

The constitutionality of acquisitive prescription: a section 25 analysis

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1 Introduction

Acquisitive prescription (“prescription”) is one of the original methods of acquisition of ownership in South African law.¹ No assistance is required from the original owner; ownership vests in the possessor *ex lege* the moment he satisfies all the requirements for prescription. Prescription law was first consolidated by the Prescription Act 18 of 1943 (the 1943 act),² but the Prescription Act 68 of 1969³ is now the main authority in this context.⁴ The common law still remains an important source, as neither of the prescription acts codifies this field of law.⁵

According to the 1969 act, a person (“the possessor”) becomes owner of a thing⁶ after having possessed it openly, continuously and as if he was the owner for an uninterrupted period of 30 years.⁷ The type of possession required for prescription is *possessio civilis*⁸ (civil possession), which consists of two

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¹ s 2(2) of the Prescription Act 18 of 1943 and s 1 of the Prescription Act 68 of 1969. See also Voet *Commentarius ad Pandectas* 41 3 1; De Groot *Inleidinge* 2 7 1; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman’s The Law of Property* (2006) 160; Sonnekus and Neels *Sakereg Vonnisbundel* (1994) 309 and Van der Merwe *Sakereg* (1989) 268. Although limited real rights such as servitudes can also be acquired through prescription, this article only pertains to the acquisition of ownership through acquisitive prescription.

² This act came into operation on 19 April 1943.

³ This act, which repealed the 1943 act, came into operation on 1 December 1970 and is prospective in nature.

⁴ Since 30 November 2000 most prescription cases will be governed solely by the Prescription Act 68 of 1969, which is the reason why we only refer to the requirements of this act in the main text. Nonetheless, the 1943 act may still be applicable in cases involving extreme instances of postponement.

⁵ See *Bisschop v Stafford* 1974 3 SA 1 (A) 7; *Pienaar v Rabie* 1983 3 SA 126 (A) 135 and *Morkels Transport (Pty) Ltd v Melrose Foods (Pty) Ltd* 1972 2 SA 464 (W) 467, where this position is confirmed.

⁶ Although “a thing” in terms of the act encompasses both movable and immovable objects, this article only focuses on prescription of land.

⁷ According to s 1 of the Prescription Act 68 of 1969, “a person shall by prescription become the owner of a thing which he has possessed openly and as if he were the owner thereof for an uninterrupted period of thirty years or for a period which, together with any periods for which such thing was so possessed by his predecessors in title, constitutes an uninterrupted period of thirty years”.

⁸ Voet 41 2 1, 41 2 3; *Pienaar v Rabie* (n 5) 134 and *Cillie v Geldenhuys* 2009 2 SA 325 (SCA) par 8. See also *Joles Eiendom (Pty) Ltd v Kruger* 2007 5 SA 222 (C) par 28; *Sapphire Dawn Trading 42 BK v De Klerk* case no 693/2008 (FSB) (unreported) par 8-9 and *Morgenster 1711 (Pty) Ltd v De Kock* NO 2011 JDR 1761 (WCC) par 14.

elements, namely the *animus domini* (mental) and *corpus* (physical).⁹ The *animus domini* element entails possession with the intention of an owner,¹⁰ while the *corpus* element refers to the physical detention of the property. Anything less than *animus domini* (such as the limited *possessio naturalis*¹¹ of a lessee or usufructuary, being a mere *detentor*,¹² *commodatarius*¹³ or someone exercising a servitude over a servient tenement) does not qualify as possession as the owner.¹⁴ Should a possessor recognise the rights of the owner by, for instance, making a request or expressing a willingness to rent or to buy the property, possession automatically ceases to be *animus domini*.¹⁵ Still, the law does not require someone to possess property in the belief that he *is* the owner; all that is required is that he must possess it *as if* he is the owner.¹⁶ In this regard the *animus domini* element and “as if owner” requirement of the 1969 act are synonymous.¹⁷ The subjective mind set of the possessor is irrelevant for purposes of prescription, which means that both *bona* and *mala fide* persons are able to possess property *animus domini*.¹⁸ It is worth emphasising that it is difficult to satisfy the *animus domini* element, a fact which is borne out in case law.¹⁹

Common-law authors, academic commentators and judges mainly regard prescription as an unproblematic legal rule in South African law, which is clear from the fact that they simply describe (and justify) it as a rule that promotes legal certainty and punishes neglectful owners for not looking after their interests.²⁰ However, the seemingly uncontroversial nature of this legal institution was challenged before the European court of human rights in *JA Pye (Oxford) Ltd v United Kingdom*.²¹ In this decision the fourth chamber of the European court found that adverse possession – the English law equivalent of acquisitive prescription – was in conflict with article 1 of the First Protocol (“article 1”) to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.²² The fourth chamber’s judgment – although overturned on appeal by the grand chamber – evoked an outcry from property-law scholars in the European

⁹ *Pienaar v Rabie* (n 5) 128.

¹⁰ Voet 44 3 9 and *Pienaar v Rabie* (n 5) 128. See also *Welgemoed v Coetzer* 1946 TPD 701 712-713; *Hayes v Harding Town Board* 1958 2 SA 297 (N) 299 and *Wood v Baynesfield Board of Administration* 1975 2 SA 692 (N) 701. See further Badenhorst *et al* (n 1) 162 and Van der Merwe (n 1) 275.

¹¹ “Mere or natural possession”, according to Hiemstra and Gonin *Trilingual Legal Dictionary* (2006) 256-257.

¹² Hiemstra and Gonin 177 define *detentor* as the mere “holder” of the thing.

¹³ Hiemstra and Gonin 166 define *commodatarius* as a “lender (for use)”.

¹⁴ *Glaston House (Pty) Ltd v Cape Town Municipality* 1973 4 SA 276 (C) 281; the *Wood* case (n 10) 702 and the *Joles* case (n 8) par 30.

¹⁵ Voet 44 3 9; *Malan v Nabygelegen Estates* 1946 AD 562; *Minister van Landbou v Sonnendecker* 1979 2 SA 944 (A) 945 and the *Sapphire* case (n 8) par 9.

¹⁶ the *Bisschop* case (n 5) 9-10; *Pienaar v Rabie* (n 5) 137; *Minnaar v Rautenbach* 1999 1 All SA 571 (NC) 577 and *Ploughmann NO v Pauw* 2006 6 SA 334 (C) par 36. See also Badenhorst *et al* (n 1) 162.

¹⁷ the *Cillie* case (n 8) par 8; the *Minnaar* case (n 16) 574-575; the *Joles* case (n 8) par 28 and the *Sapphire* case (n 8) par 7 9.

¹⁸ *Campbell v Pietermaritzburg City Council* 1966 2 SA 674 (N) 680 and the *Morkels* case (n 5) 474. See also Badenhorst *et al* (n 1) 160-161.

¹⁹ See the *Sapphire* case (n 8); *Summers v Kiewitz* case no 14722/10 (WCC) (unreported) and the *Morgenster* case (n 8). See also Robertson “The difficulty of proving the essentials of acquisitive prescription” 2000 *THRHR* 158-161.

²⁰ Voet 41 3 1; De Groot *Inleidinge* 2 7 4; *Pienaar v Rabie* (n 5) 136; the *Morkels* case (n 5) 468 477-478 and the *Minnaar* case (n 16) 577. See also Badenhorst *et al* (n 1) 161 and Van der Merwe (n 1) 268-269.

²¹ 2006 43 EHRR 3 (IV).

²² (n 21) par 73-76.

Union who feared that the fourth chamber's decision also invalidated acquisitive prescription in their countries.²³ The fourth chamber's judgment highlights the possibility that prescription might also be in conflict with the South African property clause, namely section 25 of the Constitution of the Republic of South Africa 1996.

To understand the implications of the *Pye* decision in terms of the South African property clause, it is necessary to briefly set out the history of this case, the requirements for adverse possession in English law as well as how Article 1 operates in the setting of the European Union. The next section below presents a short discussion of each of these topics. The third section analyses prescription from a South African constitutional perspective. This article focuses only on the section 25(1) deprivation issue, namely whether there has been a deprivation of property that complies with the section 25(1) requirements. For that purpose the argument in the third section adopts the methodology set out by Ackermann J in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*.²⁴ The final section concludes that sufficient reasons do exist for acquisitive prescription in South African law and that it therefore results in a properly authorised, justified and therefore non-arbitrary deprivation of property, which is in line with section 25(1).

2 Background to the *Pye* case and article 1 of the European convention²⁵

Pye – a private company – was the registered owner of 25 hectares of land (“the disputed land”) in the United Kingdom, which land was occupied by neighbouring owners (“the Grahams”) in terms of a grazing agreement until the end of 1983. When the grazing agreement expired, *Pye* refused to enter into a fresh agreement with the Grahams. However, the Grahams remained in occupation of the land and although they approached *Pye* twice for purposes of renewing the agreement (in 1984 and 1985 respectively), *Pye* did not respond to these requests. Apart from an agreement in 1984, when *Pye* agreed to sell the Grahams the standing crop of grass on the land, there were no further dealings between the Grahams and *Pye* after 1985. From this time onwards the Grahams intended to use the land until requested by *Pye* not to do so. In 1997 Graham approached the land registry and claimed that he had acquired title over the land by way of adverse possession.

Adverse possession, although being the legal rule in English law that is most comparable to acquisitive prescription in civil law, is not the same as prescription. This is because adverse possession is wholly a creature of statute and not an original method of acquisition of ownership.²⁶ Still, adverse possession extinguishes the owner's title if someone else has been in undisturbed possession of his land for an

²³ See, eg Caterina “Some comparative remarks on *JA Pye (Oxford) v The United Kingdom*” 2007 *European Review of Private Law (ERPL)* 273; Sagaert “Prescription in French and Belgian property law after the *Pye* judgment” 2007 *ERPL* 265; Radley-Gardner “*Pye (Oxford) Ltd v United Kingdom: The view from England*” 2007 *ERPL* 289 and Milo “On the constitutional proportionality of property law in the Netherlands” 2007 *ERPL* 255.

²⁴ 2002 4 SA 768 (CC).

²⁵ This section is partly based on and in places resembles passages in par 3.2 of ch 3 and par 5.3.2.4.2 of ch 5 in Marais *Acquisitive Prescription in View of the Property Clause* (2011 diss SA).

²⁶ *Roberts v Swangrove Estates Ltd* 2008 Ch 439 par 20 per Mummery LJ. See also Gray and Gray *Elements of Land Law* (2009) par 9 1 3 and Smith *Property Law* (2009) 79. For a more comprehensive discussion of how adverse possession operates in English law, see par 3.2 of ch 3 in Marais (n 25).

uninterrupted period of twelve years.²⁷ Possession for purposes of adverse possession also consists of two elements, namely factual possession (*factum possessionis*) and the intention to possess (*animus possidendi*).²⁸ Factual possession “signifies an appropriate degree of physical control”²⁹ and resembles the *corpus* element of *possessio civilis* in South African prescription law. The biggest difference between adverse possession and prescription lies in the *animus possidendi* element. English law, contrary to the *animus domini* of civil law, does not require the intention to own but merely the intention to possess.³⁰ It follows that it is “easier” to succeed with an adverse possession claim in English law than would have been the case under a civil-law prescription regime, as the *animus possidendi* can co-exist with an express willingness to pay rent or to take a tenancy from the owner.³¹ This position differs greatly from South African law, where such a willingness – if clearly discernible – will negate the intention of possessing property as the owner. This fundamental difference between common-law adverse possession and civil-law acquisitive prescription is neatly illustrated by the facts of the *Pye* case. Mr Graham said in his draft witness statement that, had Pye requested him to pay rent, he would happily have paid. In other words, Mr Graham unequivocally expressed a willingness to pay rent, which would have prevented the running of prescription in South African law. Nonetheless, in English law such willingness is not inconsistent with possession *animo possidendi*.

The court *a quo* found that the Grahams had satisfied the requirements for adverse possession and gave judgment in their favour, although Neuberger J expressed his dissatisfaction with this apparently unjust result. Pye appealed to the court of appeals, which found that the Grahams did not possess the land with the requisite *animus possidendi* and thus overturned the decision of the court of first instance. The Grahams in turn appealed to the house of lords, which reversed the decision of the court of appeals and restored Neuberger J’s judgment. Pye then took its case to the fourth chamber of the European court of human rights, averring that adverse possession was in conflict with article 1 of the first protocol to the European convention. The fourth chamber agreed with Pye and decided that adverse possession upsets the “fair balance” required by Article 1 in that it amounts

²⁷ See s 15(1) and sch 1, par 8 of the Limitation Act 1980. The position differs depending on whether a case concerns adverse possession of unregistered or registered land; see s 17 of the Limitation Act 1980 and s 75(1)-(2) of the Land Registration Act 1925. Although English adverse possession law in the context of registered land underwent fundamental changes in 2003 with the enactment of the Land Registration Act 2002, this act is irrelevant for present purposes because it came into operation after the *Pye* case was lodged. For this reason we restrict our discussion of adverse possession to the pre-Land Registration Act 2002 English law.

²⁸ *JA Pye (Oxford) Ltd v Graham* 2003 1 AC 419 432-433, 435 and *Ofulue v Bossert* 2009 UKHL 16 par 67. See also Gray and Gray (n 26) par 9 1 43 and Smith (n 26) 72.

²⁹ *Powell v McFarlane* 1979 38 P & CR 452 470.

³⁰ *Buckinghamshire County Council v Moran* 1990 Ch 623 643 and *JA Pye (Oxford) Ltd v Graham* (n 28) 436-437. See also Gray and Gray (n 26) par 9 1 53.

³¹ *Ocean Estates Ltd v Pinder* 1969 2 AC 19 24 per Lord Diplock and *JA Pye (Oxford) Ltd v Graham* (n 28) 438. See also Gray and Gray (n 26) par 9 1 48.

to an uncompensated expropriation.³² Finally, the United Kingdom government intervened and appealed this decision to the grand chamber, which overturned the fourth chamber's decision and held that adverse possession *is* in line with article 1 in that it merely results in a legitimate deprivation of property.³³

Although the grand chamber settled the issue of the constitutionality of adverse possession in terms of the European convention, the *Pye* case underscores the importance of the question whether acquisitive prescription will pass scrutiny under section 25 of the South African constitution. Indeed, the possibility that prescription could amount to an uncompensated expropriation in favour of the possessor was recently argued before the Western Cape high court in *Summers v Kiewitz*.³⁴ Although the court rejected the expropriation argument in that instance, the *Summers* case illustrates the possibility that the constitutionality of prescription may have to be dealt with by South African courts. For this reason this article sets out to ascertain whether prescription is in line with section 25 of the constitution. In what follows we present a constitutional analysis of prescription in terms of section 25(1), asking the question whether the forced transfer of ownership brought about by prescription constitutes a deprivation of property that satisfies the requirements of that section. The follow-up question whether the forced transfer of ownership brought about by prescription could be seen as an expropriation, and if so, whether that expropriation satisfies the requirements of section 25(2) and (3), will be discussed in a second article to be published separately.

3 *Acquisitive prescription in view of section 25(1) of the constitution*³⁵

3.1 Introduction

Section 25 of the constitution consists of two main parts, namely protective provisions (s 25(1)-(3), read with s 25(4)) and reform provisions (s 25(5)-(9), read with s 25(4)).³⁶ These two parts embody a tension within section 25, as the provision aims both to protect existing property rights and to promote transformation in the form of land and other reforms.³⁷ Still, it is possible to read section 25 as a coherent whole and to view it as constituting a “creative tension”, without falling prey to conflicting interpretations.³⁸ To this end it is necessary to interpret the property

³² Van der Walt *Constitutional Property Law* (2011) 190-191 warns of the possibility of confusion when using a 1 for comparative purposes. In this sense the term “deprive” in the second rule of a 1 does not refer to the state's police power to regulate property but rather to expropriation. Thus, decisions of the European court of human rights that concern instances of “deprivation” under the second rule must not be understood as entailing deprivation in terms of s 25(1) of the South African constitution. Therefore, this article uses the term “expropriation” when discussing the second rule while “deprivation” is used to describe the type of interference mentioned in the third rule. For purposes of clarity, we use the South African law equivalents when referring to the types of interference set out in the second and third rules of a 1.

³³ The reasoning behind the judgments of the fourth and grand chambers is discussed in greater detail in section 3.2.4.2 below.

³⁴ (n 19) par 62.

³⁵ This section is mainly based on and in places resembles par 4 4 3-4 4 4 and 5 3 of ch 4 and 5 respectively in Marais (n 25).

³⁶ Van der Walt (n 32) 16. Van der Walt further divides these two main parts into four clusters of provisions, namely deprivation (s 25(1)), expropriation (s 25(2)-(3)), interpretation (s 25(4)) and land and other related reforms (s 25(5)-(9)).

³⁷ Van der Walt (n 32) 16.

³⁸ See Van der Walt (n 32) 22, citing *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

clause purposively.³⁹ This approach accords with that of the constitutional court's *dicta* to the effect that section 25 must be viewed "as part of a comprehensive and coherent Bill of Rights in a comprehensive and coherent constitution".⁴⁰

Section 39 (the interpretation clause) stipulates how courts must interpret the bill of rights and legislation:

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

Section 8(2) of the constitution provides that a provision in the bill of rights binds both natural and juristic persons. Section 8(4) determines that juristic persons, like companies, are entitled to rights enshrined in the bill of rights "to the extent required by the nature of the rights and the nature of that juristic person". In this context the constitutional court in the *FNB* case confirmed that juristic persons are entitled to protection under section 25.⁴¹ As a result, both private individuals and juristic persons are beneficiaries of the constitutional protection of property rights under the property clause.

The next issue that requires consideration is the application of the bill of rights, since prescription mostly occurs between private parties (ownership vests in an individual after possessing the property of another person openly and as if owner for 30 years). The question is therefore whether section 25 applies horizontally, in other words to conflicts between private parties. Direct horizontal application entails that individuals can rely directly on a provision in the bill of rights to protect themselves against infringements of their rights through the conduct of others.⁴² Section 8(2)⁴³ allows a private party to invoke a provision in the bill of rights when such person's rights are violated by the conduct of another individual. Subjecting prescription to constitutional scrutiny might therefore look like direct horizontal application of section 25. However, closer analysis reveals that constitutional scrutiny of prescription in terms of section 25 does not, in fact, amount to direct horizontal application but rather entails either vertical or indirect horizontal application of section 25.⁴⁴ According to section 8(1), the bill of rights "applies to all law, and binds the legislature". Furthermore, section 39(2) provides that "[w]hen interpreting legislation ... every court ... must promote the spirit, purport and objects of the Bill of Rights". Acquisitive prescription is allowed for and regulated by legislation enacted by parliament, in the form of the prescription acts, and it is these acts that must be in line with the bill of rights as they provide the statutory

³⁹ Van der Walt (n 32) 22 29-56. The constitutional court has indicated that it will interpret the constitution purposively; see the *Port Elizabeth* case (n 38) par 14-23 and the *FNB* case (n 24) par 63-64.

⁴⁰ the *FNB* case (n 24) par 63.

⁴¹ (n 24) par 45. See also *Ex parte Chairperson of the Constitutional Assembly in re Certification of the Constitution of the Republic of South Africa*, 1996 1996 4 SA 744 (CC) par 57.

⁴² Currie and De Waal *Bill of Rights Handbook* (2005) 43.

⁴³ "A provision in the Bill of Rights binds a natural or a juristic person ...".

⁴⁴ Van der Walt (n 32) 56-66 argues that it is highly unlikely that s 25 will ever apply directly horizontally to a property dispute. To the same effect is Roux "Property" in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2003) 46-6 – 46-8.

authority for the forced transfer that takes place when prescription occurs.⁴⁵ Insofar as the prescription acts do not codify prescription law and the common law still plays a role, indirect horizontal application of section 25 may be required to steer the development of the common law in terms of section 39(2).

In essence, the prescription acts provide that a possessor acquires ownership in property – by way of original acquisition of ownership – after such person possessed it openly and as if owner for an uninterrupted period of 30 years.⁴⁶ A possessor does not acquire ownership by merely possessing the property of another person under certain specified circumstances, but through the prescription acts that enable him to acquire ownership once all the requirements are satisfied. Thus, although the state seems to play no direct role in prescription cases, it does in fact do so through its enactment and enforcement of the prescription acts that allow the acquisition of ownership by the possessor. It follows that the state, through the enforcement of the prescription acts, authorises and regulates the forced transfer of property from the owner to the possessor when the possessor satisfies the prescription requirements. Prescription is therefore an example of a forced transfer effected in terms of and enforced under the authority of state law. Consequently, an owner wishing to invoke section 25 to protect his ownership against prescription claims will not challenge the conduct of the possessor, but must challenge the legislation that allows the extinguishment of his ownership. This analysis illustrates that constitutional scrutiny of prescription is an instance of vertical and indirect horizontal application of section 25.

3.2 The *FNB* case methodology

3.2.1 Introduction

In the *FNB* case, the “leading judgment regarding the property clause”⁴⁷ to date, Ackermann J set out a seven-stage methodology for adjudicating section 25 disputes:

- “(a) Does that which is taken away from [the property holder] by the operation of [the law in question] amount to property for purpose of s 25?
- (b) Has there been a deprivation of such property by the [organ of state concerned]?
- (c) If there has, is such deprivation consistent with the provisions of s 25(1)?
- (d) If not, is such deprivation justified under s 36 of the Constitution?
- (e) If it is, does it amount to expropriation for purpose of s 25(2)?
- (f) If so, does the [expropriation] comply with the requirements of s 25(2)(a) and (b)?
- (g) If not, is the expropriation justified under s 36?”⁴⁸

This article proceeds to analyse acquisitive prescription with reference to the first four questions of the framework of the *FNB* case methodology to determine whether it is in line with section 25(1).⁴⁹

⁴⁵ See also Currie and De Waal (n 42) 44.

⁴⁶ See s 2 of the Prescription Act 18 of 1943 and s 1 of the Prescription Act 68 of 1969.

⁴⁷ *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) par 35. This position was recently confirmed in *Haffejee NO v Ethekwini Municipality* 2011 6 SA 134 (CC).

⁴⁸ We formulate the questions of the *FNB* case as set out by Roux (n 44) 46-3 (footnotes omitted). These questions were originally set out in the *FNB* case (n 24) par 46.

⁴⁹ This methodology was followed in *Nhlabathi v Fick* 2003 2 All SA 323 (LCC); *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bissett v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 1 SA 530 (CC); the *Reflect-All* case (n 47); *Offit Enterprises (Pty) Ltd v COEGA Development Corporation (Pty) Ltd* 2011 1 SA 293 (CC) and the *Haffejee* case (n 47).

3.2.2 Does that which is taken away amount to “property” for purpose of section 25?

The first question concerning the constitutional validity of acquisitive prescription is whether the affected interest amounts to “property” that enjoys constitutional protection under section 25. In the *FNB* case the court held that ownership of corporeal movables, and also ownership of immovables, “must ... lie at the heart of our constitutional concept of property”.⁵⁰ This *dictum*, read with section 25(4)(b),⁵¹ makes it clear that ownership of land qualifies as property for purposes of section 25. Through acquisitive prescription, an owner loses ownership in land – a corporeal immovable – to a possessor when that possessor satisfies the requirements set out by the prescription acts. It follows that the property interest in the context of prescription, namely ownership in land, qualifies as “property” for purposes of section 25.

3.2.3 Has there been a deprivation of property?

The constitutional court in the *FNB* case attached a wide meaning to deprivation, defining it as “any interference with the use, enjoyment or exploitation of private property”.⁵² Ackermann J distinguished between deprivation and expropriation, stating that any interference with property amounts to deprivation, while only some deprivations amount to expropriation.⁵³ In other words, expropriation constitutes a sub-species or sub-category of deprivation.⁵⁴ Against this background it is worth emphasising that prescription does not merely limit an owner’s use and enjoyment of property; it results in the loss of ownership in its entirety. If one applies the wide definition of deprivation laid down in the *FNB* case to this situation it is clear that prescription must constitute deprivation. However, the definition for deprivation seems to have been narrowed in the *Mkontwana* case.⁵⁵ In that decision Yacoob J departed from the *FNB* case, holding that whether an interference results in deprivation “depends on the extent of the interference with or limitation of use, enjoyment or exploitation” and 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”.⁵⁶ These added qualifications (such as “normal restrictions” and “substantial interference”) unnecessarily complicate the deprivation question in that they appear to limit the

⁵⁰ the *FNB* case (n 24) par 51.

⁵¹ “For purposes of [s 25] – property is not limited to land.”

⁵² the *FNB* case (n 24) par 57.

⁵³ the *FNB* case (n 25) par 57. This interpretation of the difference between deprivation and expropriation does not contradict *Harksen v Lane NO* 1998 1 SA 300 (CC), although it is more nuanced; see Van der Walt “Striving for the better interpretation – a critical reflection on the constitutional court’s *Harksen* and *FNB* decisions on the property clause” 2004 *SALJ* 854 867-869.

⁵⁴ The *FNB* methodology makes it unnecessary to initially distinguish between deprivation and expropriation in a s 25 dispute, which is one of the primary reasons why this article focuses on the deprivation question. It will only be necessary to ascertain whether prescription amounts to expropriation in terms of s 25(2)-(3) under two circumstances, namely if (i) the deprivation complies with s 25(1); or (ii) should it contravene s 25(1), if it is possible to justify it under section 36(1); see the *FNB* case (n 24) par 46.

⁵⁵ (n 49). Interestingly, although the *Reflect-All* case (n 47) par 35 approved *Mkontwana*’s approach, Nkabinde J (par 36) emphasised O’Regan’s J minority judgment in the *Mkontwana* case where it was stated that “[i]f one of the purposes of s 25(1) is to recognise both material and the non-material value of property to owners, it would defeat that purpose were ‘deprivation’ to be read narrowly”.

⁵⁶ the *Mkontwana* case (n 49) par 32.

scope of interferences that may constitute deprivation. Nonetheless, we believe that our conclusion remains the same even if one were to follow the stricter interpretation given in the *Mkontwana* case, for it is hard to imagine how a comprehensive interference with ownership such as acquisitive prescription would fail the deprivation test. Against this background it is clear that prescription must amount to deprivation in terms of section 25(1) under both the wider *FNB* and the narrower *Mkontwana* approach.

3.2.4 Is the deprivation in line with section 25(1)?

3.2.4.1 The position in South African constitutional law

The next stage in the *FNB* case methodology relates to whether the deprivation in question (forced transfer of ownership through acquisitive prescription) complies with the requirements of section 25(1). Section 25(1) sets out two requirements for a valid deprivation, namely that it may only (i) take place in terms of law of general application, (ii) which law may not permit arbitrary deprivation of property.

The first requirement is easily met, for the legislative provisions⁵⁷ that govern prescription clearly qualify as law of general application. This conclusion is analogous to the *FNB* case, where the constitutional court held that section 114 of the Customs and Excise Act 91 of 1964 constituted law of general application.⁵⁸ The prescription acts are furthermore precise, specific and accessible to the citizenry, as is required by the constitutional provision.⁵⁹ In so far as the common law still applies to prescription cases, it is clear that it also qualifies as law of general application.⁶⁰

It remains to determine whether prescription satisfies the second requirement set out by section 25(1). According to this requirement, the law of general application may not authorise an arbitrary deprivation of property. According to the *FNB* decision, the word “arbitrary” refers to a situation where the law of general application “does not provide sufficient reason for the particular deprivation in question or is procedurally unfair”.⁶¹

The *FNB* case did not elaborate as to the meaning of procedural fairness in the context of section 25(1), but this aspect did enjoy attention in both the *Mkontwana* and *Reflect-All* cases. It is necessary to ascertain how these two decisions approached this question before one can establish whether the processes surrounding prescription are procedurally fair. In the *Mkontwana* case the applicants averred that legislation⁶² which limited their right to alienate their property was in conflict with section 25. With reference to the meaning of procedural fairness in the context of section 25(1), Yacoob J held that it is “a flexible concept and that the requirements that must be

⁵⁷ s 1 of the Prescription Act 18 of 1943 and s 2(1)-(2) of the Prescription Act 68 of 1969.

⁵⁸ the *FNB* case (n 24) par 61. See further Woolman and Botha “Limitations” in Woolman, Roux and Bishop (eds) *Constitutional Law of South Africa* (2006 OS July 2006) 34-51 – 34-52; Roux 46-21 and Van der Walt (n 32) 232-237.

⁵⁹ Woolman and Botha 34-48 – 34-50 and Gildenhuys *Onteieningsreg* (2001) 93.

⁶⁰ *S v Thebus* 2003 6 SA 505 (CC) par 65.

⁶¹ the *FNB* case (n 24) par 100. See also the *Reflect-All* case (n 47) par 39.

⁶² S 118(1) of the Local Government: Municipal Systems Act 32 of 2000. This section provides that the registrar of deeds may register a transfer of property only if an owner produces a prescribed certificate issued by the municipality, which certifies that all consumption charges in connection with the property have been paid in full during the two years preceding the certificate’s date of issue. The applicants claimed that this process was procedurally unfair because the municipality was not obliged, unless if requested in writing, to keep them informed of monies owing by (unlawful) occupiers of their property.

satisfied to render ... law procedurally fair depends on all the circumstances”.⁶³ In the *Reflect-All* case the applicants claimed that certain legislation⁶⁴ authorised an arbitrary deprivation because it restricted their use, enjoyment and exploitation of their property.⁶⁵ The constitutional court confirmed the meaning afforded to procedural fairness in the *Mkontwana* case and proceeded to adjudicate the case against that background.

These two decisions create the impression that procedural fairness in the context of section 25(1) will be “assessed on the same basis as in cases dealing with just administrative action under section 33 of the Constitution and the Promotion of Administrative Justice Act (PAJA)”.⁶⁶ This position is problematic, as it seems to denote that the test whether a deprivation is procedurally unfair must be conducted in terms of section 33 of the constitution and PAJA rather than under section 25(1).⁶⁷ Van der Walt argues that the solution lies in the question whether a deprivation is imposed directly by legislation (that does not result in administrative action) or whether it is caused by administrative action that is authorised by legislation.⁶⁸ If the deprivation is caused directly by legislation, one must answer the section 25(1) procedural fairness question in terms of section 25(1), but probably with reference to the principles of administrative law under PAJA, although PAJA will find no direct application. If a deprivation is caused by administrative action, it is preferable – in terms of the principles of subsidiarity – to direct the challenge through PAJA and not via section 25(1).⁶⁹ It now has to be determined which one of these two routes must be followed for establishing whether the deprivation caused by prescription is procedurally fair. Since prescription is affected *ex lege*, it is clear that it is not caused by administrative action and is therefore not directly reviewable under PAJA.⁷⁰ Ownership vests in the possessor *ipso iure* once all the statutory requirements are satisfied, which means that no discretion is exercised by an administrator and hence no administrative decision is taken. This eliminates the possibility of reviewing prescription in terms of PAJA. It follows that the section 25(1) approach must be taken, which probably in any event entails that the processes surrounding prescription must accord with the principles of procedural fairness as developed in administrative law. In this regard procedural fairness will most likely be satisfied if (i) the legislation in question provides for judicial oversight or (ii) if it provides for an occasional review procedure.⁷¹

⁶³ the *Mkontwana* case (n 49) par 65. The constitutional court found that the impugned legislation is procedurally fair for two reasons, namely that (i) it would be costly and impractical to require municipalities to furnish owners with information on a continuous basis; and (ii) because owners are in a better position to monitor the occupation and use of their property.

⁶⁴ s 10(1) and 10(3) of the Gauteng Transport Infrastructure Act 8 of 2001.

⁶⁵ the *Reflect-All* case (n 47) par 3. The applicants contended that the statutory provision in question allows the relevant authorities to proclaim route determinations without providing a process by which the applicants’ interests as landowners could be considered. For this reason they argued that failure to reconsider the road designs without consulting them (as owners) amounted to procedurally unfair deprivation of property rights. The court dismissed their claim by finding (par 46) that it would be “unrealistic, impractical and not in the public interest” to adhere to their expectations.

⁶⁶ Van der Walt (n 32) 265.

⁶⁷ Van der Walt (n 32) 266.

⁶⁸ Van der Walt (n 32) 266-267.

⁶⁹ Van der Walt (n 32) 267-268. Although Van der Walt’s approach is more intricate than presented in the main text, the limited scope of this article does not allow us to provide a detailed account of his argument here.

⁷⁰ S 1 of PAJA defines administrative action as “any decision taken, or any failure to take a decision”.

⁷¹ Van der Walt (n 32) 270.

Thus, the question whether the forced transfer brought about by acquisitive prescription was procedurally arbitrary will depend on these two questions. In this regard it is significant that prescription cases usually entail a situation where a possessor openly possessed an owner's land without his permission (or knowledge) for a period of 30 years. Ownership vests in the possessor of the land *ipso iure* on the moment that all the requirements for prescription are satisfied, which means that the owner's ownership is extinguished automatically at that point.⁷² Although this is a harsh consequence, it is worth emphasising that the requirements for prescription are strict and difficult to satisfy. Firstly, the fact that possession must be open and exercised *animo domini*, coupled with the long 30-year prescription period, makes it difficult to acquire ownership through prescription. Secondly, the owner is granted a long time-frame of 30 years to obtain a court order to evict the possessor or to simply grant express or tacit permission for the occupation, either of which will interrupt the running of prescription and so protect the owner's interests. These requirements reduce the possibility that an owner will lose ownership through mere inattention or neglect. In this sense the owner can oppose the prescription claim in court, challenging the claimant's satisfaction of the statutory requirements on the facts of the case. Finally, an owner can also challenge the constitutional validity of the relevant provisions in the prescription acts for being in conflict with section 25. In this regard it appears that the forced transfer of ownership brought about by prescription will probably never be deemed procedurally arbitrary because the legal procedure that regulates the forced transfer allows the owner ample opportunities to protect his rights.

The second leg of the arbitrariness question involves the question whether the deprivation brought about by acquisitive prescription is substantively arbitrary. According to Ackermann J, a deprivation will be substantively arbitrary if the law of general application "does not provide sufficient reason for the particular deprivation in question".⁷³ This analysis focuses on the relationship between the deprivation, the purpose it seeks to achieve and its impact on the owner's use and enjoyment of his property.⁷⁴ Therefore, the central question here is whether there is a sufficient *nexus* between the deprivation in question, the effect(s) it has on the owner and the reason(s) for the deprivation. The constitutional court also held that the substantive arbitrariness test is contextual in nature and depends on the facts and circumstances of each case.⁷⁵ It is worth emphasising that the word "arbitrary" is not limited to a mere rationality inquiry, but neither does it involve a fully-fledged proportionality analysis as contemplated in section 36(1).⁷⁶ The severity or scope of the deprivation determines whether the test for substantive arbitrariness will require either a rationality- or a proportionality-like inquiry, those two being the extremes on a continuum.⁷⁷ The fact that prescription involves a complete loss of the most complete real right, namely ownership of land, would probably indicate that the analysis should always tend towards the proportionality end of the scale. Should a

⁷² According to s 2(1)-(2) of the Prescription Act 18 of 1943 and s 1 of the Prescription Act 68 of 1969. The *FNB* case (n 24) par 100.

⁷³ the *FNB* case (n 24) par 100; the *Reflect-All* case (n 47) par 47.

⁷⁴ the *FNB* case (n 24) par 63 and the *Reflect-All* case (n 47) par 47.

⁷⁵ the *FNB* case (n 24) par 65.

⁷⁶ The *FNB* case (n 24) par 66, 100 and the *Reflect-All* case (n 47) par 49. There may possibly be a deep circularity in this aspect of the *FNB* test, as the test to decide whether to use rationality of proportionality already presupposes proportionality in that one takes the effect of the deprivation into consideration. Nonetheless, such a critique falls outside the scope of this article.

deprivation pass the substantive arbitrariness test, then it is constitutionally valid and the question of whether it is justifiable in terms of section 36(1) does not arise.⁷⁸

The substantive arbitrariness enquiry therefore pivots on a rich, contextual analysis in which the purpose of the deprivation, the nature of the affected right, the effect that the deprivation has on the affected owner and other factors are weighed up to establish whether they, considered together, offer sufficient justification for the deprivation. In the limited scope of our inquiry, prescription is somewhat unique in that the affected right is always ownership of land and the effect of the deprivation is always complete loss of ownership through a legally enforced transfer to the possessor who satisfied the requirements. Insofar as the rich web of contextual relationships that Ackermann J had in mind in the *FNB* case plays a role in these cases, the striking fact is that the required balance between those relationships is already accounted for in the requirements for acquisitive prescription embodied in the prescription acts. Factors like the strict possession requirement, the long prescription term and the ease with which the owner can assert and protect his rights against the possessor indicate that, as soon as all the requirements have been met, it is highly unlikely that a second judicial weighing of the relationships involved will indicate that the deprivation brought about by the prescription was arbitrary. In that sense, the substantive arbitrariness of the deprivation brought about by prescription will apparently always turn on the general justification for having and retaining the institution of acquisitive prescription as such.

Still, it is clear that strong reasons will have to be advanced to justify the forced transfer brought about by prescription and therefore the inquiry will lie closer to the proportionality side of the continuum. It follows that there has to be very strong substantive reasons for enforcing a transfer of ownership from the owner to the possessor whenever the latter satisfies the requirements set out in the relevant statutes. The two rationales that are traditionally used to justify the law's support for acquisitive prescription are that (i) it promotes legal certainty by affording *de iure* status to long-existing *de facto* realities;⁷⁹ and that (ii) it punishes owners for not looking after their interests.⁸⁰ In this article we refer to three jurisprudential arguments that are analogous to these two grounds and that provide strong justification for an institution such as acquisitive prescription, namely (i) law-and-economics theory, (ii) the argument based on personal autonomy of an owner and sanctity of the home in constitutional property law in terms of Radin's theory of property for personhood and, finally, (iii) the social-obligation norm that is inherent in property.

Law-and-economics theory, which focuses on the economic justification behind legal rules, indicates that the forced transfer of ownership brought about by prescription performs an important corrective function in countries with a negative registration system.⁸¹ The reason for this is that prescription lowers the transaction costs associated with searching the (possibly incorrect) register insofar as it enables

⁷⁸ the *FNB* case (n 24) par 70.

⁷⁹ *Pienaar v Rabie* (n 5) 137-138; the *Minnaar* case (n 16) 577; Van der Walt *Property in the Margins* (2009) 181 and Badenhorst *et al* (n 1) 161.

⁸⁰ Voet 41 3 1; De Groot 2 7 4 and Van der Merwe (n 1) 268.

⁸¹ The constitutional court has indicated that economic considerations do play a role in the adjudication of constitutional property cases; see the *FNB* case (n 24) par 45, where Ackermann J found that it would have "a disastrous impact on the business world" if the property interests of juristic persons were not protected under s 25.

parties to disregard errors in the register that predate the prescription period.⁸² This rationale is especially relevant in situations where all the formalities for the transfer of land may not have been complied with or where there have been dealings “off the register”⁸³ that will cause the register not to accurately reflect the legal reality. Under these circumstances it is important to have a legal rule that operates as a conclusive presumption as to who owns a certain piece of land, especially in the favour of good-faith possessors and third parties.⁸⁴ Indeed, Netter, Hersch and Manson argue that there is empirical support for the claim that prescription eliminates mistakes in the land register after a certain period of time has elapsed, which reduces the costs involved in searching the register.⁸⁵ These authors also conclude that the higher a country’s population density, the higher the number of transfers, which increases the likelihood of errors in the register if no mechanism exists to rectify defects relating to landownership.⁸⁶ It follows that prescription promotes legal certainty through affording legal status to long-standing factual scenarios (so-called quieting of title), thereby lowering the transaction costs involved in ascertaining ownership of land. In addition, prescription also helps to reduce litigation costs by preventing stale claims and overcoming problems relating to lost evidence.⁸⁷ It follows that prescription renders the determination of ownership both safer and cheaper by conferring ownership on a long-term possessor.⁸⁸

Another law-and-economics argument, which is related to the punishment justification, states that prescription encourages efficient land use through shifting ownership of scarce resources (such as land) from lower-valuing owners (who neglect land) to higher-valuing users (possessors) when high transaction costs prevent voluntary exchange in the market.⁸⁹ Although this point is contentious,⁹⁰ Merrill – to our minds – correctly emphasises the ease with which owners can prevent the running of prescription by simply asserting their right of ownership through evicting (or even just confronting) possessors in whose favour prescription might have started to run.⁹¹ In support of this argument one can also consider the long period over which someone must possess property *animo domini* before it can be acquired through prescription. An additional approach that puts an interesting

⁸² Miceli “Property” in Backhaus (ed) *The Elgar Companion to Law and Economics* (2005) 246-254-255; Cooter and Ulen *Law and Economics* (2004) 155 and Posner *Economic Analysis of Law* (2003) 78. For a more detailed discussion of how law-and-economics theory can justify prescription, see par 4.4.4 of ch 4 in Marais (n 25).

⁸³ Clarke “Use, time, and entitlement” 2004 *Current Legal Problems* 239-252-258.

⁸⁴ Merrill “Property rules, liability rules, and adverse possession” 1985 *Northwestern Univ LR* 1122-1128.

⁸⁵ Netter, Hersch and Manson “An economic analysis of adverse possession statutes” 1986 *International Review of Law and Economics (IRLE)* 217-219-220. See also Miceli (n 82) 254-255 and Posner (n 82) 78.

⁸⁶ Netter *et al* 223.

⁸⁷ Baker, Miceli, Sirmans and Turnbull “Property rights by squatting: land ownership risk and adverse possession statutes” 2001 *Land Economics (LE)* 360-361; Miceli and Sirmans “An economic theory of adverse possession” 1995 *IRLE* 161 and Netter *et al* (n 85) 219.

⁸⁸ Dockray “Why do we need adverse possession?” 1985 *Conveyancer* 272-278-279.

⁸⁹ Fennell “Efficient trespass: the case for ‘bad faith’ adverse possession” 2006 *Northwestern Univ LR* 1037-1077-1080-1083; Cooter and Ulen (n 82) 155; Baker *et al* (n 87) 360 and Merrill (n 84) 1130-1131.

⁹⁰ See, for instance, Miceli (n 82) 255 and Stake “The uneasy case for adverse possession” 2001 *Georgetown LJ* 2419-2433.

⁹¹ Merrill (n 84) 1130-1131. See also Rose “Possession as the origin of property” 1985 *Univ of Chicago LR* 73-79 and Fennell (n 89) 1077. This is in line with the social-obligation norm of Alexander “The social-obligation norm in American property law” 2009 *Cornell LR* 745, which we discuss below.

slant on the fact that prescription encourages efficient land use is the so-called “duty of stewardship” argument of Cobb and Fox O’Mahony.⁹² These authors argue that ownership does not merely entail rights, but that owners have an inherent obligation or duty of stewardship to look after their property. Although such an obligation admittedly does not compel owners to use their property positively,⁹³ long-term neglect by owners who do not even minimally adhere to this duty could justify prescription, especially if the possessors were precluded from acquiring ownership in land in the market (as was the case in South Africa under and, for structural reasons, even in the aftermath of the apartheid dispensation).⁹⁴ In this context the dire need of homeless people in present-day South Africa can very well be a powerful argument against recognition of an entitlement to neglect land (for instance by “allowing” people to live on it for 30 years).⁹⁵ Consequently, it would be justified to shift the property from the hands of a lower-valuing owner into the hands of a higher-valuing possessor, should the owner not adhere to this duty of stewardship and if the possessor satisfies the stringent requirements for prescription.

Interestingly, legal comparison shows that requirements for acquisitive prescription in countries that employ a negative registration system – such as Dutch and French law – are remarkably similar to those for prescription in South African law.⁹⁶ This fact illustrates that prescription probably fulfils the same economic goals in these two European jurisdictions as those mentioned above. Against this background it is understandable that prescription performs a less important role in countries with a positive registration system, like German and post-2003 English law, where the register provides conclusive proof of ownership.⁹⁷ As the economic justifications lose much of their force in such a land registration regime, these two countries have introduced procedural safeguards that largely prevent owners from losing ownership or title through prescription or adverse possession.⁹⁸

Although the means employed (forced loss and transfer of ownership) may seem harsh when compared to the ends promoted, it must be kept in mind that the requirements for acquisitive prescription are strict and difficult to satisfy.⁹⁹ This, coupled with the fact that an owner is granted up to 30 years to reclaim

⁹² Cobb and Fox “Living outside the system? The (im)morality of urban squatting after the Land Registration Act 2002” 2007 *Legal Studies* 236-254. See also Fox O’Mahony and Cobb “Taxonomies of squatting: unlawful occupation in a new legal order” 2008 *Modern Law Review* 878-911. We are indebted to Brits for bringing the latter article to our attention.

⁹³ Cobb and Fox (n 92) 253-256. See further Fox O’Mahony and Cobb (n 92) 878-911.

⁹⁴ See Van der Merwe (with Pope) “Property” in Du Bois (ed) *Wille’s Principles of South African Law* (2007) 405-510 and sources cited.

⁹⁵ Van der Merwe (with Pope) 510 and sources cited. See also Van der Walt (n 79) 176. This approach is analogous to Singer’s reliance interest theory, which is discussed below.

⁹⁶ Although both Dutch and French prescription law, unlike South African law, differentiate between good faith and bad faith possessors, these systems’ prescription requirements are remarkably similar to those of South African law. In this instance Dutch, French and South African law all require possessors to continuously possess the property of another *animo domini* (as if owner) for a relatively long period of time without the owner’s permission and without acknowledging his rights before it can be acquired through prescription: See *BW* 3:99 and 3:107 (for Dutch law), a 2255 and 2258 *CC* (for French law) and s 2 of the Prescription Act 68 of 1969 (for South African law). For a more comprehensive discussion of the requirements for prescription in Dutch and French law, see par 3 3 and 3 4 respectively of ch 3 in Marais. In this regard, see further Van Vliet “Creation” in Van Erp and Akkermans (eds) *Ius Commune Casebook* (2012) 95-129.

⁹⁷ For the position in German and English law, see *BGB* § 900 and the Land Registration Act 2002 (especially sch 6) respectively.

⁹⁸ See n 96 above.

⁹⁹ See the discussion of the *animus domini* element in section 1 above.

his property and to evict the possessor or merely grant permission, in our view creates a justifiable balance between the loss of ownership and the legitimate policy considerations of reducing transaction costs, encouraging efficient land use and the fact that prescription promotes legal certainty through quieting titles.

The second justification entails the importance of policy values such as the personal autonomy of a person and sanctity of the home in constitutional property law (especially in terms of the housing clause).¹⁰⁰ This approach, which is followed in German constitutional law in areas unrelated to acquisitive prescription, focuses on the interests that people have in property and entails that a deprivation is justified more easily if the affected property interest is located further from the personal sphere of the owner and less easily when it is located closer to it.¹⁰¹ This trend bears a striking resemblance to Radin's theory of property for personhood, which argues that a person needs control over certain property in order to lead a distinctly human life.¹⁰² Radin distinguishes between two types of property relationships, namely personal property (property that is essential for achieving proper self-development) and fungible property (property that individuals are not bound up with).¹⁰³ According to this distinction, a person's personal interest in property (such as when he occupies land as a home) is more important for fostering one's personality and should therefore receive greater protection than the fungible interest that another person (such as a commercial exploiter, an absent and/or neglecting owner) may have in the same property.¹⁰⁴ The constitutional court in the *FNB* case appears to have approved this line of thinking, especially since Ackermann J acknowledged that whether an owner makes limited or no use of property *can* play an important role to determine whether a deprivation is substantively arbitrary.¹⁰⁵ In other words, it may very well be justified to protect the interests of the possessor, who has a personal interest in the property in the form of actually making use of it as a home, over the merely fungible interests of the absent owner by forcibly shifting ownership to the possessor through prescription. According to German constitutional law the state's power to regulate the limits of property rights depends on how far a property right is located from the personal autonomy sphere of an owner.¹⁰⁶ It follows that property rights in a home in German law (*ie* personal property) are protected more strongly against regulatory deprivation than property rights pertaining to investment or commercial property (*ie* fungible property).¹⁰⁷ Furthermore, since land – a finite resource of great social importance – is subject to stricter social control and regulation,¹⁰⁸ one can argue

¹⁰⁰ Van der Walt (n 32) 245 n 165. S 26(3) of the constitution provides that “[n]o one may be evicted from their home ... without an order of court made after considering *all* the relevant circumstances ... [and] [n]o legislation may permit arbitrary evictions” (own emphasis).

¹⁰¹ Van der Walt (n 32) 245 n 165 and Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 135-141.

¹⁰² Radin “Property and personhood” 1982 *Stanford LR* 957 959.

¹⁰³ Radin (n 102) 960; Radin *Reinterpreting Property* (1993) 2 and Radin “Time, possession, and alienation” 1986 *Washington Univ LQ* 739 748 n 26.

¹⁰⁴ Radin (n 102) 986-987.

¹⁰⁵ the *FNB* case (n 24) par 54.

¹⁰⁶ Van der Walt (n 101) 135. See also Van der Walt “Unity and pluralism in property theory – a review of property theories and debates in recent literature: part 1” 1995 *TSAR* 15 27-28 and Van der Walt “Subject and society in property theory – a review of property theories and debates in recent literature: part 2” 1995 *TSAR* 322 327-328.

¹⁰⁷ Van der Walt (n 101) 135-136.

¹⁰⁸ Van der Walt (n 101) 136. This is analogous to what the constitutional court found in the *FNB* case, where Ackermann J stated that “property should serve the public good”: See the *FNB* case (n 24) par 52.

that prescription is justified insofar as it constitutes “stricter social control” over unused or neglected land. Gray’s theory of moral excludability also tends towards such a conclusion, especially when the limitation or extinguishment of the owner’s ownership – through prescription – is in line with public morality.¹⁰⁹ In this sense ownership-type “claims to ‘property’ may sometimes be [legitimately] overridden by the need to attain or further more highly rated social goals”,¹¹⁰ such as protecting possessors’ personal interests in property through prescription.

Singer’s reliance interest theory, which is similar to Radin’s personality theory, also provides a strong argument to justify prescription from both a moral and an economic perspective. The following passage captures the core of this theory: “The legal system sometimes protects the more vulnerable party to the relationship by recognizing and protecting her reliance interest in property and limiting protection of the stronger party’s interests.”¹¹¹ Singer argues that if an owner “allows” a possessor to remain on his land, the owner condones the occupation through conveying “a message to the possessor that the owner has abandoned the property”.¹¹² Over time the possessor’s interest in the property will grow, for he will come to rely on the “legitimacy” of his occupation.¹¹³ Conversely, the owner’s interest in the property will grow weaker the longer he is out of possession.¹¹⁴ Singer concludes that it would be “morally wrong for the true owner to allow a relationship of dependence to be established and then to cut off the dependant party”.¹¹⁵ To protect the reliance interest of both possessors (as vulnerable persons) and third parties, prescription enters the picture and confers ownership on the possessor.¹¹⁶ This theory is analogous to the underlying explanation for estoppel, which prevents an owner from vindicating his property in the hands of another when the owner has induced others to believe – to their detriment – that another person is in fact the true owner.¹¹⁷ The fact that the possessor possessed the property *animo domini* for 30 years without any interference from the owner provides a strong *nexus* in this instance between the purpose of prescription (namely protecting the reliance interests of vulnerable possessors) and the loss of ownership.

By way of conclusion, the social-obligation norm – which also partially corresponds with Radin’s theory – provides another moral justification for prescription.¹¹⁸ Alexander argues that humans must develop their capabilities (through virtues) to attain human flourishing.¹¹⁹ To this end, every person in the community is equally

¹⁰⁹ Gray “Property in thin air” 1991 *Cambridge LJ* 252 280-292.

¹¹⁰ Gray (n 109) 281.

¹¹¹ Singer “The reliance interest in property” 1988 *Stanford LR* 611 664.

¹¹² Singer (n 111) 666.

¹¹³ Singer 666-668.

¹¹⁴ Singer 667-668.

¹¹⁵ Singer 667.

¹¹⁶ Singer 668-669. Singer’s theory has interesting similarities with the duty-of-stewardship argument of Cobb and Fox O’Mahony, which is discussed above.

¹¹⁷ Badenhorst *et al* (n 1) 255. The requirements for estoppel are not discussed here; see Badenhorst *et al* 255-260.

¹¹⁸ For a more complete discussion of the social-obligation norm, see section 4 4 3 of ch 4 in Marais.

¹¹⁹ Alexander (n 91) 761. Virtues, which constitute the building blocks of capabilities, refer to dispositions to do actions that contribute to living a distinctly human life. Capabilities, on the other hand, may be understood to encompass the ability to exercise different functionings to constitute a well-lived life. Alexander identifies four main capabilities in this regard, namely life, freedom, practical reasoning and sociality (765). We do not provide an in-depth analysis of the contents of virtues, capabilities or functionings here. For a more detailed discussion, see Alexander and Peñalver “Properties of community” 2008 *Theoretical Inquiries in Law* 127 134-138.

entitled to the necessary capabilities to help promote human flourishing. To realise one's capabilities, access to material resources such as property (for example, land) is required. Since people unavoidably depend on others to attain these resources,¹²⁰ Alexander argues that ownership not merely involves rights but also a duty to help others in one's community (who lack these resources) to foster their capabilities for purposes of leading a well-lived life.¹²¹ We argue that prescription embodies this social-obligation norm by requiring owners to "give" property, which is not constitutive of their capabilities due to their neglect of it, to possessors for whom it is essential to attain human flourishing and who occupy the land in a way that satisfies the strict requirements for prescription.¹²² It follows that the law internalises the social obligation of the owner by sometimes, under strictly circumscribed conditions, forcibly shifting ownership to the possessor through prescription for purposes of fostering his capabilities to lead a well-lived life. Yet, it must be emphasised that the social-obligation norm does not require an owner to give property, which he actively uses, values or protects, to others for purposes of helping them to flourish as human beings. It is perhaps more accurate to say that the obligation to "give" property means nothing more than to endure, as a legitimate exercise of the state's regulatory powers, the forced transfer of property that one has not used or made any open claim to over a long time, to another person who has established a strong reliance interest in that property in the form of long-term civil possession.

Alexander's theory has interesting similarities with the duty-of-stewardship and reliance interest arguments discussed above, as both of these latter two approaches conclude that a possessor will be entitled to the property if the owner neglected the land for a long period of time without asserting his ownership. Although it cannot be argued categorically that the social-obligation norm underlies South African constitutional property law, drawing a link between the two finds support in the fact that the constitution aims to promote "an open and democratic society based on human dignity, equality and freedom" for all South Africans.¹²³

Analysis of the two traditional justifications for prescription, seen in the context of the three jurisprudential trends we refer to above, suggests that powerful reasons exist for having prescription in a legal system (especially one with a negative registration regime). Law-and-economics theory argues that prescription successfully lowers transaction costs associated with consulting the register, encourages efficient land use and promotes legal certainty through the quieting of titles. Furthermore, the importance of policy values such as protecting people's homes justifies protecting a long-term possessor's home interests through prescription, especially against the background of the theories put forward by Radin and Singer. Finally, Alexander's social-obligation norm provides a convincing basis for prescription insofar as it helps people to attain human flourishing through moving land out of the hands of non-valuing owners into the hands of possessors whose flourishing depends on ownership of that land. In this sense Alexander's theory, considered together with the duty-of-stewardship argument, properly recognises the fact that ownership not merely entails rights but also involves duties. Taken together, we believe that these arguments establish a sufficient *nexus* between the deprivation brought about by

¹²⁰ Resources such as land are essential to developing one's capabilities; see Alexander 768.

¹²¹ See Alexander (n 91) 774. See further Alexander and Peñalver (n 119) 140-141.

¹²² We are indebted to Alexander for discussions that helped us formulate our arguments in this regard.

¹²³ s 36(1) of the constitution. We make this point by relying on Alexander (n 91) 767 n 86.

acquisitive prescription, the owner whose property is affected and the purpose of the deprivation.¹²⁴

3.2.4.2 The position in foreign constitutional law

Section 39(1)(c) of the constitution provides that courts may consider foreign law when interpreting the bill of rights. This opens the door for scrutinizing the manner in which the European court of human rights assessed the constitutionality of adverse possession in terms of article 1 of the first protocol. Yet, Ackermann J warned that caution is required when South African courts interpret and apply article 1 jurisprudence and accordingly the fourth and grand chamber judgments in *JA Pye (Oxford) Ltd v United Kingdom*¹²⁵ can be informative but not conclusive when determining whether prescription is in line with section 25(1).

According to *Sporrong and Lönnroth v Sweden*,¹²⁶ article 1 consists of three distinct rules.¹²⁷ The first rule guarantees the peaceful enjoyment of property.¹²⁸ The second rule subjects the “deprivation” (expropriation for purposes of South African constitutional law) of property to certain conditions.¹²⁹ The third rule allows member states to “regulate” the use of property (deprivation for purposes of South African constitutional law) in accordance with the general interest.¹³⁰ For an interference with property rights to be in line with the first rule, it must strike a “fair balance”¹³¹ between “the demands of the general interest of the community and the requirements [for] the protection of the individual’s fundamental rights”.¹³² Similarly, expropriation of property under the second rule that does not provide for compensation which is “reasonably related” to the value of the expropriated property will normally be in conflict with article 1.¹³³ For a deprivation of property rights to be valid, a “reasonable relationship of proportionality [must exist] between the means employed and the aim sought to be realised”.¹³⁴ Member states enjoy a wide “margin of appreciation” to determine whether a sufficient relationship exists between a deprivation and whether the consequences of such deprivation are in the public interest.¹³⁵

The fourth chamber in the *Pye* case found that the absence of compensation, coupled with the lack of procedural protection afforded to owners in the law of

¹²⁴ the *FNB* case (n 24) par 100.

¹²⁵ Reported as the *Pye* case 2006 43 EHRR 3 (IV) (the *Pye* case 2006) and the *Pye* case 2008 46 EHRR 45 (GC) (the *Pye* case 2008) respectively. The implications of these decisions are discussed in the next few paragraphs.

¹²⁶ 1983 5 EHRR 35.

¹²⁷ the *Sporrong* case (n 126) par 61.

¹²⁸ the *Sporrong* case (n 126) par 61; *James v United Kingdom* 1986 8 EHRR 123 par 37 and the *Pye* case 2008 par 52.

¹²⁹ the *Sporrong* case (n 126) par 61; the *James* case (n 128) par 37 and the *Pye* case 2008 par 52.

¹³⁰ the *Sporrong* case (n 126) par 61; the *James* case (n 128) par 37 and the *Pye* case 2008 par 52.

¹³¹ This notion is discussed comprehensively by Allen *Property Rights and the Human Rights Act 1998* (2005) 123-166.

¹³² The *Sporrong* case (n 126) par 69; the *Pye* case 2008 par 53 and *Beyeler v Italy* 2001 33 EHRR 52 par 107.

¹³³ the *Pye* case 2008 par 54 and the *Pye* case 2006 par 47. See further Allen (n 131) 112. Full or reasonable compensation is neither expressly nor tacitly guaranteed under the second rule, which means that an expropriation without compensation can – in certain circumstances – be compatible with a 1; see the *Pye* case 2006 par 47 and Allen (n 131) 118.

¹³⁴ the *Pye* case 2008 par 55.

¹³⁵ *Allgemeine Gold- und Silberscheideanstalt v United Kingdom* 1987 9 EHRR 1 par 52 and the *Pye* case 2008 par 55.

adverse possession, upset the fair balance between the demands of the public interest and Pye's right to peaceful enjoyment of possessions under article 1.¹³⁶ The fourth chamber rejected the traditional justifications for adverse possession – namely that it promotes legal certainty and encourages owners not to sleep on their rights – and decided that “factors over and above those which explain the law [of adverse possession]”¹³⁷ are required to adequately justify this legal rule in a system where land is registered.¹³⁸ As mentioned earlier, this result caused concern among scholars in member states of the European Union, since it seemed to invalidate acquisitive prescription in their countries. However, this decision was subsequently overturned by the grand chamber, which found that adverse possession results in a valid regulation of property in accordance with the third rule in article 1. The grand chamber decided that adverse possession – in the context of registered land – does not amount to expropriation in terms of the second rule (as was decided by the fourth chamber), but that it rather results in a regulatory limitation of the use of property under the third rule.¹³⁹ The grand chamber justified its reasoning as follows:

“The applicant companies did not lose their land because of a legislative provision which permitted the State to transfer ownership in particular circumstances (as in the cases of *AGOSI*, *Air Canada*, *Gasus*), or because of a social policy of transfer of ownership (as in the case of *James*), but rather as the result of the operation of the generally applicable rules on limitation periods for actions for recovery of land.”¹⁴⁰

The grand chamber reasoned that the statutory provisions that resulted in the extinguishment of ownership through adverse possession “were ... not intended to [expropriate] paper owners of their ownership, but rather to regulate questions of title”.¹⁴¹ In addition, it decided that adverse possession was part of the general land law and that it intended to regulate “limitation periods in the context of the use and ownership of land as between individuals”.¹⁴² Although the distinction between the three rules is by no means self-evident in article 1 jurisprudence,¹⁴³ we believe – at least from a South African point of view – that the grand chamber was correct to regard adverse possession as a regulatory deprivation rather than an expropriation of property.¹⁴⁴

¹³⁶ the *Pye* case 2006 par 75. The minority disagreed with the majority on this point at par O-II – O-14 and found that adverse possession is compatible with a 1.

¹³⁷ the *Pye* case 2006 par 64.

¹³⁸ the *Pye* case 2006 par 58-62.

¹³⁹ the *Pye* case 2008 par 65-66. The first minority at par O-17 agreed with the majority on this point. The opposite conclusion was reached by the majority of the fourth chamber in the *Pye* case 2006 par 58-62. The second minority in the *Pye* case 2008 par O-III, O-II9 also held that adverse possession amounts to expropriation.

¹⁴⁰ the *Pye* case 2008 par 65.

¹⁴¹ the *Pye* case 2008 par 66.

¹⁴² the *Pye* case 2008 par 66.

¹⁴³ We extrapolate this from the conflicting findings by the grand and fourth chambers pointed out above, together with Allen (n 131) 103-106 and Van der Walt (n 101) 96-120. According to Allen (103 and 121-122), the absence of a compensation guarantee under the second rule mostly avoids the issue of having to distinguish between the first, second and third rules.

¹⁴⁴ Waring *Aspects of Property The Impact of Private Takings* (2009 dis Cambridge) 169-170 and Gretton “Private law and human rights” 2008 *Edinburgh LR* 109 110-112 criticise the grand chamber for categorising adverse possession under the third rule. However, Allen (n 131) 103-104, 118, 121-122 thinks that the classification of an interference under one of the rules is relevant but not conclusive to the outcome of a case because compensation is not guaranteed under the second rule. The irrelevance of the classification between expropriation and deprivation under a 1 is analogous to the “telescoping” effect of the arbitrariness test in the context of s 25, as pointed out by Roux (n 44) 46-2 – 46-3, 46-19 – 46-20, 46-32. Still, Allen does provide a *caveat* (112) where he states that

The grand chamber relied on the justifications provided in *Stubbings v United Kingdom*¹⁴⁵ to determine whether adverse possession is in line with article 1.¹⁴⁶ In the *Stubbings* case the European court of human rights held that limitation periods promote legal certainty, protect defendants from stale claims and prevent injustice.¹⁴⁷ The latter objective is realised by preventing parties from litigation in cases based on evidence that took place in the distant past or that may have become lost over time. The grand chamber in the *Pye* case held that these justifications are also applicable in the context of limitation periods for recovery of land.¹⁴⁸ In this regard it reiterated that states enjoy a wide “margin of appreciation” to determine whether an interference is in the public interest.¹⁴⁹ Subsequently, it found that adverse possession is not “manifestly without reasonable foundation”, as there existed a general interest in both the limitation period itself and the extinguishment of ownership at the expiration of the limitation period.¹⁵⁰

The grand chamber regarded two factors as central arguments that justify the existence of adverse possession, namely (i) the “relatively long” twelve-year limitation period, coupled with the fact that (ii) the law requires “very little action” for the owner to stop time running.¹⁵¹ Regarding procedural fairness, the grand chamber pointed out that the owner could apply for repossession of the land at any point during the duration of the limitation period, and that the owner could also contest a claim based on adverse possession in the domestic courts.¹⁵² For these reasons, the grand chamber decided that adverse possession did not upset the fair balance required by article 1.¹⁵³ The reasons that justify adverse possession in light of article 1 are analogous with the section 25(1) substantive arbitrariness test discussed above. It follows that we arrive at the same conclusion as the majority¹⁵⁴ in the grand chamber judgment for purposes of the constitutionality of prescription in South African law, namely that the deprivation affected by acquisitive prescription is neither arbitrary nor “manifestly without reasonable foundation”. The fact that the grand chamber held that adverse possession (which requires a twelve-year period and merely requires possession *animo possidendi* in English law) complies with article 1 strengthens our argument that the South African constitutional court will probably find acquisitive prescription (which requires a 30-year period coupled with

the differentiation between expropriation and deprivation “is one area where the tactical possibilities should not be ignored”. We are indebted to Reid for bringing Gretton’s article to our attention.

¹⁴⁵ 1997 23 EHRR 213 par 49. This decision dealt with limitation periods in personal injury cases.

¹⁴⁶ The *Pye* case 2008 referred to this case in par 68. The majority in the *Pye* case 2006 par 63-64 expressly rejected these reasons for justifying adverse possession.

¹⁴⁷ *Stubbings v United Kingdom* 1997 23 EHRR 213 par 49.

¹⁴⁸ the *Pye* case 2008 par 69. The second minority at par O-II4, O-II7 argued that these justifications do not hold water if one is able to determine who the owner is by investigating the register.

¹⁴⁹ the *Pye* case 2008 par 71, citing *Jahn v Germany* 2006 42 EHRR 49 par 91.

¹⁵⁰ the *Pye* case 2008 par 74. The first minority at par O-I9 agreed with the majority on this point.

¹⁵¹ the *Pye* case 2008 par 78.

¹⁵² the *Pye* case 2008 par 80. The first minority at par O-I22 – O-I23 agreed with the majority that adverse possession does afford sufficient procedural protection for the owner. To the contrary is the majority in the *Pye* case 2006 par 73-76, where it was held that adverse possession does not provide adequate procedural protection for an owner.

¹⁵³ the *Pye* case 2008 par 85. The first minority disagreed with the majority on this point at par O-II and held that adverse possession does violate a 1. According to the first minority (par O-I23 – O-I28), adverse possession does not strike a fair balance between the rights of the owners and the general interest served. The second minority also disagreed with the majority and found (par O-II1, O-II10 and O-II13) that adverse possession does violate a 1 because it amounts to an uncompensated expropriation.

¹⁵⁴ The grand chamber split with 10 votes to seven.

possession *animo domini*) to be in line with section 25(1) because of its even stricter requirements.¹⁵⁵

3.2.5 Can the deprivation be justified in terms of section 36(1)?

The analysis so far suggests very strongly that the deprivation brought about by acquisitive prescription will not have to be subjected to an individual section 25(1) scrutiny in every individual prescription case, because the general reasons for enforcing the institution, combined with the strict requirements, should ensure that the deprivation is non-arbitrary in every individual instance. Given that prescription can only take place insofar as it is authorised by the prescription acts, the implication seems to be that deprivations brought about by possessors whose possession satisfies the statutory requirements will always be constitutionally unassailable. However, in the unlikely event that a court may find that deprivation does not satisfy the requirements of section 25(1), either because it is not authorised by law of general application or because it is arbitrary, it could in theory still be justified under section 36(1)¹⁵⁶ of the constitution.¹⁵⁷ Both Roux and Van der Walt argue that, should one strictly adhere to the *FNB* methodology, section 36(1) is unlikely to play a meaningful role in a constitutional property dispute.¹⁵⁸ This is due to the fact that the proportionality test in section 36(1) is “similar in spirit but stronger in force than the (variable) non-arbitrariness test laid down in the *FNB* decision”.¹⁵⁹ It therefore appears that section 36(1) will play an extremely limited – if any – role in cases where a deprivation does not meet the requirements of section 25(1).¹⁶⁰ Due to the standard of the arbitrariness test – which is contextual in nature and varies between “thin rationality” and “thick” proportionality – it is safe to conclude that

¹⁵⁵ We do not agree with the outcome of the grand chamber’s *Pye* judgment in terms of the constitutionality of adverse possession in light of article 1, due to the fact that the requirements for adverse possession are too lenient when compared to the requirements of prescription.

¹⁵⁶ “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 ...”.

¹⁵⁷ Roux (n 44) 46-26 – 46-28. The court acknowledged this possibility in the *Nhlathi* case (n 49) par 34. However, Van der Walt says that although s 25 is not explicitly excluded from limitation under s 36(1), it is highly unlikely that an interference that is in conflict with s 25 could be justified under s 36(1); see Van der Walt (2011) 78-79. To the same effect is the *FNB* case (n 24) par 110.

¹⁵⁸ Roux (n 44) 46-26 – 46-28 and Van der Walt (n 32) 74-79. Roux 46-26 – 46-27 bases his argument on two reasons. First, if the deprivation is not authorised by law of general application it is impossible for the deprivation to survive s 36(1) scrutiny, since s 36(1) also requires that the limitation must take place in terms of law of general application. Secondly, should the deprivation be either substantively or procedurally arbitrary, it is highly unlikely that it could still be “reasonable and justifiable in an open and democratic society” as required by s 36(1). If the deprivation (prescription) is substantively arbitrary because it extinguishes ownership without sufficient reason(s) (which will entail an inquiry nearer the proportionality side of the spectrum), a s 36(1)- analysis will merely confirm the conclusion reached under the arbitrariness test inquiry.

¹⁵⁹ Van der Walt (n 32) 74.

¹⁶⁰ Van der Walt (n 32) 78-79. For an example to the contrary, see the *Nhlathi* case (n 49) par 34-35. In this case the land claims court held that the appropriation of a grave by an occupier on someone else’s land in terms of s 6(2)(dA) of the Extension of Security of Tenure Act 62 of 1997 (“ESTA”) would be justifiable in terms of s 36(1), even if it was regarded as an expropriation of land and even though ESTA does not provide for compensation as required by s 25(2) of the constitution. However, the court in this instance did not decide whether there was an expropriation but merely posited the assumption for the sake of argument. For a critical view of this approach of the land claims court, see Van der Walt (n 32) 79.

the “section 36(1) limitation analysis is probably not really significant for purposes of section 25”,¹⁶¹

From the paragraphs above it is clear that, should prescription amount to an arbitrary deprivation in terms of section 25(1) and should the predictions by Roux and Van der Walt prove to be correct, it is highly improbable that it could be justified under section 36(1). If it amounted to arbitrary deprivation in conflict with section 25(1), prescription would be unconstitutional and the matter would end there. However, in the unlikely event that a deprivation brought about by acquisitive prescription is held to be arbitrary, and in the even more unlikely event that the arbitrary deprivation is found to be justifiable in terms of section 36(1),¹⁶² the next stage in the *FNB* methodology would be to establish whether prescription amounts to an expropriation in terms of section 25(2). A much more likely reason to ask this question is when one concludes, as we do, that prescription constitutes a properly authorised, justified and non-arbitrary and therefore constitutionally valid deprivation.

4 Conclusion

Acquisitive prescription is a well-known and established legal rule in South African law that is mostly regarded as unproblematic and free from legal uncertainty. However, the fourth chamber of the European court of human rights recently questioned the uncontroversial nature of adverse possession – the common law equivalent of prescription – in the *Pye* case by deciding that it results in an uncompensated expropriation of property contrary to article 1 of the first protocol to the European convention. This decision, which was overturned by the grand chamber on appeal, prompted us to establish whether the rules surrounding prescription are in line with section 25 of the South African constitution. To answer this question we followed the *FNB* methodology and, for purposes of this article, specifically focused on the question whether prescription satisfies the section 25(1) requirements for a valid deprivation of property.

We chose three jurisprudential trends that share characteristics with the traditional justifications for prescription to ascertain whether sufficient reasons exist for this legal institution in terms of the section 25(1) substantive arbitrariness test. Firstly, law-and-economics theory argues that prescription quiets titles in situations where the land register – in a negative registration system – is defective, which promotes legal certainty. Prescription also encourages efficient land use by moving land out of the hands of lower-valuing owners and into the hands of higher-valuing possessors. Yet, it does not entail a general “use it or lose it” principle, as the requirements for prescription are strenuous and cannot be satisfied easily by opportunistic possessors.

The second theory focuses on the policy values of the personal autonomy of a person and sanctity of the home in constitutional property law. Should two persons both have an interest in the same property, such as possessors *vis-à-vis* owners, Radin’s personality theory determines that the party who has a more personal interest in the property (namely possessors) should receive greater protection. This

¹⁶¹ Van der Walt (n 32) 79. To the same effect is Roux’s view (n 44) 46-3, who thinks that the question whether the limitation clause fulfils any meaningful role for purposes of section 25 has “receded into the background”.

¹⁶² As was the case in the *Nhlabathi* case (n 49).

theory explains the shifting of ownership from a neglecting owner to the possessor through prescription, especially if the possessor occupies the land as a home.

The final theory we referred to is Alexander's social-obligation norm, which states that ownership does not merely consist of rights but also entails a duty to help others in one's community to acquire the necessary capabilities to promote their human flourishing. In this context we think that prescription recognises this social-obligation norm by requiring neglecting owners to "give" property, which is not constitutive of their capabilities, to possessors for whom it is essential to flourish as human beings and who satisfy the stringent requirements for prescription. In our view these theories establish a strong *nexus* between the deprivation in question, the impact on the owner and the purpose it seeks to achieve. For this reason we think that prescription results in a mere non-arbitrary deprivation of property that complies with section 25(1). Our conclusion is strengthened by the grand chamber's judgment in the *Pye* case, where it decided that adverse possession results in a constitutional regulation of property.

Although this article focused only on the deprivation issue, it has to be considered whether prescription does not perhaps result in expropriation – or even constructive expropriation – of property. The fact that the fourth chamber found that adverse possession amounted to an uncompensated expropriation contrary to article 1 underscores the importance of such an analysis. We turn to that question in a second article that follows upon this one.

SAMEVATTING

DIE GRONDWETLIKHEID VAN VERKRYGENDE VERJARING: 'N ARTIKEL 25(1)-ANALISE

Verkrygende verjaring word merendeels beskou as 'n area van die Suid-Afrikaanse reg wat ongekompliceerd en regseker is. Hierdie klaarblyklik onproblematiese aard van verjaring was egter in twyfel getrek deur die vierde kamer van die Europese hof vir menseregte in die *Pye*-saak, welke hof bevind het dat *adverse possession* – die *common law*-eweknie van verjaring – 'n ongekompenseerde onteiening behels wat strydig is met artikel 1 van die eerste protokol tot die Europese konvensie. Op appèl het die groot kamer die vierde kamer se beslissing omvergewerp en beslis dat *adverse possession* in lyn is met artikel 1 deurdat dit 'n blote (grondwetlike) ontneming van eiendom behels. Nietemin, die vierde kamer se beslissing beklemtoon die moontlikheid dat verjaring in die Suid-Afrikaanse konteks ook mag neerkom op 'n ongekompenseerde onteiening, wat strydig sal wees met artikel 25 van die Suid-Afrikaanse grondwet. Om hierdie vraag te beantwoord gebruik ons die *FNB* metodologie om te bepaal of verjaring strook met die eiendomsklousule.

In hierdie artikel fokus ons slegs op die artikel 25(1)-kwessie, naamlik of verjaring 'n nie-arbitrêre ontneming van eiendom behels. Hiervoor verwys ons na drie liberale sakeregtetheorieë om te bepaal of daar 'n genoegsame *nexus* tussen die ontneming (verjaring), die redes vir die ontneming en die impak daarvan op die eienaar bestaan. Hierdie teorieë is *law and economics*-teorie, die persoonlike outonomieit van eienars (tesame met die belangrikheid van die woning in konstitusionele sakereg) asook die sosiale verpligtingsnorm. Hierdie teorieë bied sterk morele en ekonomiese gronde vir verjaring, welke gronde – in ons opinie – genoegsame regverdigings bied ten einde die toets vir substantiewe arbitrêre ontneming van artikel 25(1) te bevredig. Die groot kamer se uitspraak in die *Pye*-saak verleen stukrag aan ons argument, aangesien daardie hof bevind het dat *adverse possession* in terme van die Europese konvensie ook neerkom op 'n geldige ontneming van eiendom kragtens die eiendomsklousule van die Europese Unie. Die vraag of verjaring dalk onteiening – of selfs konstruktiewe onteiening – behels val buite die bestek van hierdie artikel en sal in 'n afsonderlike artikel aandag geniet.