
The Tale of Two Women

Is the Transformative Thrust Embodied in the Property Clause a Theory or a Lived Reality Where Land Reform Is Concerned?

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Introduction

Post-apartheid, the constitutional dispensation has revived debate about the content of ownership. Although the property clause encapsulates the continued existence of the notion of private ownership, its provisions indicate clearly that arguments in favour of the absoluteness of ownership are no longer sustainable, if they ever were. The property clause sets out a framework that regulates the context and manner in which deprivation and expropriation of property can take place, thus indicating the continued relevance of private ownership, but within a new constitutional framework. Accordingly, the property clause explicitly requires reform of access to land, water and other natural resources, which indicates that a more socially responsible form of ownership is envisaged for the future. The constitutional vision for property emerges clearly: it employs property (and its protection) to work towards achieving a society founded on the values of freedom, dignity and equality [footnotes omitted].

(Pope & Du Plessis, 2020: 91)

While the role and function of ownership are directed in accordance with the particular legal and constitutional systems in which it functions, in South Africa, the ‘constitutional vision for property’ (Michelman & Marais, 2018: 121) is increasingly highlighted. This calls for a ‘modest systemic status’ (Michelman & Marais, 2018: 121), thereby impacting the overall centrality of the role of ownership.

Although academics and practitioners have underscored the potential of the property clause to transform property rights and, inevitably, also society

(Van der Walt, 2009: 5),¹ this chapter is more focused on whether specific land reform legislation in South Africa dealing with vulnerable occupiers in particular has given effect to the transformative thrust of the property clause, irrespective of attempts to amend that clause and change its current form. Is it possible that the transformative thrust, integral to land reform endeavours, has remained a concept in theory only and thus elusive, or has it become a lived reality for specific beneficiaries under the land reform programme?

Although land reform is all-encompassing, with three interconnected sub-programmes, the focus of this chapter is specifically on measures regulating the relationship of landowners vis-à-vis occupiers for purposes of the Extension of Security of Tenure Act 62 of 1997, better known as ESTA. Has the transformative thrust of the property clause had any impact, specifically where the relevant relationship continues to be unequal when approached through a lens that endorses hierarchical structures in terms of which ownership is still deemed to be the apex right? (Van der Walt, 2012: 113–15; Wilson, 2021: 11).² This is critical, as intended beneficiaries under this particular sub-programme remain vulnerable sectors of South African society, like the two elderly women who form the focus of this exploration: Mrs Phillips and Mrs Malan.

The background to the measures intended to protect the persons in question will be provided first, followed by a discussion of *Grobler v Phillips* and *Nimble Investments*.³ A reflection follows thereafter, having regard to property law rules and principles. Some ideas regarding the transformative thrust of the property clause are offered, before concluding.

Vulnerable Occupiers and the Extension of Security of Tenure Act 62 of 1997

Background

Decades of focused racial spatial planning and social engineering – apartheid (Van Wyk, 2020: 1–22), succeeding centuries of colonialism

¹ ‘Law and social change are most intimately and powerfully linked, not on the grand scale of elite political struggle, but in more modest, everyday struggles about the terms on which ordinary men and women respond to and shape the limits placed on their range of autonomy. Struggles about the scope and content of property law are a paradigmatic example, because they shape the terms on which men and women access the resources necessary to sustain a dignified, autonomous existence.’

² For an exposition of the ‘rights paradigm’, see Van der Walt (2009: 53–70) and for an exposition of the hierarchical paradigm of ownership, with private individual title as the apex right, see Wilson (2021: 11).

³ *Grobler v Phillips and Others* (446/2020) [2021] ZASCA 100 (14 July 2021) and *Nimble Investments (Pty) Ltd v Malan* 2022 (4) SA 554 (SCA).

and imperialism (Terreblanche, 2002; Ngcukaitobi, 2021) ultimately resulted in a complex (Pienaar, 2014: 141–52), fragmented South African land control system (Pienaar, 2014: 160–62). While an exploratory land reform programme was embarked on under the former Nationalist government in 1991, these initial steps were too few and too superficial, calling for a much more engrained, focused effort. A fully fledged land reform programme followed post-Constitution, embedded in the property clause, in section 25(5) on redistribution (Kotzé & Pienaar, 2021: 278–322), section 25(6) on tenure reform (Hornby et al., 2017) and section 25(7) on restitution (Walker, 2008; Fay & James, 2009). Section 25(8) furthermore provides for the reform of all natural resources to the benefit of all South Africans generally, and section 25(9) refers to legislation to be promulgated for purposes of the tenure reform programme.

Measures Protecting Vulnerable Occupiers

Property law and land reform are inextricably linked (Muller et al., 2019: 675–84). Whether the South African Bill of Rights should embody a property clause, as well as the role and function thereof, was much debated (Chaskalson, 1994: 131, 1995: 222–40; Coggin, 2021). That debate revived, to some extent, when the amendment of the property clause was placed on the agenda in 2018, and a review committee was established accordingly.

A uniquely South African property clause, sculpted to deal with homebred needs and demands, was confirmed in *Certification of the Constitution*.⁴ Notably, this entailed specifically embedding a land reform programme in the property clause. Globally, property clauses are usually employed for one of two objectives: (a) to preserve and protect existing rights and interests or (b) to transform and enhance (Wilson, 2021: 19–20). Given the South African background and the fact that the majority of the sub-clauses in section 25 are indeed aimed at transforming and effecting change, and given that land reform is located in the property clause specifically, it is undeniable that the South African property clause is indeed an example of the second category of clauses (Van der Walt, 2012: 173; Wilson, 2021).⁵ Thus, endorsing and promoting land reform and adjusting property constructs and relations are part

⁴ *Certification of the Constitution of the Republic of South Africa, In re 1996 1996 (4) SA 744 (CC)*.

⁵ This highlights that the property clause was not only intended to stop discrimination and inequality, but to go beyond it – to change and to transform.

and parcel of the national transformation endeavour. Subsection 25(5)–(9) very clearly places specific duties on the state to take reasonable steps to achieve set outcomes, including by promulgating relevant and appropriate legislation. Under section 25(5) and (6), various legislative measures were indeed promulgated to benefit vulnerable persons, persons occupying land that belongs to another, with consent or in accordance with a specific right to occupy (Pienaar, 2014: 305–19; Muller et al., 2019: 498–509; Muller & Viljoen, 2021: 366–77, 380, 486–90; Wilson, 2021: 82–103)⁶ including under ESTA (Muller et al., 2019: 751–63; Muller & Viljoen, 2021: 287–96; Wilson, 2021: 57–81).⁷

Extension of Security of Tenure Act 62 of 1997 (ESTA)

The Aim of ESTA

In *Molusi v Voges*,⁸ the Constitutional Court (CC) held that ESTA ‘was enacted, among other things, to improve the conditions of occupiers of premises on farmland and to afford them substantive protections that the common-law remedies may not afford them’ (para. 7). That was necessary as:

[P]re-reform-era land law reflected the common-law-based view that existing land rights should be entrenched and protected against unlawful intrusions. The land reform legislation – ESTA in this case – changed that view. It highlights the reformist view that the common law principles and practices of land law, that entrench unfair patterns of social domination and marginalisation of vulnerable occupiers in eviction cases, need to change. (para. 39)

At issue was whether the termination of the right of residence and eviction were lawful, as it was granted under the common law on the basis of a lease agreement (para. 2). Nkabinde J highlighted that ESTA

⁶ The Land Reform (Labour Tenant) Act 3 of 1996 regulates labour tenancy. Persons falling within the definition of ‘labour tenant’ would at least be second-generation tenants, whose parents or grandparents provided services to the landowner and in return received certain occupational and agricultural use rights. There are further measures that also protect vulnerable occupiers or tenants within formalised tenancy arrangements, e.g. the Rental Housing Act 50 of 1999. While important for property law purposes, this measure does not, strictly speaking, fall within the ambit of land reform measures as such.

⁷ Section 25, combined with section 26(3) of the Constitution, has furthermore impacted greatly on the promulgation of PIE.

⁸ *Molusi and Others v Voges NO and Others* 2016 (3) SA 370 (CC).

has a very specific application to particular vulnerable categories of persons, for particular reasons (para. 39). Relying on a 'common law ground' could not force the matter into the (pre-constitutional) common-law paradigm. The finding of the Supreme Court of Appeal (SCA) that the respondents were 'perfectly entitled to rely . . . on such common law grounds . . . in support of the pleaded claim for eviction' was incorrect (para. 29). Fairness furthermore played an important role in the process as a whole. In contrast, the SCA relied on the common-law principles of the *rei vindicatio* and the reasonableness of the notice of termination (para. 45).

The judgment underlined that common-law evictions are things of the past where rural dwellers are concerned (Pienaar, 2014: 395–417; Muller et al., 2019: 700–15; Muller & Viljoen, 2021: 330–33, 431–41). Instead, *any interference* with occupation, specifically eviction, can only take place in accordance with the provisions of ESTA. Much more is at stake than merely indicating standing or that there is a ground for the application. Eviction orders may only be granted when it is just and equitable in a particular set of circumstances (ESTA, s. 19(3)).⁹ Common law and its approaches, rules and implications are explicitly excluded in this context.

Intended Beneficiaries

Occupiers who meet the requirements and fall within the ambit of ESTA stand to benefit. This includes:

- (a) 'normal' occupiers, usually farm workers or former farm workers, residing on land which belongs to another and who have or had consent or another right in law to do so;¹⁰ and
- (b) 'long term' occupiers (ESTA, s. 8(4)), who have occupied land for a period longer than ten years and who have reached the age of sixty or are employees or former employees of the owner or person in charge

⁹ Automatic review proceedings constitute a further mechanism to ensure just and equitable outcomes. This is not a fail-safe mechanism, but when applied correctly, information contained in the probation report should assist the court in deciding whether the granting of an eviction order would be just and equitable.

¹⁰ *Venter v Claasen* 2001 (1) SA 720 (LCC); *Dique v Van der Merwe* 2001 (2) SA 1006 (T). These cases confirmed that marriage partners do not acquire an occupational right purely based on the marriage relationship. Also included in this category are persons who reside on land belonging to another who are self-employed.

and as a result of ill-health, injury or disability are unable to supply labour.¹¹

When a person falls within the ambit of ESTA, procedural and substantive benefits follow (Pienaar, 2014: 395–417). However, for many years, for women in particular, the definitions and categorisations of occupier status remained contentious. ‘Indirect’ occupier status often referred to women who were deemed to derive their occupier status via spouses. While case law found that a wife could, for example, remain on the land because of the right to family life of her spouse, that in itself did not make her an occupier for purposes of ESTA.¹² This had important implications for joinder and placing women’s interests before the court (Pienaar & Geysers, 2010: 248–60). The issue was finally resolved in the Constitutional Court judgment of *Klaase v Van der Merwe*,¹³ having regard to Mrs Klaase’s fundamental rights, including her right not to be evicted from her home without a court order, made after considering all relevant circumstances, and her right to have her human dignity respected and protected (para. 52).

In light of the main objectives of ESTA and the frequently precarious position of female rural dwellers, the focus shifts to *Grobler v Phillips* and *Nimble Investments*.

The Tale of Two Women

Grobler v Phillips

Grobler v Phillips entailed an eviction application against an eighty-five-year-old widow, Mrs Phillips, who occupied property with her disabled son. Mrs Phillips had been in occupation of the property since 1947, when she was eleven years old. The appellant was successful with an eviction application in the magistrate’s court, after which the High Court set aside the eviction order on appeal. On appeal to the SCA, the order of the High Court was confirmed, on the basis that the granting of the eviction order was not just and equitable. That conclusion was reached

¹¹ Labour tenants: persons using or intending to use the land mainly for industrial, mining, commercial or commercial farming purposes and persons who have an income exceeding R13,625 per month (under General Notice 72 of 16 February 2018 in Government Gazette 41447) are excluded from the definition of ‘occupier’.

¹² *Landbounavorsingsraad v Klaasen* 2005 (3) SA 410 (LCC).

¹³ *Klaase v Van der Merwe* 2016 (9) BCLR 1187 (CC).

because of the particular circumstances of Mrs Phillips, including the long period of her occupation, that she would have been protected under ESTA had township development not taken place¹⁴ and because of a verbal promise made to her by previous landowners that she would be able to continue residing on the property for the rest of her life. While that oral right to reside, *habitatío*, was not registered and recorded against the title deed of the property, and thus not enforceable against the current landowner, this factor, considered with the other factors, enjoined the court not to grant an eviction order. That led to the CC judgment, handed down in September 2022, by Tshiqi J.

The CC-decision first relayed the litigation history (paras. 6–20), highlighting that the landowner, Mr Grobler, had already purchased the property in 2008 and had since then been unable to use his land. Justice Tshiqi underscored that eviction applications always raised constitutional matters, in particular with respect to the primary home, and that it was in this light that the interpretation of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was critical (para. 22). The court further highlighted that (a) the SCA specifically considered Mrs Phillips' wish to remain on the property and not to be moved; and (b) that the SCA erroneously found that it was the High Court that had to exercise a discretion to grant an eviction order, whereas it was actually the magistrate's court's prerogative (para. 23). A rather formalistic, technical approach to the decision, before focusing on the question as to whether it was just and equitable to grant an order of eviction (paras. 33–47).

Notably, all relevant circumstances had to be considered in deciding whether it would be just and equitable to grant an eviction order. With reference to case law decided under ESTA and highlighting that the same considerations could be considered here as well, within the context of PIE, the CC underlined that the wishes or personal preference of unlawful occupiers were not relevant (para. 36).

Next, the CC dealt with the burden of providing alternative accommodation:

Who then bears the obligation to provide alternative accommodation? Section 4(7) of PIE clearly states that such obligation lies with a 'municipality, or other organ of state or another landowner'. PIE was enacted to

¹⁴ ESTA does not apply to towns or urban areas. Township development over a long period of time engulfed the parcel of land, transforming it from agricultural to residential land. Hence excluding ESTA.

prevent arbitrary deprivation of property and is not designed to allow for the expropriation of land from a private landowner from whose property the eviction is being sought [emphasis added]. (para. 37)

Regarding competing interests of parties, due regard must be had to the considerations of justice and equity, by striking a balance between the various rights (para. 39), a process that required 'some give by both parties' (para. 40). Over time, Mr Grobler made various offers to Mrs Phillips, including reasonable accommodation in a retirement centre for a period of twelve months provided that costs were limited to R4,000 per month; relocation costs; an upmarket apartment in a secure complex where Mrs Phillips could live for the rest of her life; and a choice from a list of properties in the vicinity constituting a two-bedroom dwelling in a good condition where she would have a lifetime right of residence (paras. 41–43).

Given all of the above, the CC concluded that the SCA had failed to balance the rights of both parties. Whereas Mr Grobler had been struggling to enforce his ownership for fourteen years, since he bought the property, Mrs Phillips would continue to enjoy a decent home:

Furthermore, the Supreme Court of Appeal placed too much emphasis on Mrs Phillips' peculiar circumstances. A just and equitable order should not be translated to mean that only the rights of the unlawful occupier are given consideration and that those of the property owner should be ignored. And it does not mean that the wishes or personal preferences of an unlawful occupier are of any relevance in this enquiry. (para. 44)

Given all of the above factors and considerations, including that Mrs Phillips would not be rendered homeless as the offer of Mr Grobler still stood, the appeal was upheld and the eviction order granted.

Nimble Investments v Malan

After having resided on the farm in question since 1974, Mrs Malan received permission to continue occupying cottage 1 on the farm after her husband died in 2005. A previous attempt in 2006 to evict Mrs Malan was resolved when a lease agreement was concluded with respect to cottage 1. After the appellant bought the farm in 2008, negotiations relating to the evacuation of cottage 1, due to rezoning for purposes of establishing an Agri-Park and the extension of the highway came to naught. Renewed negotiations in 2016 resulted in the respondent agreeing to relocate to cottage 5. On the day of the relocation, members of the

household started removing roof tiles, roof sheets and trusses from cottage 1, despite being ordered to stop by the farm manager in the presence of police. An unlawful structure, built from building materials taken from cottage 1, was constructed alongside cottage 5. Throughout this process, Mrs Malan reacted vehemently. When a letter insisting that the illegal structure be dismantled and the building material returned was ignored, respondents received notices to vacate cottage 5 as their occupation had been terminated on the basis of the respondent's misconduct, which constituted a fundamental breach. At that time the respondent was sixty-eight years old. The Land Claims Court (LCC) set aside the eviction application during the automatic review process.¹⁵

In the SCA, the minority judgment was handed down per Carelse AJA, with Mbatha JA concurring and the majority judgment per Schippers JA, with Dambuza JA and Eksteen AJA concurring. Carelse AJA was satisfied that Mrs Malan met the requirements for long-term occupation. Two further issues were also dealt with:

- (a) whether the termination of the right of residence was just and equitable; and
- (b) if the termination was just and equitable, whether the eviction would be just and equitable (para. 12).

The court reiterated the well-established two-phased approach, underlining that the right of residence had to be terminated before the eviction notice could be issued. Before the termination of the right of residence, there were no discussions between the appellant and the respondents, and the respondents were not legally represented (para. 18). The respondents should have been granted an effective opportunity to make representations before their right of residence was to be terminated (para. 22). Accordingly, the minority judgment found it unnecessary to consider whether there was a fundamental breach of trust (para. 23).

The majority judgment highlighted some of the correspondence that occurred, *inter alia* a notice to Mrs Malan that her right of residence had been terminated on specific grounds, namely:

- (a) the unlawful removal of the building materials that constituted a material breach of the relationship; and

¹⁵ On the grounds that (a) the first respondent was a long-term occupier; (b) that the dispossession of the building material did not constitute a fundamental breach; and (c) that Mrs Malan was not granted an opportunity to make representations before her right of residence was terminated.

- (b) a further breach when the unauthorised and unlawful structure, to accommodate further members of her family who had not lived with her previously, was erected (para. 37).

Failure to demolish the structure would lead to eviction proceedings. When the eviction proceedings commenced, the founding papers set out that the termination of Mrs Malan's right of residence was just and equitable on three alternative grounds:

- (a) failure to pay rent;
- (b) if she was an occupier under section 8(5) of ESTA the termination was justified under section 10(1); and
- (c) if she was an occupier contemplated under section 8(4), termination was warranted under section 10(1)(a), (b) or (c) of ESTA (para. 39).

Mrs Malan opposed the eviction application, with legal representation, on the grounds that (a) she was a long-term occupier and (b) on a special plea in terms of section 8(5), namely that her right of residence could be terminated only on twelve calendar months' written notice to leave the farm (para. 40).

The first question canvassed was whether there was a breach, which could not be remedied, as contemplated in ESTA (para. 46). This was relevant as it ultimately impacted on whether an eviction order would be just and equitable. Considering all relevant factors, including the history of the relationship of the parties, the seriousness of the occupier's conduct and its effect on the parties and the present attitude of the parties to the relationship, as shown by the evidence (para. 47), the court concluded that it was not practically possible to restore the relationship between Mrs Malan and the appellant (para. 53). The SCA consequently found that the LCC had erred in finding that there was no fundamental breach in the relationship (para. 60).

The issue of whether the eviction order was just and equitable centred on the specific facts (para. 61). Notably, the legislature specifically provided for eviction on the grounds of a fundamental breach (para. 63). The court considered the conduct of both the appellant and the respondent, highlighting that the appellant offered to assist the respondent financially to relocate to serviced plots in the area, that the appellant upgraded cottage 5 with Mrs Malan's approval, that it was only Mrs Malan who qualified as a long-term occupier under section 8(4) (paras. 63–65), and that the other respondents had been occupying property rent-free for many years despite the fact that they were employed elsewhere and received an income (para. 66). The court found that the LCC

had failed to consider the evidence of the appellant's interests in not permitting unlawful conduct, the erection of the illegal structure on the farm and the continued unlawful occupation thereof (para. 67).

Whether the eviction order was just and equitable also entailed the court considering why cottage 5 became prominent in the first place: the appellant was compelled to use that particular portion of the land where cottage 1 was located because of the widening of the road and in order to secure a long-term tenant necessary for its business.

The court was satisfied that no purpose would be served to remit the matter to the magistrate, also having regard to the delay of five years. The appeal thus succeeded, and the eviction order was reinstated.

Reflection

Background

For centuries private individual title – ownership – has enjoyed a prominent position (see Shoemaker, 2021: 1698; Winchester, 2021). Winchester shows very clearly how the centrality of ownership, over centuries, has shaped the modern world: it has dominated approaches to settlement and invasion, demarcation, survey, deeds and registries and the science of mapping, ultimately impacting on all dimensions of daily life: influencing religion, belief, sovereignty, citizenship, franchise, war and peace (Winchester, 2021). Whereas private, individual title unlocked a magnitude of benefits and privileges, common or co-ownership, although still ownership, was just not on a par – as noted by Hardin to constitute the ‘tragedy of the commons’: ‘Common ownership remorselessly generates tragedy’ (Hardin, 1968: 1243). Furthermore, it was the ownership of land in particular that was sought after as ‘a necessity of all human existence, which is the original source of all wealth, which is strictly limited in extent, which is fixed in geographical position – land . . . differs from all other forms of property in these primary and fundamental conditions’ (Churchill quoted by Winchester, 2021: 180).

This also resonates with the South African concept of ownership, of private, individual title. Van der Walt highlights that, within the traditional notion of property, especially pre-Constitution, property rights are defined in terms of a hierarchy based on a binary position (Van der Walt, 2012: 114). Accordingly, having a property right entitles the holder to a remedy that will trump the interest of those who have no property rights or who have weaker rights. In the same vein, having a strong

property right (like ownership) gives a remedy that will trump weaker property rights (like limited real rights) of others, just as even a weak property right (like a limited real right) gives a remedy that will trump the holders of non-property rights (like personal rights) (Van der Walt, 2012: 115). Overall, landowners were further expected and entitled to be in undisturbed and exclusive possession of the land, resulting in any interferences – particularly in the form of unlawful occupation of land – to be dealt with harshly and swiftly, in accordance with the ‘normality assumption’ (Van der Walt, 2012: 56–59). In this regard, common-law property law has prevailed as a rule and, in the process, failed to respond adequately to the needs of persons who do not hold ownership rights over land (Wilson, 2021: 43).

All of that stood to change in a new constitutional dispensation. While protective measures were most certainly embodied in section 25, authorised, focused and considered interferences were specifically provided for, and particular duties were placed on the state in this regard: to interrogate and to question the then-existing paradigm (Pienaar, 2014: 820–22; Wilson, 2021: 57). *Molusi v Voges* underscored that common-law property rules were not relevant within the current eviction paradigm, given the transformative thrust of the property clause post-1994. That is the case specifically where ESTA and PIE are concerned. While both legislative measures were promulgated for particular reasons, providing procedural and substantive protective measures for inherently vulnerable occupiers, each has specific scopes and application: ESTA applies in rural areas, essentially on farmland, and specifically excludes townships, whereas PIE applies nationwide, encapsulating all land in South Africa when unlawful occupation takes place. Thus, depending on the specific location of the land, particular legislative measures would apply, whereas, conversely, others are excluded in principle. Therefore, although a new eviction paradigm emerged, and although land reform legislation would essentially embody the property clause’s transformative thrust, the legislation itself had limits, specifically regarding scope and application.

The Case of Mrs Phillips

Township expansion and urban development meant that ESTA, the protective measure specifically promulgated to protect vulnerable persons generally, but specifically after the age of sixty and who had been in occupation of land for more than a decade, was not available to Mrs Phillips.

A previous landowner endeavoured to assist Mrs Philips in providing some form of occupation for her lifetime. While the intention was clear, the arrangement was not formalised. The doctrinal approach to limited real rights and their enforcement against all third parties, including successors in title, meant that an oral arrangement embodied personal rights only in the absence of registration. Common law South African property law rules and principles underscore ownership as the core right, encapsulating a variety of entitlements, including the right to use and enjoy and the right to possess (Muller, 2019: 44–46; Muller et al., 2019: 103–108, 244–54; Pope & Du Plessis, 2020: 51–58, 94–99; Horn et al., 2021: 27–50). While an owner could let go of one or more of such entitlements, thereby subtracting from the *dominium*, the implications thereof were likewise doctrinally determined. Granting a right to live in a house to someone, for a lifetime, would result in a limited real right for that particular individual, enforceable *inter partes*. However, for successors in title to be bound by this arrangement, the subtraction from *dominium* would have to be formalised, recorded and publicised for the world to take note of (Muller et al., 2019: 244–54).

If ESTA did apply, Mrs Philips would have been a section 8(4) long-term occupier with concomitant protective measures. She would ultimately only be evicted in extraordinary circumstances. Under PIE, the Act that was applicable here, Mrs Philips would have had a valid defence if she was *not* an unlawful occupier – that is, if she had consent or another right in law to occupy. As highlighted above, she had neither: consent was specifically revoked by the new landowner and her life right, while relied on for many years, was not formalised and thus not enforceable against the current landowner. Had the life right indeed been registered, the normal common-law property law rules would have prevented this case going forward on an eviction basis. As previous case law has underlined¹⁶ (Boggenpoel & Pienaar, 2017: 321–32), a *habitatio* would then prevail, even and including against the landowner. Presently she was thus in unlawful occupation and stood to be evicted under PIE.

Yet in the SCA judgment Mrs Phillips, as unlawful occupier, was enabled to remain in occupation. Her informal right to occupy was balanced and weighed against the registered right of land ownership and has prevailed. It prevailed because of Mrs Phillips' particular

¹⁶ *Hendricks v Hendricks* 2016 (1) SA 511 (SCA).

personal and socio-economic circumstances, coupled with the particular historical background of the relevant parcel of land. Such a scenario would have been unthinkable pre-Constitution.

But Mrs Phillips' relief was short-lived as the CC upheld the appeal and confirmed the eviction order. That conclusion was reached by essentially highlighting the availability of alternative accommodation and approaching the investigation (and balancing act) from the landowner's perspective. In this regard, paragraph 37 of the CC judgment, quoted earlier, employed by the CC in relation to the duty to provide suitable alternative accommodation, is especially interesting. Two aspects in particular are striking: Firstly, declaring that section 4(7) of PIE 'clearly states that such obligation lies with a municipality, or other organ of state or another landowner' is technically incorrect. Ironically, the CC quotes the whole of section 7(4) earlier in the judgment, in paragraph 28, reproduced here in full:

If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an eviction if it is just and equitable to do so, *after considering all the relevant circumstances, including*, except whether the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another land owner for the relocation of an unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women [emphasis added].

Accordingly, whether suitable, alternative land had been made available, by the persons or bodies mentioned, is *one of the factors* that could be considered in deciding whether the granting of an eviction order would be just and equitable in the relevant circumstances. Notably, the rest of the section also specifically lists the following factors to be taken into account: the rights and needs of the elderly, children, disabled persons and households headed by women.

Interpreting the specific part of section 4(7) of PIE as only indicating where the duty to provide alternative accommodation lies seems misplaced and specifically ignoring the second part of the section – particularly of relevance to the current facts – is problematic.

Secondly, stating that PIE was promulgated to protect private land ownership against arbitrary deprivation as a starting point is again misplaced. There is a huge body of law dealing specifically with the reasons for and motivations behind promulgating PIE (Pienaar, 2014: 820–22; Muller et al., 2019: 751–63; Muller & Viljoen, 2021: 287–96). PIE

was clearly promulgated for various reasons, including regulating unlawful occupation of land in a fair and humane manner.

The CC focused on the balancing of rights and considering all relevant facts and circumstances and in this process highlighted the various generous offers of accommodation made by Mr Grobler to Mrs Phillips. Mr Grobler is fortunate that he was able to do so – a generous litigant, who owned a variety of properties in single, private title. The CC underlined that Mrs Phillips could not choose where she wanted to live and that her wishes were irrelevant. Ironically, Mrs Phillips never really had a free choice of home and will again not have a free choice in where she is to be settled; and she is not and never will be a homeowner.

The *crux* here is the new eviction paradigm that emerged post-Constitution, which extends beyond formal, official, property law-endorsed rights and interests. The standard of what is just and equitable enables a court's active participation in weighing and balancing rights. Yet, despite the new paradigm, the balancing act is *still* approached from the perspective of the landowner and how other rights could possibly weigh up to those of a landowner. In this balancing act, Mrs Phillips' wishes are irrelevant. Approached in this way, non-ownership rights remain *subject* to landowners' rights. This methodology is endorsed further when an investigation is approached from the departure that the relevant Act, PIE, exists to protect landowners' rights.

The Case of Mrs Malan

Notably, Mrs Malan and Mrs Phillips were both elderly, vulnerable widows with extensive periods of occupation – respectively, just under fifty and seventy years. Insecure tenure prevails when the relationship between a landowner and tenant becomes strained and eventually unsustainable. In these instances, the breakdown of the relationship results in the loss of a home as well. That remains the case so long as tenants, especially vulnerable persons, depend on someone else to provide housing and shelter. In that regard, it is imperative for the relationship to be sustained on a basis of mutual respect and understanding – with both parties having reciprocal duties and obligations.

Essentially, both judgments have shown that whether a particular right or which specific right – be it ownership or an informal right – prevails is determined by the particular facts and circumstances on the one hand and the balancing or weighing exercise on the other. While the outcome of an eviction application may thus remain somewhat unpredictable and

case-specific, because of the particular circumstances, the CC judgment has endorsed an approach that, in principle, continues to subject non-ownership rights to landowners' rights.

Ironically, as in the *Philips* case, the specific legislative measure enacted to assist persons like Mrs Malan did not assist in this particular case. While farm workers routinely enter into lease agreements, problems prevail in that employment remains linked to accommodation. Accordingly, where difficulties are encountered in either of these dimensions, tenure insecurity invariably ensues. Under these circumstances, 'just and equitable' meant that considerations of the public interest in the broadening of a national road and private, commercial interests – by supporting a long-term business lease agreement, outweighed Mrs Malan's occupational rights, particularly when her personal conduct was also taken into account. Despite the latter, for Mrs Malan the crux of the matter remained her relationship with the landowner, which placed an additional burden on the linkage of employment and accommodation.

Transformative Thrust?

Property law bears a lot of responsibility. At its core, property is society's system for distributing valuable resources. Through property law, we decide who gets what and how our relationships around resources are defined and managed.

(Shoemaker, 2021: 1695–756)

Property law has both constructive powers – in making choices and awarding and distributing rights – and destructive powers – by preventing, limiting, manipulating and taking away. Property law is also inherently linked to power relations. In the South African context, the destructive power of property law was harnessed specifically for purposes of racial domination and the corresponding utilisation of resources. Ownership, and what it entailed with respect to land and immovable property, was restricted to the minority of South Africans, with the majority largely lacking ownership, on the periphery.

Notably, for purposes of the overarching racially based land control system, the precise concept of ownership was further adjusted. In this regard, certain entitlements were highlighted, such as the general point of departure that a landowner should be in exclusive and uninterrupted possession of property, which rights operated in a high-handed fashion in relation to all other 'lesser rights', constituting anything less than ownership. Ironically, given the goal of racial separateness, landowners

could not consent to the occupation of land in contravention of the Prevention of Illegal Squatting Act 52 of 1951 (see Pienaar, 2011: 317–38),¹⁷ thereby further curtailing the specific content and entitlements of landowners – all in pursuit of the overarching goal of racial engineering. Accordingly, within the South African context, the specific concept, content and form of private ownership embodied a uniquely South African-created concept. It is the manipulation and employment of this concept that is embodied in the ‘rights and wrongs of property law’. It is also this specific concept and system as a whole that had to be dismantled and reconfigured post-1994 in light of the property clause.

In principle, various avenues were possible:

- dismantling the concept of common-law ownership altogether and providing a brand-new concept in its place;
- keeping the concept basically unchanged, preserving its essential traits and characteristics;
- or finding a midway: retaining some of the essential characteristics and traits of private ownership but ensuring some inroads into its content and effect.

It would seem as if the last option was followed in South Africa by employing two mechanisms specifically:

- (a) promulgating legislation that specifically encroaches on and invades the core of private ownership; and
- (b) enabling courts to approach and interpret extant law in new, innovative ways and/or to interpret and apply legislative measures – both pre- and post-Constitution – purposively aligned with the Constitution, thus underscoring the transformative thrust.

Regarding the first mechanism, promulgating legislation, the advantages of relying on particular provisions are often also tied to their own limitations. Whereas boundaries may be extended and protective measures enhanced by way of purposive interpretation, the limitations inherent in legislation remain relevant. That is the case where a specific measure only applies in particular instances or only in relation to specific jurisdictional facts, such as the location of the land and property in question. Whereas the

¹⁷ A landowner could not consent to the occupation of a person who did not fall within the ambit of the ‘allowed racial groups’. Even if a landowner would want to consent to a black person occupying their property, it was prevented.

protective measures operate generally, it would not cover all land and certain exclusions would result. Therefore, even if the transformative thrust of the property clause is embodied in land reform-related legislation, like ESTA, inevitably not all persons would be assisted by legislation.

For Mrs Phillips, it was precisely new legislation, PIE, embodying a new standard of 'just and equitable' that led to her result, though not the legislative measure that was promulgated and intended to benefit her in the first place. With reference to Wilson's categorisation of 'outsiders' and 'insiders' (Wilson, 2021: 6) and Van der Walt's reference to 'property in the margins' (Van der Walt, 2009: 230), Mrs Phillips became an insider for an interim period only, after the SCA judgment was handed down. When the CC confirmed the eviction order, Mrs Phillips, as an elderly woman living with a disabled son in the only home she had known for most of her life, pursuant of a promise made to her by previous landowners, became an outsider again, living on the margins.

In principle, transformative potential is not limited to legislation. It remains for courts and presiding officials to garner the potential of extant law, searching specifically for gaps or spaces where boundaries can be shifted and protective measures extended (Wilson, 2021: 10).¹⁸

To date (Coggin, 2021: 1–37),¹⁹ the focus has mainly been on the balancing or negotiation of rights, often within the 'just and equitable' context or in the balancing of competing constitutional rights.²⁰ As illustrated above, the result is essentially context- and fact-specific, meaning that the transformative thrust, when encountered, is often sporadic, unpredictable and limited. While this approach may have, incrementally, over time, benefited some persons, depending on the actual circumstances, the question is whether this is enough. Is this what the transformative thrust of the property clause and the Bill of Rights envisioned? The balancing and/or renegotiating of rights depend on countervailing rights to be adjudicated on or unpacked, usually in a court of law. In this regard, the playing field is somewhat limited. Furthermore, by focusing on the balancing of rights, the concept of property and what it entails within a transformative framework – specifically transforming

¹⁸ Wilson argues that rights create spaces in which humans can act to pursue their goals. Rights protect agency and law protects rights.

¹⁹ A body of law has, however, developed regarding constitutionality of legislation, tested against s. 25(1) and (2), also impacting on what constituted 'property' for the purposes of s. 25.

²⁰ *Daniels v Scribante and Another* 2017 (4) SA 341 (CC). In this case, the right to dignity was balanced with ownership rights to effect improvements to a home.

the property system and prevailing power relations, access to and utilisation of resources, specifically land – has largely fallen by the wayside. Notwithstanding endorsing ‘one system of law’ (*Pharmaceutical Manufacturers*, para. 44; Van der Walt, 2012: 20),²¹ actually locating non-traditional ownership and non-property rights within the single system of law has remained challenging, for various reasons. First, despite endeavouring to promote a spectrum of rights, courts still approach ownership as the core right, as the point of departure, with all other rights either flowing from or competing with private individual title and where non-ownership rights do prevail, it is seen as an exception, and often only temporary. Secondly, existing recording and formalisation mechanisms remain largely aligned with deeds and registries systems built on formal private, individual title foundations (Pienaar, 2021: 215–44, 235–36). Thirdly, existing conceptions of property and property law continue to influence and inhibit broader societal values from being considered in relation to the utilisation of property and resources (Shandu & Clark, 2021: 39–77). In this regard, economic, commercial and financial considerations routinely overshadow social or basic-needs concerns. Shandu and Clark explain the preference for property rights within an economic paradigm on the basis that they can be measured, are attributed an economic or financial value and are traded in terms of existing markets (Shandu & Clark, 2021: 46). It is in this light that Shandu and Clark instead argue for a values-based approach to property relations in South Africa (Shandu & Clark, 2021: 39–77). With reference to a handful of property theories, including property as a ‘web of interconnected rights’ (highlighting environmental and sustainability considerations) (Shandu & Clark, 2021: 52–53), property as a continuum of land rights (highlighting recognition of the realities under which people live) (Shandu & Clark, 2021: 53) and property as personhood-theory (highlighting identity, personal connection and flourishing) (Shandu & Clark, 2021: 53–56), the authors argue that, viewed together, these approaches advance a singular idea:

The current constructions of property are limited due to property’s overemphasis on a single set of values – values that are largely economic,

²¹ *Pharmaceutical Manufacturers Association of South Africa: In re Ex Parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC). ‘There is only one system of law. It is shaped by the Constitution which is the supreme law and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.’

exclusionary and exploitive. Each of the theories aims to realise a more social conception of property law by requiring for current property systems to be radically reconstructed to make room for a more varied set of values, including social, ecological, emotional, and needs-based values. In short, these theories advocate that property should serve a social function. (Shandu & Clark, 2021: 57)

The point of departure is thus: not only are property rights limited externally by way of state regulation (tested against the Bill of Rights) but also limited internally (for example, neighbour law) and, more importantly, *also by their social function*. Ultimately, the authors argue, without unpacking a specific methodology, that the principles underlying the property law system ought to shift and align with the reality of South Africa's historical and constitutional context (Shandu & Clark, 2021: 60).

Such an endeavour would be difficult, but not impossible, under the current unamended property clause (Parliament of the Republic of South Africa, 2021). Constitutional endorsement is found in section 25(5) and (6), requiring reasonable legislative *and other steps* to broaden access to land and improve tenure security, respectively, and in section 25(8), where the reform of all natural resources is provided for. In this regard, two overarching projects are suggested: a land reform legal framework project on the one hand and a reconceptualisation of property law project on the other. Arguably, each would require particular tools and mechanisms and pursue specific objectives. One is not more important than the other. Both are ultimately aimed at a reconceptualised property law system and the protection of wider social (and environmental) interests. Concerning the former, the groundwork had already been laid, to some extent, by way of, for example, the 2019 final Land Panel Report from the Presidential Advisory Panel of Land Reform and Agriculture (PAPLRA, 2019). It is suggested that these recommendations be updated and scrutinised with the transformative thrust objective in mind, as the Report was essentially focused on the amendment of the property clause to enable expropriation with nil compensation. Such reconsideration will impact *inter alia* on policy, legislation and departmental directives. This could include addressing gaps in land reform legislation dealing with vulnerable occupiers and promulgating mechanisms to de-link employment and accommodation. Proposals in the Report linked to the Land Records Bill (see Kingwell, 2017: 44–93; PAPLRA, 2019), which enables a broad spectrum of land rights, need further urgent attention. The reconceptualisation of the South African property system would need dedicated effort and focus especially from academics, practitioners

and the bench. Some of the groundwork has already been done by scholars in terms of various property theories and approaches that endorse a broader spectrum of the values-based system (Van der Walt, 1997, 2009, 2012; Shandu & Clark, 2021: 39–77; Wilson, 2021). Inevitably, such reconceptualisation would also impact on how property law courses are structured and presented at tertiary education and training institutions. The substantive reconceptualisation of property rules and principles and the land reform legal framework must form a holistic, realigned whole – in general, but especially regarding recognition, enforcement and recording of all relevant rights. Thus *actually* embodying the transformative thrust of the property clause *in a single system of law*.

Conclusion

Property law is bolstered by opportunity and potential and burdened by responsibility. In this light, Van der Walt's earlier work remains pertinent and relevant. By highlighting the fundamental purpose of the property clause, he underlines that existing rights and entitlements can be changed, restricted and subjected to new or stricter controls and limitations. There is further no reason 'why property interests not recognised or protected by private law could be acknowledged and protected by the property clause' (Van der Walt, 2012: 122). The fundamental purpose of the property clause determines whether an entitlement would enjoy protection. This purpose requires a 'just and equitable balance between existing, private property interests and *the public interest in the transformation of the current property regime*' (Van der Walt, 1997: 8). Achieving this balance embodies two components: purposively scrutinising (reading, understanding, interpreting) and applying the property clause 'with due regard for the tensions between the individual and society, between the privileged and the underprivileged, between the haves and the have-nots, between the powerful and the powerless'; and, secondly, doing so in a way that is 'not influenced unwittingly' by 'unsuitable, private-law presuppositions' (Van der Walt, 1997: 13).

While the tale of two women was relayed here, the issue extends beyond Mrs Phillips and Mrs Malan. Ultimately at stake – *in the public interest* – is a transformed property system, where extant hierarchical and binary approaches to property rights are reconceptualised and reconfigured in light of South Africa's colonial and apartheid legacy. Only then can human dignity, equality and freedom become a lived reality for all.

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