to own property is commonly referred to as "ownership". Ownership is generally defined as the real right that potentially confers the most complete or comprehensive control over a thing, which means that the right of ownership empowers the owner to do with his thing as he deems fit, subject, however, to the limitations imposed by public and private law.
>
> 6.1.9 The scope of the right of ownership can only be determined by reference to the limitations imposed by law. As was stated by Spoelstra, AJ[27] (as he then was):
>
> > "Die absolute beskikkingsbevoegdheid van 'n eienaar bestaan binne die perke wat die reg daarop plaas. Die beperkings kan of uit die objektiewe reg voortvloei of dit kan bestaan in beperkings wat deur die regte van ander persone daarop geplaas word. Geen eienaar het dus altyd 'n onbeperkte bevoegdheid om na vrye welbehae in goeddunke sy eiendomsbevoegdhede ten aansien van sy eiendom uit te oefen nie. ... Ons reg gaan ook uit van die

[27] In Gien v Gien 1979 (2) SA 1113 (T) at 1120 D-H

> sogenaamde absoluutheid van eiendomsreg uit maar terselfdertyd met erkenning van de beperktheid daarvan."

6.1.10 It is therefore clear that the contents and limitation of ownership do not pre-exist, but are determined by law. Regulating legislation should not be seen as infringing an unlimited right of ownership. It should rather be seen as determining the flexible content of that right at any given time. One such limitation which determines the scope and contents of the applicants' right of ownership in respect of their properties is the town planning scheme which defines the rights of use in respect of property. The owner has no more rights than those defined in the town planning scheme. The restriction of section 9(1) is thus a restriction in being granted more rights than those that exist. The same principle applies with respect to ownership establishment in terms of Ordinance 15 of 1986: No-one may use his or her land for the establishment of a township unless a township application has been granted by the authorized municipality concerned. Until such a grant has taken place, the owner of the land simply does not have the right to use his or her land for a township. It is thus a privilege granted by the municipality and not an inherent right of ownership."

[32] The respondents' argument, at first blush, appears to be an attractive one. However it seems to me that the fundamental effect of section 10 is to create new and substantive obstacles to the exploitation and alienation of affected land which prior to the enactment of the Infrastructure Act did not exist.

[33] The majority judgment of the Constitutional Court in *Mkontwana* supra[28] held that:

> "Whether there has been a deprivation depends on the extent of the interference with or limitation of use, enjoyment or exploitation. It is not necessary in this case to determine precisely what constitutes deprivation. No more need be said than that at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation.
>
> ...
>
> The right to alienate property is an important incident of its use and enjoyment. The effect of s 118(1) and s 50(1)(a) of the ordinance is that transfer can take place only if all outstanding consumption charges have been paid. ... The provisions are not

[28] Per Yacoob J at paras 32-33

> merely procedural. They are a substantive obstacle to alienation and constitute a deprivation of property within the meaning of s 25(1)."

[34] The separate concurring judgment in *Mkontwana*[29] puts it thus:

> "There can be no doubt that some 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 estate, 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 recognize both the material and non-material value of property to owners, it would defeat that purpose were, 'deprivation' to be read narrowly."

[35] In the light of the approach taken by the Constitutional Court in *Mkontwana* I must conclude that sections 10(1) and 10(3) of the Infrastructure Act amount to a deprivation of property for the purposes of section 25 of the Constitution. To hold otherwise would, I believe, unduly narrow the concept of deprivation of property contemplated in section 25.

Arbitrary deprivation

[36] Section 25(1) of the Constitution guarantees property against arbitrary deprivation. The leading judgment of the Constitutional Court on section 25(1) of the Constitution is *First National Bank of SA* supra. Writing for the Court, Ackermann J *"... concluded that a deprivation of property is 'arbitrary' as meant by s 25 when the 'law' referred to in s 25(1) does not provide sufficient*

[29] Per O'Regan J at para 89

reason for the particular deprivation in question or is procedurally unfair."[30]

This approach to section 25(1) was reconfirmed by the Constitutional Court in *Mkontwana*.[31]

[37] Deprivation of property is accordingly arbitrary and unconstitutional if:

37.1. there is insufficient reason for the deprivation; or

37.2. it is procedurally unfair.

I shall refer, for convenience, to these two concepts as *"substantive"* and *"procedural"* arbitrariness.

Substantive arbitrariness

[38] In the *First National Bank* case, the Constitutional Court set out the considerations relevant to an investigation into substantive arbitrariness for the purposes of section 25(1):

> "[97] The formulation of property rights and their institutional framework differ, often widely, from legal system to system. Comparative law cannot, by simplistic transference, determine the proper approach to our property clause that has its own context, formulation and history. Yet the comparative perspective does demonstrate at least two important principles. The first is that there are appropriate circumstances where it is permissible for legislation, in the broader public interest, to deprive persons of property without payment of compensation.

[30] First National Bank of SA v Commissioner, South African Revenue Service 2002 (4) SA 768 (CC) at para 100

[31] Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality 2005 (1) SA 530 (CC) at para 34.

[98] The second is that, for the validity of such deprivation, there must be an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve. It is one that is not limited to an enquiry into mere rationality, but is less strict than a full and exacting proportionality examination. Moreover, the requirement of such an appropriate relationship between means and ends is viewed as methodologically sound, respectful of the separation of powers between Judiciary and Legislature (in the case of the United Kingdom between Judiciary and Executive) and suitably flexible to cover all situations. It matters not whether one labels such an approach an 'extended rationality' test or a 'restricted proportionality' test. Nor does it matter that the relationship between means and ends is labeled 'a reasonably proportional' consequence, or 'roughly proportional', or 'appropriate and adapted' or whether the consequence is called 'reasonable' or 'a fair balance between the public interest served and the property interest affected.'

[99] That the word 'arbitrary' can grammatically have such a substantive content is reflected in The Oxford English Dictionary definition of 'in an arbitrary manner', which includes 'without sufficient reason'. The standard set in s25(1) is 'arbitrary' and not, as in s36(1) of the Constitution, 'reasonable and justifiable'.

The conclusion reached on the meaning of arbitrary in s25

[100] Having regard to what has gone before, it is concluded that a deprivation of property is 'arbitrary' as meant by s25 when the 'law' referred to in s25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. 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 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 its 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 s36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s25."[32]

[39] The applicants make the following submissions in support of their contention that section 10(3) is substantively arbitrary in its effect[33]:

39.1. Section 10(3) empowers the MEC to proclaim route designs which, when read with section 9(1):

(i) absolutely prohibit the grant of any town planning applications in respect of land falling within the provisional road reserve of the designed route;

(ii) impose onerous conditions on town planning applications in respect of land adjacent to the provincial road reserve of the designed route, and

[32] First National Bank of SA v Commissioner, South African Revenue Service 2002 (4) SA 768 (CC) at paras 98 to 100.

[33] I point out that the applicants only contend that section 10(3) is substantively arbitrary. However, they contend that both sections 10(1) and 10(3) are procedurally arbitrary.

(iii) treat the provisional road reserve as though it was an actual provincial road for the purposes of building, town planning and mining restrictions.

39.2. Section 10(3) directly prevents the exploitation of property within its scope and indirectly interferes with landowners' rights to alienate their property. These are far reaching deprivations of the property rights of affected landowners, particularly on the interpretation of s 10(3) adopted by the respondents which is one that obliges the MEC to proclaim every previously accepted design and vests in him no discretion not to do so.

39.3. It is accordingly incumbent upon the respondents to justify this with reference to a public purpose. The respondents' justification argument relates to the need to protect the hypothetical provincial road network for planning purposes. The applicants submit that this argument breaks down for the following reasons:

(i) There is no time limit placed on the uncompensated interference with landowners' rights. There is no obligation on the respondents to construct roads along the designed routes within any period and, on their own admission, it is impossible to predict when, or even whether, roads will ultimately be

proclaimed along these routes. So the affected landowners' property is frozen indefinitely and possibly forever.

(ii) On the interpretation of the MEC, section 10(3) is particularly blunt in its operation. The MEC maintains that he is not obliged to assess the 30 year old planned routes and designs for legality in respect of new environmental constraints, or appropriateness in respect of changed patterns of urban development over the last 30 years. His blanket promulgation in notice 2626 of the entire preliminary designed road network makes it clear that he did not do so. Thus in response to a complaint that section 10 does not provide for consultation with interested landowners prior to a determination, the respondents state the following:

> "It is important to appreciate that none of the provincial roads in respect of which preliminary design has been accepted, may be constructed unless an authorization from Gauteng Department of Agriculture, Conservation and Environment had first been obtained in terms of section 22 of the Environmental Conservation Act, 1989. Again, no such authorization may be issued by that department unless an environmental report, which could be a full environmental impact study, had been submitted to that department in accordance with the procedures prescribed by the Environmental Impact Assessment Regulations promulgated under that Act. These regulations require full public participation of all interested parties.
>
> Therefore, prior to construction of these roads, the full scrutiny of all interested parties will be brought to bear on these roads. This procedure is, in many respects, a repetition of the procedures prescribed with respect to preliminary designs in section 8 of the Act."

The applicants contend that this highlights the shortcomings of the mechanism created by s 10(3). It is quite possible that

because of environmental constraints, the construction of a provincial road along a route covered by notice 2626 may be impossible. Yet that enquiry will be conducted only by the MEC if at some indeterminate stage in the future, he or she decides that the time is now ripe for proclamation and construction of a road along the designed route. In the intervening period, which stretches indefinitely into the future, the landowners in question are subject to far-reaching interference with their property rights in the name of a hypothetical road which may never be capable of proclamation.

(iii) On the respondents' own version, section 10(3) has been deliberately designed to pre-empt any process by which the constitutionally mandated planning authorities – the local government planning tribunals – can consider town planning applications over the provisional road reserve by attempting to balance the road planning concerns against the property rights of affected landowners and the municipal developmental interest in favour of granting a town planning application. On the respondents' version, the law accordingly:

(a) either takes as its starting point that local town planning tribunals are not competent to perform their functions responsibly; or

(b) is designed to prevent planning decisions which are premised on a full investigation and balancing of all the competing interests in relation to a town planning application (including the road planning interest in the hypothetical road network) being taken.

(iv) Finally, section 10(3) represents an unfair attempt to shift the financial burden of long-term planning from the provincial government, and thus the general provincial public, to individual land-owners.

[40] The applicants accordingly contend that section 10(3) interferes with landowners' property rights in a manner which does not meet the substantive requirements of section 25(1) of the Constitution.

[41] The respondents, in turn, argue that sufficient reason exists for the deprivation. They rely on the following:

41.1. In the answering affidavit the rationale behind the planning of the Gauteng Strategic Road Network, being based on fundamentally sound planning policy principles, is comprehensively explained – the outcome being a major road network to be established on the basis of forward planning to serve as a transport system for the economic core area of

South Africa. The framework is to guide the orderly long-term development of the area.

41.2. What was recognized is that the layout of the major transport routes that would be required for the long-term future had to be determined timeously in order to prevent their subsequent routing through built-up areas, which would be very expensive from the point of view of social disruption of existing communities, existing infrastructure and services as well as from a monetary viewpoint. The very permanent nature of a transport corridor, once established, was recognized, hence the need to have started early on with route alignment and basic planning or preliminary design of roads.

41.3. The purpose of the network served the need of local authorities in the region for a framework within which long-term land use planning for their areas of jurisdiction could be undertaken, allowing for flexibility in the planning approach.

41.4. The purpose was therefore to prevent *ad hoc* decisions and to optimize investment benefits.

41.5. The above considerations serve the rationale of a holistic policy framework for the orderly long-term development of the region as a means to avoid uncoordinated town planning which could result in a chaotic spatial development pattern in the region.

41.6. It cannot be argued that such a concept of pro-active or strategic planning is not something well-known and widely applied in almost all development disciplines throughout the world.

41.7. In the answering affidavit the importance of the Gauteng Strategic Road Network at the time of the promulgation of the Infrastructure Act during 2001 is comprehensively dealt with. It establishes, the respondents, argue, that there was sufficient reason to have enacted the regulatory measures through the deeming provisions of section 10 of the Infrastructure Act as it was necessary to protect the planned routes and preliminary design of roads that were historically approved.

41.8. By 2001 the planned Gauteng Strategic Road Network was already an integral part of land use and development planning in the province and was integrated in the new planning dispensation which has emerged since the advent of democracy in 1994 – fulfilling crucial functions on various levels, *inter alia*, the overall spatial planning of the province, contributing to optimize the utilization of transport infrastructure in a more dense urban environment. In this sense the Gauteng Strategic Road Network serves what it was planned and designed for, namely, as a system where each component part has a specific role and function to fulfill.

41.9. It was subsequently important to safeguard the integrity of the planning of this strategic road network when the Infrastructure Act was drafted to serve a legitimate government purpose considered to be absolutely necessary for the reasons referred to above.

41.10. By the time the Infrastructure Act was promulgated hundreds of millions of Rand of public money had already gone into route determinations and preliminary designs.

41.11. There were also various other public interest considerations which served as a legitimate government purpose for imposing the regulatory measures to protect the integrity of the road network. The respondents point to the following considerations:

(i) Social responsibilities to prevent communities being disrupted and uprooted when roads are constructed at a later stage is a protectable interest serving a legitimate government purpose.

(ii) A further public interest consideration is the fact that protecting the integrity of the road network prevents the costly disruption of existing development, should a road have to be constructed through such areas afterwards in the event of the development being allowed in an unregulated manner.

(iii) Considerations of the economic development potential and the road network's contribution to serve strategic provincial land users which are of national and international significance are further public interest considerations that were taken into account as legitimate government purpose issues.

(iv) The consequences, if accepted route determinations or accepted preliminary designs were to be frustrated, is demonstrated by examples which illustrate that the granting of township applications within the road reserve of an accepted preliminary design would have resulted in the disruption of the social fabric of communities leading to the loss of installed services such as sewerage lines, stormwater drainage, roads and electrical reticulation, with the consequent waste of expenditure already incurred in this regard.

(v) Another example is that it could lead to re-routing the existing network on a forced basis through informal settlements with consequent social disruption of the community and concomitant abortive expenses. This could also lead to sections of the road having to be abandoned which would again result in disruption of the function of other routes.

[42] The respondents further submit that the applicants' contention that immediate expropriation is the answer lacks insight into the practical realities of day to day

government and more particularly the fact that government does not have an unlimited budget. There are many other social needs and other government functions to be performed that require government funding. They refer to what was stated by Cloete, AJA in *Steinberg v South Peninsula Municipality*[34]:

> "If this were the law a public authority such as the respondent would be obliged to acquire and compensate the owners of all rights which might be affected by a proposed undertaking in the public interest [in this instance, a future road], in advance of a final decision as to the extent of the undertaking or even whether it will be implemented at all. The consequence would be that forward planning and good government would become economically impossible."

[43] The respondents, in conclusion, submit that given the legitimate government purpose sought to be achieved, there is a compelling purpose for having imposed the regulatory measures through the application of section 10 of the Infrastructure Act.

[44] It seems to me that the respondents make 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 consequences of consigning more than thirty years of road planning to the dustbin.

[45] However, I am of the view that the means adopted by the provincial legislature, which entail the effective prohibition of any future exploitation of the affected land, are unreasonably disproportionate to the end sought to be achieved

[34] 2001 (4) SA 1243 (SCA) 1249 at para 11

thereby. A careful consideration of the reasons proffered by the respondents as justification of the deprivation does not demonstrate that the MEC requires an absolute prohibition on the grant of town planning applications in respect of land falling within the provisional road reserve of the designed routes in order to protect his legitimate interests.

[46] The protection justifiably sought by the MEC could be adequately achieved by measures falling well short of a prohibition on such applications. No reason has been advanced why the MEC's interest in the accepted preliminary designs cannot be adequately protected by less intrusive ones such as measures along the lines of those contained in section 7 of the Infrastructure Act. Those measures seem to me to adequately address the MEC's concerns. Measures of the sort contained in section 7 would, in my view, constitute a reasonably proportional means to the end sought to be achieved by the MEC.

[47] In the circumstances I find section 10(3) of the Infrastructure Act to amount to an arbitrary deprivation of the property of the applicants.

Justification in terms of section 36 of the Constitution

[48] In *First National Bank*[35] supra the Constitutional Court considered the possibility that section 36 of the Constitution[36] may come into play once an infringement of section 25(4) has been established:

> "[110] It might be contended that, once the deprivation has been adjudged to be arbitrary, no scope remains for justification under s36. By its terms, s36 of the Constitution draws no distinction between any rights in the Bill of Rights when it provides that '[t]he rights in the Bill of Rights may be limited'. Neither the text nor the purpose of s36 suggests that any right in the Bill of Rights is excluded from limitation under its provisions. In view of the conclusion ultimately reached on this part of the case, it is not necessary to decide this question finally here. It will be assumed, without deciding, that an infringement of s25(1) of the Constitution is subject to the provisions of s36.
>
> [111] It is unnecessary, on the facts of the present case, to embark in any detail on the s36(1) justification analysis, incorporating that of proportionality applied to the balancing of different interests, as enunciated in *S v Makwanyane and Another* and as adapted for the 1996 Constitution in *National Coalition for Gay and Lesbian Equality and Another v The Minister of Justice and Others*. FNB's ownership in the vehicles concerned is ultimately completely extinguished by the operation of s114 of the Act. As against this the Commissioner gains an execution object for someone else's customs debt. But, as already indicated, there is no connection between FNB or its vehicles and the customs debt in question. Under these circumstances the object achieved by s114 is grossly disproportional to the infringement of FNB's property rights."

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[35] At para 110 to 113

[36] "36. Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

(footnotes omitted).

[49] The respondents did not advance any argument to me regarding the possible application of section 36 of the Constitution should I come to the conclusion that section 10(3) of the Infrastructure Act amounts to an arbitrary deprivation of property. In the absence of any compelling argument to the contrary I must conclude, in the light of my finding that s10(3) gives rise to an unreasonably disproportionate consequence, that the section is not reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Section 10(3) of the Infrastructure Act is accordingly constitutionally invalid.

Procedural arbitrariness

[50] The applicants contend that both sections 10(1) and 10(3) are procedurally arbitrary. In the light of my conclusion that section 10(3) is substantively arbitrary and therefore constitutionally invalid there is no need to consider any further defect that the provision may suffer from.[37]

[51] The applicants' attack on the procedural fairness of section 10(1) is based on the following contentions:

[37] The applicants also contended that section 10(3) violates the guarantee in section 25(3) of the Constitution against the expropriation of property without just and equitable compensation. Section 10(3) was also attacked on the ground that it conflicts with the co-operative government obligations by the province in terms of sections 41(1), 151(4) and 154 of the Constitution.

51.1. Whereas section 6 of the Infrastructure Act, in a manner consistent with the requirements of section 25(1) of the Constitution, requires detailed public consultative processes to precede any route determination which will have these far-reaching consequences on landowners' property rights, section 10(1) obliges the MEC to proclaim the route determinations without affording landowners any process whatsoever by which their interests can be considered.

51.2. The respondents suggest that no process was necessary because interested parties were consulted at the time that the original route determinations were made. This contention, according to the applicants, breaks down for the following reasons:

(i) The original route determinations were made at a time when there was no statutory requirement that interested parties be consulted. Such consultation as took place was accordingly purely discretionary and would not necessarily comply with the requirements of procedural fairness now demanded by the Constitution.

(ii) Even on their own version, the consultation carried out by the respondents did not extend to consultation with property owners within proclaimed residential townships.

(iii) In any event, such consultation as may have taken place with respect to route determination would have had to have taken place more than thirty years ago, prior to the determination of the routes. In the intervening three decades, circumstances have changed and the identity of the affected owners may have changed.

(iv) Because the original determination three decades ago had no legal status it had no effect on the rights of landowners and this fact would have conditioned their responses to any invitations for their comment. The only deprivation of property took place when notice 2625 was promulgated under section 10(1) of the Infrastructure Act. It was at that point, and in relation to the circumstances then prevailing and the landowners then affected, that a fair process had to take place.

51.3. The applicants contend that it follows that section 10(1) is inconsistent with section 25(1) of the Constitution because it obliges the MEC to effect the deprivation of property by means of a procedure which is not fair.

[52] The respondents respond to the applicants' assertions regarding section 10(1) firstly by placing in dispute the standing of the applicants to challenge section 10(1). They argue in their heads of argument that:

> "... the attack on section 10(1) of the Infrastructure Act is academic under the circumstances, as none of the applicants are struck by the regulatory measures which took effect by virtue of section 10(1) as read with section 7. None of the applicants complain of their ownership being infringed upon by a route published in terms of section 10(1) and consequently, the Honourable Court should not consider whether section 10(1) ought to be struck down or not."

[53] The factual basis for the respondents' contention does not appear to be correct. Each applicant's property is either traversed by or is adjacent to routes which have been accepted and proclaimed a such by virtue of the MEC's notice given in terms of section 10(1). While a far greater impact on their property rights resulted from the notice given in terms of section 10(3), it does not follow that section 10(1) standing alone does not affect their property. The applicants have, in my view, established the necessary standing to challenge the constitutionality of section 10(1).

[54] The second leg of the respondents' defence to the attack on section 10(1) is put by them as follows:

54.1. Given that our Courts recognize fairness to be a relative concept which is to be applied sensibly *"to conform maximally to the exigencies and practicalities of the circumstances"*,[38] the planning process which was followed in the past, is of utmost relevance. In this regard:

(i) Extensive consultation processes were followed involving a broad spectrum of interested parties.

[38] Masetla v President of the RSA and Another 2008 (1) SA 566 (CC) at para 190

(ii) Public participation in the planning of the network was initiated in 1970. Although this was not formalized in the form of statutory requirements at the time, broad consultation did indeed take place.

(iii) The extensive consultation processes involved the compilation of an interim report which was subsequently published and distributed for comment which resulted in a final *"schematic"* framework.

(iv) In respect of each route, route planning was done following a public participation process. Only thereafter did the basic planning of the routes commence.

54.2. In the process of the basic planning of the roads mentioned in the MEC's first notice landowners were consulted. Some of the applicants and their predecessors-in-title were consulted personally and they gave comments which are still a matter of record in the relevant planning reports.

54.3. What the applicants apparently demand is that the historical consultative processes should be ignored and that they be treated on the same footing

as landowners whose property will be the subject of future route determinations. This is clearly unrealistic and impractical and not in the public interest as this will stultify the building of roads in respect of which the preliminary work has already been completed.

54.4. The limitations in relation to the rights of the applicants that are alleged to be affected is of such a nature that the processes followed in limiting those rights requires a degree of fairness much lower than, for instance, where existing ownership rights are taken away.

54.5. The respondents accordingly submit that the differentiation between the consultative processes, that is, the processes that were followed in respect of historically approved routes opposed to future determinations should be found not to offend the Constitution.

[55] I find myself broadly in agreement with the respondents' contentions. It seems to me that it would place an unnecessary and indeed intolerable burden on the MEC were he to be obliged to embark afresh upon a complex consultative procedure in order to formally accept what was historically the product of a reasonably fair procedure in any event. In the circumstances I find that section 10(1) of the Infrastructure Act is not procedurally arbitrary in its effect. As this was the only attack on section 10(1), the section cannot be found to be invalid.

The appropriate relief

[56] In the circumstances the applicants are entitled to an order declaring section 10(3) of the Infrastructure Act to be constitutionally invalid. Provincial Notice 2626, which relies on section 10(3) for its validity, must also be set aside.

[57] I consider that this would be an appropriate case in which to invoke the provisions of section 172(1)(b) of the Constitution to suspend the declaration of validity for a sufficient period to enable the Gauteng Provincial Government to correct the defect in section 10(3). I have stated earlier in this judgment that I believe the MEC has a legitimate and justifiable interest in protecting the preliminary designs for provincial roads that were previously accepted. I do not believe that he should lose all protection while the legislature ponders how best to address his needs in a constitutionally valid manner. I believe that a suitable period of suspension would be one that endures until twelve months have elapsed from the date of confirmation of this order by the Constitutional Court.

[58] The parties were in agreement that any party achieving substantial success in the matter would be entitled to costs, including the costs occasioned by the employment of two counsel. My order will reflect that agreement.

Order

[59] The following order is made:

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.

2. The order in paragraph 1 is referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution.

3. Notice No 2626 of 2003 published in Provincial Gazette Extraordinary No 331 on 20 August 2003 is set aside.

4. In terms of section 172(1)(b) of the Constitution:

   (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;

   (ii) the government of the 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.

R HUTTON

Acting Judge of the High Court

On behalf of the applicants:	D.N. Unterhalter SC
	M. Chaskalson
Instructed by:	Coetsee van Rensburg Inc
On behalf of the respondents:	G.L. Grobler SC
	N.J. Louw
Instructed by:	The State Attorney
Dates of hearing:	18 and 19 August 2008