The consequences of a successful estoppel defence: A constitutional analysis

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Declaration

By submitting this thesis electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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October 2020, Johannesburg

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Summary

The consequences attributed to estoppel at common law ordinarily entail the suspension of the owner's *rei vindicatio* and hedged possession in favour of the successful estoppel raiser. However, remarks made in the Supreme Court of Appeal judgment, *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA), have caused uncertainty in this regard. The uncertainty concerns the question whether the traditional position of suspension and hedged possession subsequent to the case now result in compulsory loss and acquisition of ownership. In light of this uncertainty, this dissertation considers and analyses the consequences ascribed to the situation where a *bona fide* purchaser successfully raised estoppel against the *rei vindicatio*, and the question whether development in this regard could be justified based on comparative, policy and constitutional analysis.

The dissertation revealed that if the judgment of *Oriental Products* indeed implies that the estoppel defence automatically results in ownership acquisition, the most suitable category for the acquisition from a doctrinal perspective would be original, rather than derivative acquisition of ownership. Instead of maintaining acquisition of ownership as a consequence of estoppel in its defence form, it is argued that the development of a completely new self-standing mode of original acquisition based on the requirements of estoppel is supported by comparative, policy and constitutional considerations. From a comparative perspective, constructs like estoppel found in foreign jurisdictions give rise to the same issues that estoppel in South African law does, especially when considering whether ownership acquisition *via* the defence is possible. This finding exposed that it may not be wise to ascribe ownership acquisition consequences to estoppel in its defence form. Strong policy reasons that prefer and justify the development of a new and self-standing mode of original acquisition of ownership in the context of estoppel, as opposed to the uncertain traditional position were found. Significantly, the study showed that this development might be mandated given the current uncertain traditional position being inconsistent with section 25 of the Constitution. Development of a new self-standing mode of acquisition of ownership that complies with the requirements of estoppel would not only pass constitutional muster but would also allow for the old debate around the consequences of a successful estoppel defence to finally be settled.

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Opsomming

Gemeenregtelik is die gevolge van estoppel gewoonlik die opheffing van die *rei vindicatio* van die eienaar en besitsverskansing vir die persoon wat slaag met haar beroep op estoppel. Opmerkings in die Hoogste Hof van Appèl uitspraak: *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (HHA) het egter onsekerheid oor die presiese gevolge van estoppel laat ontstaan. Dit is onduidelik of die tradisionele gevolge van die opheffing van die *rei vindicatio* en besitsverskansing noodwendig tot verlies en verkryging van eiendomsreg aanleiding gee. Vervolgens oorweeg hierdie verhandeling die regsgevolge in omstandighede waar ʼn *bona fide* koper slaag met sy of haar beroep op estoppel teen die *rei vindicatio*, met spesifieke oorweging of regsontwikkeling op hierdie gebied geregverdig is, gebaseer op ʼn regsvergelykende, beleids- en grondwetlike analise.

Hierdie verhandeling bevind dat indien die uitspraak in *Oriental Products* wel impliseer dat estoppel as verweer noodwendig tot eiendomsverkryging aanleiding gee, die eiendomsverkryging uit ʼn teoretiese oogpunt eerder as ‘n vorm van oorspronklike as afgeleide eiendomsverkryging beskou moet word. Nogtans word, op sterkte van regsvergelykende, beleids- en grondwetlike oorwegings aan die hand gedoen dat ʼn nuwe, afsonderlike vorm van oorspronklike eiendomsverkryging behoort te ontstaan wanneer die beroep op estoppel slaag. Dit blyk dat dieselfde regsteoriese probleme met soortgelyke regsfigure in oorsese regstelsels ondervind word, veral rakende die oorweging of eiendomsverkryging uit die regsfigure behoort te spruit. Bevindinge in hierdie ondersoekrigting dui daarop dat eiendomsverkryging moontlik nie ʼn wenslike gevolg van estoppel in die vorm van ʼn verweer behoort te wees nie. As gevolg van die onsekere gevolge van estoppel soos vervat in die tradisionele posisie, word daar bevind dat sterk beleidsoorwegings bestaan ten guste van die ontwikkeling van ʼn nuwe en afsonderlike vorm van eiendomsverkryging in hierdie verband. Verder bevind hierdie studie dat tot die mate waartoe die onsekere, tradisionele posisie strydig met artikel 25 van die Grondwet is, regsontwikkeling noodsaaklik is. ʼn Nuwe, afsonderlike vorm van eiendomsverkryging geskoei op die vereistes van estoppel sou grondwetlike ondersoek deurstaan. Regsontwikkeling in die rigting voorgestel, met ʼn nuwe vorm van eiendomsverkryging, sal die ou strydvraag rondom die gevolge van ʼn suksesvolle verweer van estoppel finaal beëindig.

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“One can choose to go back toward safety or forward toward growth. Growth must be chosen again and again; fear must be overcome again and again.”

—*Abraham Maslow*

When I think about my LLD journey, the above quote comes to mind. Setting the goal of doing a doctorate degree was daunting, but putting in the hours to follow through and realise this goal was the hardest part. The LLD journey is one of constant battles and victories. Battles with time, priorities, thoughts (positive and negative), abilities (or lack thereof); and finding the courage to push through each battle to take steps forward and not back. Although I expected that the project would require mental strength and agility, I did not anticipate the honing that I would go through, emotionally and spiritually. Honing that inspired much-needed growth and transformation. None of which would have been possible without the unwavering support of family, friends, colleagues and university institutions. It is this support that moved me to choose growth and not to go back towards safety and to overcome my fears and doubts again and again. I cannot thank everyone who was there for me, but I would like to mention a few.

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Chapter 1: Introduction

1 1 Introduction to the research problem

The consequences of an estoppel defence that is successfully raised by a *bona fide* purchaser against an owner's *rei vindicatio* have sparked academic debate for many years.[1] The focus of the debate has always been on the question whether estoppel should result in acquisition of ownership in favour of the estoppel raiser,[2] or rather keep

[1] See for instance Carey Miller DL *The acquisition and protection of ownership* (1986) 308-309; Van der Merwe CG *Sakereg* 2 ed (1989) 372-373; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 473-474; Visser PJ & Potgieter JM *Estoppel: Cases and materials* (1994) 240; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 554-555; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 348-359; Boggenpoel ZT *Property remedies* (2017) 79-85; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 278-279.

[2] In this dissertation, the term *estoppel raiser* is used to describe the defendant who raises estoppel as a defence against the *rei vindicatio*. The use of this terminology assists in keeping the focus on estoppel and its consequences and follows the use of the term "estoppelopwerper" in Afrikaans that can be translated to *estoppel raiser* in English. The term "estoppelopwerper" is used by Visser in Visser PJ "Estoppel en die vekryging van eiendomsreg in roerende eiendom" (1994) 57 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 633 633. However, it is appreciated that the term estoppel raiser, may not be regarded as a very eloquent description of such a party. The alternative to using the term estoppel raiser is the term *estoppel assertor*, which has been preferred by Sonnekus. See Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 357. My difficulty with using the word *assertor* to describe the defendant is due to the legal connection this term has with asserting rights. It is ordinarily accepted that one asserts rights and raises defences. Since estoppel is traditionally accepted to operate as a defence in law rather than a remedy for the assertion of a right, I deem it more appropriate to employ the term estoppel raiser rather than estoppel assertor. It is especially necessary to be careful with how I describe this party from the outset, since it is shown in this dissertation that estoppel as a defence is not an appropriate legal construct to assert rights with and that legal development of a new construct is required in order for the relevant party to assert rights. In this regard, the use of the term estoppel raiser rather than estoppel assertor will avoid any possible confusion between the defence of estoppel and the developed construct that will be discussed later in the dissertation. Moreover, the consequence of hedged possession that is traditionally described as the consequence of a succesful estoppel defence also makes ascribing a name to the defendant complex. This is due to the known difficulties that exist in law with defining the term possession. In this regard, see Middelburg AWF "Die beskerming van die houerskap in die Suid Afrikaanse reg" (1954) 17 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 268 269-270; Van der Walt AJ *Die ontwikkeling van houerskap* (unpublished LLD dissertation University of Potchefstroom 1986) chapter 1. For a contrasting view regarding the concept of possession, see Kleyn DG *Die mandament van spolie in die Suid Afrikaanse reg* (unpublished LLD dissertation University of Pretoria 1986) 344-376; Van der Merwe CG *Sakereg* 2 ed (1989) 107-112. For an overview of the

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to its traditional consequences reflected in the existing common law position.[3] The existing common law position entails the suspension of the *rei vindicatio*, which provides the successful estoppel raiser with hedged possession.[4] Notably, hedged possession in the context of a successful estoppel defence remains undefined and therefore uncertain in law apart from it being known to be indefinite and resulting in some of the owner's entitlements being suspended.[5] Importantly, the legal position of the parties involved is regarded as unaffected by the successful estoppel defence.

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opposing views regarding the term possession, see in general Boggenpoel ZT *Property remedies* 91-93; Muller G et al *General principles of South African property law* (2019) 181-183.

[3] From the outset, it is necessary to distinguish between the consequences actually ascribed to a successful estoppel defence and the results argued for in the event that development of such consequences might be plausible. In this regard, the term existing common law position is used throughout the dissertation to refer to the results ascribed to estoppel at common law. As indicated in the main text, it entails that a successful estoppel defence merely results in the suspension of the *rei vindicatio* and the resultant hedged possession in favour of the successful estoppel raiser for an indefinite period. However, in the event that it is confirmed in chapter 2 that the *Oriental Products* case indeed changed the existing common law position, a distinction will be made between the common law position pre-*Oriental Products* and the common law position post-*Oriental Products*. The former referring to the traditional consequences ascribed to estoppel, while the latter will refer to the consequences that potentially can be ascribed to estoppel as a result of the *Oriental Products* case, which may include ownership acquisition. The common law position (pre and post-*Oriental Products*) will also be contrasted throughout the dissertation with the proposed development of the common law, which entails the development of a new self-standing mode of acquisition of ownership that will allow *bona fide* purchasers who can show the traditional requirements of estoppel to acquire ownership over the concerned property. For arguments in favour of ownership acquisition as a result of estoppel, see Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 96; Van der Merwe CG *Sakereg* 2 ed (1989) 373; Van Heerden HJO "Estoppel: 'n Wyse van eiendomsverkryging" (1970) 33 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 19 25; Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 234; Visser PJ "Estoppel en die vekryging van eiendomsreg in roerende eiendom" (1994) 57 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 633 636; Pelser FB "Aspekte van eiendomsverkryging deur estoppel" (2005) 38 *De Jure* 153 157. For arguments to the contrary, see Carey Miller DL *The acquisition and protection of ownership* (1986) 309; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 473; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 348.

[4] Van der Merwe CG *Sakereg* 2 ed (1989) 373; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 259. See also *Apostoliese Geloofsending van Suid-Afrika (Maitland Gemeente) v Capes* 1978 (4) SA 48 (C) 58; *Absa Bank Ltd v Knysna Auto Services CC* (266/2015) [2016] ZASCA 93 (1 June 2016) para 20.

[5] In *Apostoliese Geloofsending van Suid-Afrika (Maitland Gemeente) v Capes* 1978 (4) SA 48 (C) 60 the court indicated that the owner's entitlement to vindicate and to have possession over the property is

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In contradiction to the existing common law position set out above, the relatively recent Supreme Court of Appeal judgment, *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading*,[6] created the impression that where estoppel is successfully raised against a plaintiff owner's *rei vindicatio* such owner loses ownership to the estoppel raiser. This is evident from statements made by Shongwe JA and Harms DP, respectively. Shongwe JA held that:

> "In the context of this case, the appellant [as owner] is entitled to retransfer of the property but for the fact that it cannot assert its right of ownership because of estoppel. Hence, the applicant (*sic*) *loses its ownership* of the property."[7] (Own emphasis added)

Similarly, Harms DP opined that:

> "Whether this formalistic approach [that estoppel may only be used as a defence] can still be justified need not be considered in this case even though the effect of the successful reliance on estoppel has the effect that the appellant may not deny that the first respondent holds the unassailable title in the property or that the deeds registry entry is correct. This means that should the latter wish to dispose of the property the appellant would not be able to interfere. If this means that ownership *passed by* virtue of estoppel so be it. The better view would be that the underlying act of transfer is deemed to have been validly executed."[8] (Own emphasis added)

These remarks that were made by the respective judges in the *Oriental Products* case undoubtedly muddied the waters of the already controversial consequences of estoppel. Where it was previously clear, although regularly challenged, that the consequences of estoppel do not affect the legal position of the parties regarding the concerned property, it is now unclear what the impact of the hedged possession that the successful estoppel raiser obtains for an indefinite period of time is on the

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suspended along with other entitlements. However, the other entitlements are not described by the court. For a discussion of this case see chapter 2, section 2 4 3.

[6] 2011 (2) SA 508 (SCA).

[7] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 23.

[8] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 31.

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ownership over the concerned property.[9] The doubt regarding the aforementioned leads to a number of further uncertainties. Firstly, it is unclear whether South African law now recognises that the successful reliance on estoppel as a defence against an owner's *rei vindicatio* has the effect of acquisition of ownership in favour of the successful estoppel raiser. Secondly, if the above is the case, it is also uncertain whether ownership is acquired by way of the original or derivative mode of acquisition. Thirdly, whether the recognition of acquisition of ownership by way of estoppel can be justified from a comparative and policy perspective, remains untested and open for debate. In the final instance, it is not clear what the constitutional implications of the common law position as well as the post-*Oriental Products* position of estoppel are.

Considering the above uncertainties, the aim of this study is first to determine what the legal position is regarding the consequences of a successful estoppel defence. If it is found that the position is unsatisfactory in light of comparative, policy and constitutional considerations, the study purports to explore whether it might be desirable from a policy and constitutional perspective to rather develop a self-standing mode of ownership acquisition in favour of the purchaser in these circumstances.

1 2 Research aims and hypotheses

The purpose of this research is to investigate the proprietary and constitutional consequences of a successful estoppel defence where it is raised against an owner's *rei vindicatio*, considering the recent *Oriental Products* case. Therefore, the study purports to explore the scope of the consequences ascribed to a successful estoppel defence at common law. In addition, the focus is on whether acquisition of ownership should take place in favour of the estoppel raiser, specifically by way of development of the common law; how such acquisition should occur at common law; and whether

[9] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) paras 23, 31. See also Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 331; Sonnekus JC "Eienaars en ander reghebbendes mag ervaar dat swye nie altyd goud werd is nie" 2013 *Tydskrif vir die Suid Afrikaanse Reg* 326 327; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 259; Boggenpoel ZT *Property remedies* (2017) 79-85; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 278-279.

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such development would be in line with section 25 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

The hypothesis underlying the study is that the successful reliance on estoppel has the consequence of suspending the owner's *rei vindicatio* at common law. This suspension of the owner's *rei vindicatio* merely provides the successful estoppel raiser with (indefinite) hedged possession of the property against the owner. A further assumption made in this regard is that the consequences of a mere suspension of the owner's entitlement to vindicate may not be desirable. It is anticipated that it might therefore be more appropriate to rather develop an independent mode of acquisition of ownership in favour of *the bona fide* purchaser who can prove the traditional requirements of estoppel.

Interestingly, the common law position regarding the consequences of estoppel has not been tested against the property clause found in the South African Constitution. It is expected that the common law position, which entails the suspension of the owner's *rei vindicatio* and results in hedged possession in favour of the estoppel raiser will arguably survive constitutional muster. However, the uncertainty created by the court in *Oriental Products,* as to whether the estoppel raiser acquires ownership, might render the post-*Oriental Product*s understanding of the common law position unconstitutional. An analysis of the constitutionality of the common law position regarding the consequences of estoppel as a defence against the *rei vindicatio* is therefore important to determine whether development of the law is mandated to ensure consistency with the property clause. Moreover, it is expected that if development takes place in the form of creating a new self-standing mode of acquisition of ownership that is subject to the traditional requirements of estoppel, such development will most likely not result in an arbitrary deprivation of property in terms of section 25(1) of the Constitution. In addition, such development is anticipated to be in line with comparative law and policy considerations. In this regard, the presumption is that the new mode of ownership acquisition would arguably be an original, rather than a derivative mode of acquisition of ownership.

1 3 Methodology and qualifications

The aim of this study is primarily to investigate the consequences of a successful estoppel defence to determine if the development of the common law of estoppel

should take place. The proposed development entails recognising a self-standing mode of acquisition of ownership that would be available to *bona fide* purchasers who can satisfy the traditional requirements of estoppel. In this regard, the methodology for the development of the common law as provided for by Van der Walt in line with the Constitution will guide the methodology followed in this dissertation. Although, Van der Walt developed and applied this methodology in the context of the law of servitudes and the development thereof, the methodology he created in this regard can arguably be applied to the development of any other common law construct, including estoppel. His methodology consists of three methodological phases, each meant to ensure that development only takes place when it is necessary and within the constitutional framework.[10]

The first phase of the methodology involves identifying the source of law that the legal construct under scrutiny forms part of[11] and establishing the legal position or legal result the concerned legal construct brings about. This entails employing an accurate and in-depth historical and doctrinal analysis.[12] Regarding estoppel as the legal construct under scrutiny, the appropriate source of law is not in issue, since it is clear that estoppel forms part of the common law. However, estoppel should be described in the specific context in which it is questioned, which in this study is its consequences as a defence against the *rei vindicatio*. More specifically, the scrutiny should be located

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[10] Van der Walt AJ "Development of the common law of servitude" (2013) 130 *South African Law Journal* 722 722-755. See also a cursory application of the methodology in the context of the development of estoppel in Boggenpoel ZT & Cloete C "The proprietary consequences of estoppel in light of section 25(1): Testing Van der Walt's hypotheses" in Muller G, Brits R, Slade B & Van Wyk J (eds) *Transformative property law: Festschrift in honour of AJ van der Walt* (2018) 147-172 172.

[11] In this regard, the subsidiarity principles that were laid down by the Constitutional Court are instructive. See *Ex parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 (2) SA 674 (CC) para 44; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) para 25; *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) para 96; *Chirwa v Transnet Ltd* 2008 (2) SA 24 (CC) para 23; *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 (6) SA 4 (CC) para 37; *Walele v City of Cape Town and Another* 2008 (6) SA 129 (CC) para 15. See further Van der Walt AJ *Property and constitution* (2012) 21; Van der Walt AJ "Development of the common law of servitude" (2013) 130 *South African Law Journal* 722 744.

[12] Van der Walt AJ "Development of the common law of servitude" (2013) 130 *South African Law Journal* 722 737. See also Davis DM "Where is the map to guide common law development?" (2014) 25 *Stellenbosch Law Review* 3 12.

in the interplay between these legal constructs because the problem results where the owner entrusted her property to a third party who then transacted with a *bona fide* purchaser for the sale of the property. The situation must furthermore entail the owner having made a negligent representation that the third party seller is the owner or at the very least has the right to dispose of the property, on which the *bona fide* purchaser reasonably relied to her detriment. As a result, particular consideration will be given to the *rei vindicatio* to provide a complete understanding of estoppel and its consequences in the context of vindication. Since the focus is only on the *rei vindicatio* and estoppel, the various other contexts and fields of law, where the defence of estoppel can also be raised against actions other than the *rei vindicatio*, falls outside the scope of this dissertation and will therefore not be explored.[13] Moreover, the focus of the dissertation is limited to the *consequences* ascribed to a successful estoppel defence raised against the *rei vindicatio* and therefore excludes an in-depth investigation into the requirements of estoppel.[14] However, some consideration will be given to the requirements of estoppel to the extent that such consideration is necessary for a better understanding of the consequences of the defence.

The important question in the first phase of Van der Walt's methodology is what the common law position pertaining to the consequences of an estoppel defence entails. Therefore, historical and case law analyses will be undertaken. As a starting point, this research will describe the origin and development of the applicable private property law rules and principles pertaining to estoppel and the *rei vindicatio* in order to set the scene for the investigation into the consequences of a successful estoppel defence. The research will then discuss South African case law, which dealt with the

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[13] For a discussion of the application of estoppel in contract law, see Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 342-347. See also *Trust Bank of Africa Ltd v Eksteen* 1964 (3) SA 402 (A) in which the consequences of estoppel were considered in contract law. For the application of estoppel in the context of family law, see Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 347-348; *Louw v MJ&H Trust (Pty) Ltd* 1975 (4) SA 268 (T). For an overview of the application of estoppel in the law of succession, see Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 334-335.

[14] The requirements of estoppel have arguably been clarified in *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A); *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A) and *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A). For a detailed discussion of the requirements of estoppel, see Carey Miller DL *The acquisition and protection of ownership* (1986) 310-323; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 65-281; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 273-278.

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result of estoppel in the vindication context, in order to determine the traditional common law position in this regard. It is hoped that if any uncertainty exists pertaining to the consequences of estoppel or if there is any inconsistency with the way in which the courts have approached the consequences of estoppel, that such uncertainties or inconsistencies will become evident after a critical analysis of the development of the constructs and the relevant case law.

After establishing the traditional common law position regarding the consequences of estoppel in terms of historical, doctrinal and jurisprudential analyses, the study will proceed to consider the appropriateness of development of the law in this regard. More specifically, whether the property law rules and principles regarding acquisition of ownership would be able to accommodate development of the common law to provide for acquisition of ownership. Therefore, as part of determining the law (although for purposes of development here), the research will consider whether the most suitable category for acquisition of ownership is original or derivative acquisition. This will be done through doctrinal analysis. Here the basic principles pertaining to each category and also all the modes of acquisition of ownership will be critically analysed. Furthermore, the arguments made by scholars for and against original and derivative acquisition regarding the consequences of estoppel will also be described and analysed, respectively.

The second phase of Van der Walt's methodology involves the assessment of the acceptability of the common law position pertaining to the consequences of estoppel as identified in the first phase of the methodology.[15] The first step in this stage requires an examination of the constitutional framework (values underlying the Constitution and non-property constitutional rights) in order to determine whether the common law position is in line with the Constitution.[16] If the common law position aligns with the constitutional framework, constitutional development is not required.[17] The study purports to test the consequences traditionally ascribed to estoppel against the

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[15] Van der Walt AJ "Development of the common law of servitude" (2013) 130 *South African Law Journal* 722 737.

[16] Van der Walt AJ "Development of the common law of servitude" (2013) 130 *South African Law Journal* 722 745. See also Davis DM "Where is the map to guide common law development?" (2014) 25 *Stellenbosch Law Review* 3 11.

[17] Section 8 of the Constitution. See Van der Walt AJ "Development of the common law of servitude" (2013) 130 *South African Law Journal* 722 748.

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Constitution, in particular section 25(1) of the Constitution.[18] The constitutional analysis will consider the test for non-arbitrary deprivations as laid down in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*[19] ("*FNB*") and subsequent Constitutional Court cases to determine whether the consequences of estoppel would survive section 25 scrutiny. In the event that the common law position (traditional consequences of estoppel) infringes the property clause, development of the common law of estoppel will be constitutionally required.[20]

The second phase of Van der Walt's methodology further involves determining whether comparative law and policy considerations might favour development of the common law in this regard. Where this is ordinarily the case, such considerations will constitute strong reasons for the development of the law.[21] Consequently, a comparative analysis of constructs in Scottish and English law, which are similar to estoppel, will be undertaken. A comparison between the constructs in these foreign jurisdictions and the South African doctrine of estoppel might be useful to anticipate some of the benefits, and problems, that may arise with regard to the proprietary consequences of estoppel and possible solutions to potential problems. The anticipation of further benefits or problems with the common law position regarding the consequences of estoppel may help in deciding whether it might be more favourable from a comparative perspective to develop the consequences of estoppel in South African law. The value of comparing estoppel in South African law to estoppel in English law is firstly found in the fact that estoppel originated in English law and was

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[18] Only a cursory section 25 analysis of the consequences of estoppel has been done. See Boggenpoel ZT & Cloete C "The proprietary consequences of estoppel in light of section 25(1): Testing Van der Walt's hypotheses" in Muller G, Brits R, Slade B & Van Wyk J (eds) *Transformative property law: Festschrift in honour of AJ van der Walt* (2018) 147-172 166-171.

[19] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

[20] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) paras 54−55. See also Van der Walt AJ "Development of the common law of servitude" (2013) 130 *South African Law Journal* 722 745; Davis DM "Where is the map to guide common law development?" (2014) 25 *Stellenbosch Law Review* 3 13−14.

[21] Van der Walt AJ "Development of the common law of servitude" (2013) 130 *South African Law Journal* 722 742.

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subsequently received into South African law.[22] Although the construct of estoppel that exists in South Africa remains the same as its English law counterpart at its core, the respective jurisdictions have developed estoppel over time in response to the unique needs of their respective legal systems. These developments, together with the disparate legal traditions of the respective jurisdictions, have the effect that estoppel in English law is somewhat different from estoppel in South African law. The value of comparing estoppel in South African law with similar constructs in Scottish law such as the doctrine of personal bar is firstly because personal bar was traditionally treated synonymously with estoppel in the Scottish legal system. Furthermore, the doctrine of personal bar has also been influenced significantly by English jurisprudence concerning the doctrine of estoppel. This is so because Scotland formed part of the Kingdom of Great Britain.[23] Moreover, the South African and Scottish jurisdictions are considered as comparable jurisdictions since both legal systems are characterised as mixed legal systems, which means they both containing a combination of rules and principles from the civilian legal tradition and the common law legal tradition.[24] As a result of the above, both Scottish and English law may prove to be valuable to assist with determining how the consequences of estoppel should be developed in South African law.

As indicated by Van der Walt, policy may also justify the development of the common law. It should, however, be noted that Grobler maintains that when policy is considered for purposes of development of the law, such consideration should be done with caution, since policy in itself is a nebulous concept and its content is almost always open for debate. She argues that where policy is used to justify why the law should be developed in a constitutional dispensation, such policy considerations should be

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[22] De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 10-11; Carey Miller DL *The acquisition and protection of ownership* (1986) 306; Sonnekus JC *Rabie PJ & Sonnekus JC The law of estoppel in South Africa* 3 ed (2012) 52. See also *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) 452; *Trust Bank of Africa Ltd v Eksteen* 1964 (1) SA 74 (N) 82; *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A) 409.

[23] Reid EC & Blackie JWG *Personal bar* (2006) 21-26. See also the case of *William Grant and Sons Ltd v Glen Catrine Bonded Warehouse Ltd* 2001 SC 901.

[24] Hahlo HR & Khan E *The South African legal system and its background* (1968) 178; Zimmermann R "Good faith and equity" in Zimmermann R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 217-260 217; Tetley W "Mixed jurisdictions: Common law v civil law (codified and uncodified)" (2000) 60 *Louisiana Law Review* 679 685.

accompanied by other reasons of constitutional and were relevant comparative law.[25] However, policy analysis still remains valuable for good reason. Bell explains that when legal rules fail to provide adequate answers or resolutions, the priorities of society can be found in policy and can aid to develop the rules to solve the dispute.[26] It is for this reason that policy will be considered. A policy analysis will determine whether South African law should develop to recognise acquisition of ownership in the circumstances that ordinarily give rise to a successful estoppel defence simply maintain hedged possession against the owner. The theoretical frameworks that might be useful to this study are theories of law and economics, equity and fairness. The constitutional, comparative and policy analyses of the common law position regarding the consequences ascribed to estoppel as well as the possible development of the law to provide for acquisition of ownership in this regard are done to determine if it is more desirable to develop the law pertaining to estoppel in favour of ownership acquisition.

Since it is proposed by some scholars that the consequences ascribed to a successful estoppel defence should be developed to have ownership acquisition as a result, this proposed development should also be tested against the Constitution. The third phase of Van der Walt's methodology concerns determining whether the proposed developed position passes constitutional muster. In this regard, the developed position will be tested against the relevant provision of the Constitution, which is section 25(1) of the Constitution, to determine whether the effects of the development would amount to an arbitrary deprivation of the owner's property. Here, textbooks, case law and academic literature will assist to determine whether the proposed development would comply with the identified requirements for property deprivation. Development would be mandated if the traditional consequences do not comply with the property clause, since all law should be in line with the Constitution. Also, if it is found that the proposed development infringes section 25, it would mean

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[25] Grobler L *The* salva rei substantia *requirement in personal servitudes* (unpublished LLD dissertation Stellenbosch University 2015) 219. In making this argument, Grobler draws from the work of other scholars. See in this regard Hoexter C "Judicial policy in South Africa" (1986) 103 *South African Law Journal* 436 441; Van Aswegen A "Policy considerations in the law of delict" (1993) 56 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 171 172-174; Begleiter MD "Taming the 'unruly horse' of public policy in wills and trusts" (2012) 26 *Quinnipiac Probate Law Journal* 125 136.

[26] Bell J *Policy arguments in judicial decisions* (1983) 22-23. See also Grobler L *The* salva rei substantia *requirement in personal servitudes* (unpublished LLD dissertation Stellenbosch University 2015) 224.

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that the proposed development is ill-suited under our Constitution, which would indicate that other possibilities should rather be explored in this regard.

1 4 Overview of the chapters

This dissertation consists of seven chapters including the current opening chapter, which is aimed at introducing the research problem. To set the foundation for the investigation into the proprietary consequences of a successful estoppel defence, chapter 2 sets out the general principles of the *rei vindicatio* as developed in Roman, Roman-Dutch and South African law, and the general principles of estoppel as originated in English law and subsequently developed in South African law. An overview of jurisprudence often used to explain the contested consequences of a successful estoppel defence against the *rei vindicatio* together with academic commentary follows the historical overview in chapter 2. This is done to determine the consequences of a successful estoppel defence as it is articulated in case law, including in the *Oriental Products* case. Chapter 2, therefore, establishes the common law position regarding the consequences of a successful estoppel defence.

Chapter 3, in turn, sets out the categories and the specific modes by which ownership can be acquired in South African law. The chapter investigates the characteristics of the recognised categories of ownership acquisition in South African law. This allows for the delineation of the scope and boundaries of the established modes of acquisition of ownership to determine where acquisition by way of estoppel or a developed self-standing new mode of acquisition may best be suited. Case law and academic literature regarding the distinction between the modes of acquisition and the respective views on the best categorisation for the consequences of estoppel will be analysed. This is done to ultimately determine which recognised mode of acquisition of ownership acquisition is the most suitable to accommodate the estoppel scenario. In addition, some practical questions regarding the specifics of the most appropriate mode will also be considered. These include, *inter alia* the most appropriate construct for acquisition of ownership and at what moment ownership would be acquired if the common law is developed to make provision for acquisition of ownership in these circumstances.

Chapter 4 of the dissertation investigates specific issues of comparative significance, namely whether, upon closer analysis, constructs in Scotland and

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England are comparable to estoppel in South African law. It further considers what the consequences of these constructs are in these foreign jurisdictions. This is done to determine whether the way these jurisdictions approach the *bona fide* purchaser problem with their respective constructs, can resolve the current uncertainties surrounding the consequences of a successful estoppel defence in South Africa. With this purpose in mind, the first part of chapter 4 describes and analyses the comparative constructs found in Scottish law. The second part provides an overview of the English law estoppel-like constructs. Both sections set out the ambit of an owner's right to vindicate property in these jurisdictions and how the owner's right to vindicate is impacted in the context of movable property by the operation of section 21(1) of the Sale of Goods Act 1979. Furthermore, these sections explore the position in the respective jurisdictions in the context of immovable property. The purpose is to assess whether there are mechanisms in these jurisdictions that resemble estoppel in the context of movabe and immovable property and what the proprietary consequences of these mechanisms are, especially since estoppel can be raised in the context of both movable property and immovable property in South African law. Throughout the chapter, the South African doctrine of estoppel is compared to its possible counterparts in Scotland and England, in order to draw conclusions on the comparability, and therefore the viability, of implementing similar consequences in the South African context, with the specific focus on the possibility of ownership acquisition.

Policy reasons that may justify the development of the law to provide for acquisition of ownership in favour of the *bona fide* purchaser are explored in chapter 5. The first part of the chapter describes and contextualises the way South African law mediates the conflict between the protection of the owner's rights and the protection of the estoppel raiser by way of the common law position of the consequences of estoppel. This is followed by an investigation into the anomalies that result from the traditional consequences ascribed to estoppel. The chapter then proceeds to look at policy reasons of law and economics, equity and fairness to determine whether the development of the law to provide for acquisition of ownership in the estoppel scenario is favoured above maintaining the existing common law position.

The final substantive chapter, chapter 6, evaluate whether the traditional consequences and the proposed development of the common law comply with section 25 of the Constitution. To this end, the chapter sets out the questions as formulated in *FNB* which were subsequently developed by the Constitutional Court's jurisprudence

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and applies the questions to the relevant competing constructs in an integrated fashion. The question whether the common law doctrine of estoppel and the development of the common law doctrine in favour of ownership acquisition comply with section 25 is crucial for whether development of the law can or should take place.

The concluding chapter, chapter 7, purports to provide a summary of the findings together with some final remarks.

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Chapter 2: General principles

2 1 Introduction

Scholars have, for many years, contested the consequences ascribed to estoppel as a defence against the *rei vindicatio*. The crucial question is whether the person who has successfully pleaded estoppel should forthwith become the owner of the property instead of simply receiving hedged possession against the owner's vindicatory power. When dealing with a potential development of the common law, the starting point should be an accurate historical and doctrinal analysis of the legal constructs under scrutiny, namely the *rei vindicatio* and the doctrine of estoppel. This includes determining the source of law that these constructs form part of, the scope of these constructs and how the courts have interpreted their application and consequences.[1]

While considering the significance of historical sources for the development of the common law, Van der Walt submits that in the current constitutional dispensation the place and the aim of historical analyses are different from what they were previously.[2] Traditionally, it is often assumed that proper analysis of the common law principles (the identification, interpretation and application of the principles) would provide the solution to a legal issue, which would otherwise require development. In terms of this assumption, it is the proper interpretation of the common law authorities that should allow for solutions to disputes. In the circumstances where no such solution can be found, it is deemed to be appropriate to employ interstitial or minimum development of the common law since it is presumed that inherent logic can be found

[1] Van der Walt explains the place of historical analysis when development of the common law is employed, albeit in the context of servitude law. See Van der Walt AJ "Development of the common law of servitude" (2013) 130 *South African Law Journal* 722 737; Van der Walt AJ *The law of servitudes* (2016) 9. For a more general discussion pertaining to the development of the common law in the constitutional dispensation and the place of historical and doctrinal analysis, see Fagan A "The secondary role of the spirit, purport and objects of the bill of rights in the common law's development" (2010) 127 *South African Law Journal* 611 611-627; Davis DM "Where is the map to guide common law development?" (2014) 25 *Stellenbosch Law Review* 3-14.

[2] Van der Walt AJ *The law of servitudes* (2016) 9. See also Davis DM "Where is the map to guide common law development?" (2014) 25 *Stellenbosch Law Review* 3 11-12.

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in common law doctrine.[3] This entails expanding the common law principles by including exceptions that can be deducted from the general rules and principles. However, in the constitutional dispensation legal historical and doctrinal analysis cannot be considered in isolation, since the constitutional order now poses supreme demands when it comes to developing the common law. The process of identifying suitable solutions has changed to the determination of solutions based on the Constitution of the Republic of South Africa, 1996 (the Constitution) and its values rather than on the inherent logic of common law doctrine.[4] As a result, the determination of the correct common law position regarding the consequences of a successful estoppel defence is critical, in order to determine whether development is necessary. The establishment of the correct common law position requires an overview of the *rei vindicatio* and the doctrine of estoppel, respectively. Moreover, in a legal system in which great reliance is placed on court decisions for the interpretation of common law doctrine, case law analysis is vital to pin down the correct interpretation of the consequences of a successful estoppel defence.

Consequently, this chapter will describe and discuss the general principles underlying both the *rei vindicatio*, often espoused as the strongest remedy to claim return of property, and the doctrine of estoppel, which in turn is regarded as the most important defence mechanism against the vindicatory remedy. The cases in which South African courts have had to mediate between the competing right of the owner

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[3] Van der Walt AJ "Development of the common law of servitude" (2013) 130 *South African Law Journal* 722 737; Van der Walt AJ *The law of servitudes* (2016) 9-10; Davis DM "Private law after 1994: Progressive development or schizoid confusion?" (2008) 24 *South African Journal on Human Rights* 318 319. For the origin of the idea, see Van Aswegen A "The future of South African contract law" in Van Aswegen A (ed) *The future of the South African private law* (1993) 44-60 53-56.

[4] Sections 8 and 39(2) of the Constitution of the Republic of South Africa, 1996. The relationship between sections 8 and 39(2) of the Constitution was confirmed in *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) paras 53-54. See further Van der Walt AJ "Development of the common law of servitude" (2013) 130 *South African Law Journal* 722 733-724; Van der Walt AJ *The law of servitudes* (2016) 17. See also Davis DM "Private law after 1994: Progressive development or schizoid confusion?" (2008) 24 *South African Journal on Human Rights* 318 319; Davis DM "Where is the map to guide common law development?" (2014) 25 *Stellenbosch Law Review* 3 4-6. For an argument that constitutional provisions and values should merely play a secondary role in the process of common law development, see Fagan A "The secondary role of the spirit, purport and objects of the bill of rights in the common law's development" (2010) 127 *South African Law Journal* 611 611-627; Fagan A "A straw man, three red herrings, and a closet rule–worshipper − A rejoinder to Davis JP" (2012) 129 *South African Law Journal* 788−798.

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on the one hand, and the interest of the *bona fide* purchaser for value (estoppel raiser), on the other hand, are also analysed*.* This will be done to identify how the courts in the relevant cases interpreted the proprietary consequences of a successful estoppel defence.

Accordingly, the first part of the chapter sets out the general principles of the *rei vindicatio* as developed in Roman, Roman-Dutch and South African law, with a particular focus on the scope of the owner's power to reclaim her property. In this regard, the way the remedy was applied and to what extent it was limited in Roman and Roman-Dutch law will help to determine the rationale underlying the remedy as well as the contours of the remedy which will be significant when considering possible development of the law of estoppel. The second part describes the basic principles of the doctrine of estoppel as developed in early English law and its current application in the South African legal system. This will provide the necessary context to understand the scope and reach of estoppel. The final part of the chapter provides an overview of jurisprudence often used to explain the contested consequences of a successful estoppel defence against the *rei vindicatio* together with academic commentary.

2 2 General principles of the *rei vindicatio*

2 2 1 Historical background

2 2 1 1 Roman law

The *vindicatio* was the Roman predecessor of the *rei vindicatio* and formed part of the *legis actio sacramento in rem* (proprietary remedies) of ancient Rome.[5] In terms of the Roman *vindicatio* the plaintiff had to show that she was the owner of the property,[6]

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[5] *D* 1.1-1.80: Full citation *Digesta Iustiniani* in *Corpus Iuris Civilis* Mommsen T & Krüger P (eds) translated by Watson A *The Digest of Justinian* Vol IV (1985); Diosdi G *Ownership in ancient and pre-classical Roman law* (1970) 94; Kaser M *Römisches Privatrecht* 6 ed (1960) translated by Dannenbring R *Roman private law* 2 ed (1968) 39; Cloete CT *A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context* (unpublished LLM thesis Stellenbosch University 2016) 16-17.

[6] Kaser M *Römisches Privatrecht* 6 ed (1960) translated by Dannenbring R *Roman private law* 2 ed (1968) 113; Diosdi G *Ownership in ancient and pre-classical Roman law* (1970) 94; Du Plessis P *Borkowski's textbook on Roman law* 4 ed (2010) 75; Van der Walt AJ "Gedagtes oor die herkoms en die ontwikkeling van die Suid-Afrikaanse eiendomsbegrip (vervolg)" (1988) 21 *De Jure* 306 313. However, the plaintiff could choose not to rely on the *rei vindicatio* and rather institute an *actio Publiciana*

after which the defendant had to rebut what the plaintiff showed by instead proving that she was the owner.[7] Furthermore, the procedures of the *vindicatio* required that the court should order that the property be restored to one of the parties.[8] However, what transpired when neither of the parties could prove ownership remains uncertain.[9] This is particularly interesting, because there was still a duty on the court to find which party should be allowed to control the property, even if neither could prove that they owned the property. Accordingly, the argument has been made that the *vindicatio* was not only available to owners but could also have been available to any person with the entitlement to possess.[10] The fact that ownership was never defined properly in ancient Roman law, supports this argument.[11] Consequently, the *vindicatio* was not exclusively

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in which case the plaintiff did not have to prove ownership. See for instance Kaser M *Römisches Privatrecht* 6 ed (1960) translated by Dannenbring R *Roman private law* 2 ed (1968) 113.

[7] Kaser M *Römisches Privatrecht* 6 ed (1960) translated by Dannenbring R *Roman private law* 2 ed (1968) 113; Diosdi G *Ownership in ancient and pre-classical Roman law* (1970) 94.

[8] Also, both parties had to deposit a wager-sum, in favour of the successful litigant or the state. See Kaser M *Römisches Privatrecht* 6 ed (1960) translated by Dannenbring R *Roman private law* 2 ed (1968) 115; Diosdi G *Ownership in ancient and pre-classical Roman law* (1970) 94.

[9] Diosdi G *Ownership in ancient and pre-classical Roman law* (1970) 94-95.

[10] Divergent opinions on what the requirement and underlying theory of the *vindicatio* were in pre-classical Roman law. Lotmar, Roth and Ihering made three distinct suggestions respectively. Lotmar suggests that the supposed *contravindicatio* (the requirement that the defendant also has to prove ownership) was not part of the vindication procedure. Accordingly, the property remained with the defendant where the plaintiff failed to prove ownership. Similarly, Roth argues that the judge examined only one of the party's submissions, but what makes his argument different from Lotmar's argument is the fact that Roth acknowledges the existence of the *contravindiciatio* and submits that the judge in fact only examined the *contravindicatio* and not the *vindicatio*. In other words, his contention is that after the plaintiff declared that he is the true owner, the court will look to the defendant to *contravindicate*. The defendant will then not only have to declare his ownership, but also prove it. Accordingly, where the defendant failed to prove ownership, the property was restored to the plaintiff. In contrast, Ihering is of the opinion that both parties were required to declare and prove their alleged rights. The judge could then declare that the plaintiff and defendant's claims were baseless. See for instance, Diosdi G *Ownership in ancient and pre-classical Roman law* (1970) 95. See also Cloete CT *A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context* (unpublished LLM thesis Stellenbosch University 2016) 17.

[11] Diosdi G *Ownership in ancient and pre-classical Roman law* (1970) 51; Van der Walt AJ "Unity and pluralism in property theory – A review of property theories and debates in recent literature: Part I" 1995 *Tydskrif vir die Suid Afrikaanse Reg* 15 18; Johnston D *Roman law in context* (1999) 53; Borkowski A & Du Plessis P *Textbook on Roman law* 3 ed (2005) 157. See also Dhliwayo P *A constitutional analysis of access rights that limit landowners' right to exclude* (unpublished LLD dissertation Stellenbosch University 2015) 79.

available to owners.[12] However, Louw submits that although early Roman law did not provide extensive protection to owners, an owner's right to reclaim her property strengthened over time in response to the needs of trade and commerce.[13] This is evident from the fact that the institution of ownership was coined as "*dominium*" in the late classical Roman period. *Dominium* concerned the relationship between the owner and her property.[14] Louw points out that during this time, the strong nature of ownership was already evident in the Roman maxim *ubi rem meam invenio, ibi eam vindico*, which means that an owner can vindicate her property wherever she finds it.[15] Moreover, the maxims *nemo plus iuris ad alium transferri potet quam ipse haberet*[16] (no one can transfer to someone else more rights than he has) and *id quod nostrum est sine facto nostro ad alium transferri non potest*[17] (that which is ours cannot be transferred to another without our act) allowed an owner to vindicate her goods from a *bona fide* third party for value in circumstances where the owner voluntarily placed her goods in the possession of another person who without the owner's consent sold the goods.[18]

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[12] No precise definition of ownership existed because the *paterfamilias* exercised control over the persons and things in his household. This social structure accordingly ensured that property disputes by private individuals seldom occurred. See Borkowski A & Du Plessis P *Textbook on Roman law* 3 ed (2005) 157. See further Dhliwayo P *A constitutional analysis of access rights that limit landowners' right to exclude* (unpublished LLD dissertation Stellenbosch University 2015) 79.

[13] Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 223-224.

[14] Prichard AM *Leage's Roman private law: Founded on the Institutes of Gaius and Justinian* 3 ed (1961) 158; Diosdi G *Ownership in ancient and pre-classical Roman law* (1970) 51; Borkowski A & Du Plessis P *Textbook on Roman law* 3 ed (2005) 157; Dhliwayo P *A constitutional analysis of access rights that limit landowners' right to exclude* (unpublished LLD dissertation Stellenbosch University 2015) 80.

[15] *D* 44.7.25. See further Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 224; Van der Merwe CG *Sakereg* 2 ed (1989) 361. Milton indicates that the maxim *ibu rem meam invenio, ibi eam vindico* also emphasises the broad power of the owner to vindicate her property in Roman law. See Milton JRL "Ownership" in Zimmermann R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 686.

[16] *D* 50.17.54.

[17] *D* 50.17.11.

[18] Voet 6.1.12: Full citation Voet J *Commentarius ad Pandectas* (1829) translated by Gane P *Commentary on the Pandect* (1955-1958); Grotius 2.35: Full citation De Groot H *Inleidinge tot de Hollandsche rechtsgeleertheyd* (1631) translated by Lee RW *The jurisprudence of Holland* (1926). For a discussion of the extensive power of the owner to reclaim her property in these circmstances, see *Morum Bros Ltd v Nepgen* 1916 CPD 392 394. See futher Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 224.

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These maxims indicate that the reach of the owner's right to vindicate in Roman law became stronger over time.[19]

2 2 1 2 Roman-Dutch law

The primitive Germanic principle, *mobilia non habent sequelam* (you cannot follow movable property into the hands of its possessor) determined what happened where the owner lost possession of her movable property in Germanic law. The principle entailed that possession equated to ownership since an owner could not follow and reclaim her property once the property was found in possession of another. Specifically, the owner could not reclaim her property where she lost possession of the property voluntarily. As a result, an owner's power to restore physical control over her property was limited to those circumstances where she lost possession thereof involuntarily, for example by way of theft.[20]

During the seventeenth century, the rise of free trade in the Netherlands resulted in the need to protect the owner's interest in instances of voluntary loss of possession. In response to this need, the Roman maxim of *ubi rem meam invenio, ibi vindico* made its way into the Dutch legal system and replaced the *mobilia* principle.[21] As a result, the owner's power to recover her movable property expanded and extended to where she lost possession thereof voluntarily and involuntarily. The Roman law maxim

[19] Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 224.

[20] *Morum Bros Ltd v Nepgen* 1916 CPD 392 394-395. For a discussion of the *mobilia non habent sequelam* maxim, see Van Rensburg JF *Opvolging van roerende goed in die derde hand* (unpublished LLD dissertation Stellenbosch University 1930) 15; Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 224; Van der Merwe CG *Sakereg* 2 ed (1989) 361-362; Milton JRL "Ownership" in Zimmermann R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 686; Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 77-78.

[21] Voet 6.1.12. See also De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 58; Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 225.

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governed the owner's ability to recover her property in the region and limitations on the owner's broad power to recover was often imposed by way of legislation.[22]

An owner could restore physical possession of her property in instances of both voluntary and involuntary loss of possession with the Roman law *vindicatio*, which gave effect to the *ubi rem meam* principle.[23] In this regard, Voet points out that for an owner (plaintiff) to succeed with a vindication claim she had to show that she is the owner of the property.[24] This was done by showing that the predecessor had a valid title and that a legally valid basis existed for the transfer of the property from the predecessor to the plaintiff.[25] The second requirement was that the property existed and remained identifiable.[26] The final requirement that the plaintiff had to show was that the defendant was in possession of the property at the time the proceedings were launched.[27] These requirements are identical to that of the modern-day *rei vindicatio*'s requirements as will become evident below.

Limitations on the owner's right to recover her property in Roman-Dutch law were primarily imposed by way of local legislation that prohibited the owner from claiming

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[22] Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 226. According to Van der Walt these limitations were the result of the interest of trade and commerce that shifted from the need to protect the owner's right to recover to protecting the good faith of acquirers. This need resulted in the revival of the *mobilia non habent sequelam* adagium during the eighteenth century by way of statutes promulgated to limit the extensive reach of the owner's entitlement to vindicate in some provinces of the Netherlands. See Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 77-78; Van der Merwe CG *Sakereg* 2 ed (1989) 362. See also De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 58.

[23] Grotius 2.2.5; Van der Merwe CG *Sakereg* 2 ed (1989) 346-347. See also Cloete CT *A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context* (unpublished LLM thesis Stellenbosch University 2016) 20-21.

[24] Voet 6.1.20; Van der Merwe CG *Sakereg* 2 ed (1989) 347; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 270.

[25] In the context of immovable property, proof of registration was sufficient to show ownership. See Voet 6.1.24; Van der Merwe CG *Sakereg* 2 ed (1989) 348; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 270-271.

[26] Voet 6.1.24; Van der Merwe CG *Sakereg* 2 ed (1989) 349; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 270-271.

[27] Voet 6.1.2, 2.1.24; Van der Merwe CG *Sakereg* 2 ed (1989) 349; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 270-271.

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the return of goods in certain circumstances. In the first instance, an owner could not restore her goods where a *bona fide* purchaser bought the goods (movable property) on a free market or at a public auction unless the owner paid the purchase price back to the purchaser.[28] Secondly, although an owner could generally claim back stolen goods from purchasers,[29] the owner could not recover her stolen goods purchased by moneylenders,[30] dealers in old clothing and gold and silversmiths unless the owner made good the purchase price and all expenses incurred by the dealers in respect of the goods.[31] Thirdly, where a court on a previous occasion ordered the goods to remain in the possession of the defendant in a vindicatory case, the defence *exceptio rei iudicatae* precluded the owner from recovering the property from such defendant at a later stage.[32] In the fourth place, an owner could not enforce her right to vindicate against a *bona fide* purchaser of the property, where such property was bought at a judicial sale, sale in execution or a sale by the *fiscus*.[33] In addition, recovery of goods by an owner was not allowed where the goods constituted stolen money that mixed with the money of a *bona fide* purchaser.[34] Finally, where the owner entrusted her agent with her goods, the owner was precluded from vindicating the property from the purchaser,[35] unless she paid back to the purchaser the full purchase price. This

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[28] Grotius 2.3.6; De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 56-57. See also Van der Merwe CG *Sakereg* 2 ed (1989) 363.

[29] The *ibu rem meam invenio, ibi eam vindico* maxim provided for this extensive power.

[30] The business of public moneylenders involved the pledge of goods as guarantee that the person taking out a loan will repay the loan. In the event that the pledged goods turned out to be stolen goods, the owner could not recover such goods from the moneylender with the *vindicatio*, unless the owner of the goods paid to the moneylender the value of the goods. See Grotius 2.3.6; Voet 6.1.8. See also Van Rensburg JF *Opvolging van roerende goed in die derde hand* (unpublished LLD dissertation Stellenbosch University 1930) 60; Van der Merwe CG *Sakereg* 2 ed (1989) 363.

[31] Van Rensburg JF *Opvolging van roerende goed in die derde hand* (unpublished LLD dissertation Stellenbosch University 1930) 60; Van der Merwe CG *Sakereg* 2 ed (1989) 363. See *Muller v Chadwick & Co* 1906 TS 30 39 for the legal postion of silversmiths and goldsmiths.

[32] This defence could be raised in the situation where the court in a previous judgment dealt with and made an order pertaining to the vindicatory action on the same facts and between the same parties. Grotius 2.3.7; Voet 6.1.8. See also Van der Merwe CG *Sakereg* 2 ed (1989) 364.

[33] Voet 6.1.13, 6.1.23. See also Van der Merwe CG *Sakereg* 2 ed (1989) 364-365.

[34] Voet 6.1.8. See also Van der Merwe CG *Sakereg* 2 ed (1989) 364-365.

[35] Voet 6.1.12; Grotius 2.3. See also *Morum Bros Ltd v Nepgen* 1916 CPD 392 394 for an interpretation of this Roman-Dutch limitation on the owner's *rei vindicatio* and its application in South African law.

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limitation also applied to those instances where the agent sold the goods fraudulently.[36] Interestingly, Voet indicates another exception that operated in the circumstances where the owner entrusted her goods to an untrustworthy person, who is not an agent of the owner where such person subsequently sold the goods without permission to do so. In these circumstances, the owner could not recover her property from a *bona fide* purchaser.[37] According to Groenewegen, the reason for this limitation on the owner's right to vindicate was found in the maxim *ne quis decipiatur culpa ac negligentia*, which holds that the owner should carry the consequences of her own negligence.[38] These two final exceptions seem to correlate with the limitation imposed on the *rei vindicatio* by the doctrine of estoppel in modern South African law. In particular, the requirement of negligence under this limitation seems to be similar to the negligence that is required for estoppel to be successful, although the prerequisites of estoppel seem to require much more than mere possession to be handed over to the untrustworthy person, unlike the Roman-Dutch limitation.[39] This identified similarity might be useful when contemplating the consequences of a successful estoppel defence, especially the impact of the negligence requirement on the type of protection a *bona fide* purchaser should perhaps enjoy under the circumstances that give rise to

[36] Voet 14.3.4; De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 56; Van der Merwe CG *Sakereg* 2 ed (1989) 364-367. See also *Morum Bros Ltd v Nepgen* 1916 CPD 392; *Pretorius v Loudon* 1985 (3) SA 845 (A) 862.

[37] Voet 6.1.12. See also De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 57-58.

[38] Groenewegen 4.1.16: Full citation Groenewegen S *Tractus de legibus abrogatis et institatis in Hollandia vicinisque regionibus* (1649) translated by Beinart B *A treatise on the laws abrogated and no longer in use in Holland and neighbouring regions* (1974). De Wet indicates that it is not entirely clear whether this exception applied in all cases of the owner's voluntary loss of possession. However, he supports the view that it might have only applied where the owner lost possession voluntarily by his own *culpa*. Furthermore, he shows that this limitation was a result of statutes promulgated in response to certain trade needs at the time and that it is accordingly, not a reflection of the position in Roman law. See De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 57-59. See also, *D* 50.17.203; Thomas JAC *Textbook of Roman law* (1976) 328 in which it is explained that if anyone incurs loss because of their own doing, loss has not been incurred. This is an interesting prospect if one looks at the reasoning behind estoppel which is to protect the innocent purchaser rather than the careless owner. See chapter 5, section 5 3 2 1, 5 3 2 3 below.

[39] See section 2 3 2 below for an overview of the requirements of estoppel by representation in South African law.

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a successful estoppel defence in South African law.[40] Moreover, the mere existence of this limitation in Roman-Dutch law, albeit in the form of legislative intervention, shows that there is a particular need to provide substantive protection to *bona fide* purchasers of goods where the owner made a culpable representation that can prevail against the far-reaching power of the owner to recover her property. In addition, it highlights that even in Roman-Dutch law the situation was seen as inequitable. This fact might be useful to consider in chapter 5 of this dissertation where the focus turns to determining whether there are policy reasons that may justify providing stronger protection to purchasers in the estoppel scenario..[41]

However, Grotius shows that the Roman law general rule "that an owner may vindicate his property from anyone who holds it without title, even though the holder may have acquired possession in good faith and for value"[42] remained the point of departure for the owner's power to recover lost possession in Roman-Dutch law and that limitations on this power only functioned as exceptions.[43]

2 2 2 South African law

The Roman vindicatory remedy and the *rei vindicatio,* as adopted in Roman-Dutch law, forms part of South African law. This means that in South Africa, an owner[44] is in principle entitled to claim back her property from whoever is in unlawful possession thereof. This position is in accordance with the maxim *ubi rem meam invenio ibi eam*

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[40] See chapter 5, section 5 3 2 3 below.

[41] See chapter 5, section 5 2 below.

[42] Grotius 2.2.5.

[43] Van der Merwe CG *Sakereg* 2 ed (1989) 346-347; Cloete CT *A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context* (unpublished LLM thesis Stellenbosch University 2016) 20-22. For a discussion of the development of the philosophical underpinnings of the extensive power of an owner to vindicate her property, see Van der Walt AJ "Unity and pluralism in property theory – A review of property theories and debates in recent literature: Part I" 1995 *Tydskrif vir die Suid Afrikaanse Reg* 15 20-27; Van der Walt AJ "Marginal notes on powerful(l) legends: Critical perspectives on property theory" (1995) 58 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 396 396-410.

[44] The *rei vindicatio* is a remedy only available to the owner or co-owner of property. See Carey Miller DL *The acquisition and protection of ownership* (1986) 256; Van der Merwe CG *Sakereg* 2 ed (1989) 347; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 270.

vindicio, which underlies the *rei vindicatio* and translates that an owner can vindicate her property wherever she finds it.[45] Furthermore, the *ubi rem meam invenio ibi eam vindicio* maxim manifests in the powerful entitlement, namely the *ius vindicandi* which forms part of the core entitlements that flow from ownership and is exercised when an owner institutes the *rei vindicatio*.[46] It allows the owner to recover possession from any type of unlawful possessor (*mala fide* or *bona fide*) of the property.[47] Furthermore, the action can be instituted to reclaim both movable and immovable property.

For an owner to claim back her property she must satisfy the three requirements of the remedy set out in *Chetty v Naidoo*.[48] First, the owner is required to prove that she is the owner of the property.[49] Secondly, she must prove that the property is in the

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[45] De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 56; Van der Merwe CG *Sakereg* 2 ed (1989) 347; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 539; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 233; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 269. See also Sonnekus JC "*Bona fide*-verkryging vir waarde en estoppel" (1999) 62 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 463 463; Pelser FB "Aspekte van eiendomsverkryging deur estoppel" (2005) 38 *De Jure* 153 153; *Chetty v Naidoo* 1974 (3) SA 13 (A) 20. For a discussion of the Roman maxim *ubi rem meam invenio ibi eam vindicio*, see Van der Merwe CG *Sakereg* 2 ed (1989) 347; Milton JRL "Ownership" in Zimmermann R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 686; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 539; *Chetty v Naidoo* 1974 (3) SA 13 (A) 20; *Kahn v Volschenk* 1986 (3) SA 84 (A) 92.

[46] Van der Merwe CG *Sakereg* 2 ed (1989) 173; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 470; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 233; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 105. See also Pelser FB "Aspekte van eiendomsverkryging deur estoppel" (2005) 38 *De Jure* 153 153; Cloete CT *A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context* (unpublished LLM thesis Stellenbosch University 2016) 12.

[47] See *Chetty v Naidoo* 1974 (3) SA 13 (A) 20. See also Voet 6.1.22; Carey Miller DL *The acquisition and protection of ownership* (1986) 265; Van der Merwe CG *Sakereg* 2 ed (1989) 347; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 476; Van der Merwe CG & Pope A "Property" in F du Bois (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 539; Cloete CT *A critical analysis of the approach of the courts in the application of eviction remedies in the pre-constitutional and constitutional context* (unpublished LLM thesis Stellenbosch University 2016) 12; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 269.

[48] 1974 (3) SA 13 (A).

[49] *Chetty v Naidoo* 1974 (3) SA 13 (A) 21. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 259-260; Van der Merwe CG *Sakereg* 2 ed (1989) 347; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 468; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's*

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possession of the defendant.[50] Finally, she must show that the property is identifiable and still in existence.[51] If the plaintiff satisfies all these requirements and the defendant fails to raise a valid defence against the plaintiff's action, physical control (possession) over the property will be restored to the plaintiff, together with the fruits thereof.[52]

Once the plaintiff has satisfied the three requirements, the onus shifts to the defendant to raise a legally valid defence against the *rei vindicatio*. Here, the defendant can refute what the plaintiff has established in terms of the three basic requirements of the action by arguing (i) that the plaintiff is not the owner of the property,[53] (ii) that the defendant is not in possession of the property,[54] or (iii) that the property is no longer identifiable or in existence.[55]

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principles of South African law 9 ed (2007) 405-729 539; *Luwalala v Port Nolloth Municipality* 1991 (3) SA 98 (C) 110. The owner is not required to prove that the defendant is in wrongful possession or that the defendant had a right to control the property that terminated. However, if the owner submits that the defendant had a right to be in physical control of the property, the onus would be on the owner to prove that the right of the defendant has terminated. In this regard, see Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 540; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 270-271.

[50] *Chetty v Naidoo* 1974 (3) SA 13 (A) 20. See further Voet 6.1.2; Carey Miller DL *The acquisition and protection of ownership* (1986) 278-279; Van der Merwe CG *Sakereg* 2 ed (1989) 349; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 468; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 539; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 270-271.

[51] *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 996. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 261-263; Van der Merwe CG *Sakereg* 2 ed (1989) 349; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 468; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 539 Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 270.

[52] Voet 6.1.30; Van der Merwe CG *Sakereg* 2 ed (1989) 352; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 472-474; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 540; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 273.

[53] *Ncume v Kula* (1905) 19 EDC 338. See further Van der Merwe CG *Sakereg* 2 ed (1989) 350; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 272.

[54] *Mehlape v Minister of Safety and security* 1996 (4) SA 133 (W) 136. See further Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 272.

[55] *Street v Regina Manufacturers (Pty) Ltd* 1960 (2) SA 646 (T) 648. See further Van der Merwe CG *Sakereg* 2 ed (1989) 350.

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Alternatively, there are various limitations that a court can enforce against an owner's right to vindicate, if successfully raised as a defence. These limitations constitute both traditional limitations received from Roman-Dutch law, of which some have fallen into disuse,[56] and novel limitations imposed on the *rei vindicatio* by way of South African legislation. The limitations that are operative in South African law are: (i) that the defendant has a valid right to possession over the property against the owner (for example a limited real right, creditor's right of possession or a valid lien);[57] (ii) that she is an occupier in terms of section 26(3) of the Constitution or in terms of eviction legislation, for instance, the Extension of Security of Tenure Act 62 of 1997 or the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998;[58] (iii) that the property constitutes stolen money that has been mixed with other money or, where the money has not been mixed, that the stolen money was acquired *bona fide* and for value;[59] and finally (iv) that the owner is estopped from reclaiming the property.[60] Once the defendant has successfully raised one of the above defences against the *rei vindicatio*, the plaintiff, as the owner, would not be entitled to possession of the property; instead, the defendant will be able to remain in possession.

The last-mentioned defence, namely estoppel by representation, constitutes the focus of this dissertation. Interestingly, the overview of the origin and development of the *rei vindicatio* and its limitations show that estoppel is a construct foreign to Roman and Roman-Dutch law, although the rationale for the existence of such a defence can

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[56] See section 2 2 1 2 above.

[57] *Chetty v Naidoo* 1974 (3) SA 13 (A) 20. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 266-274; Van der Merwe CG *Sakereg* 2 ed (1989) 350.

[58] Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 548-552; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The aw of property* 6 ed (2019) 280-288. See *Mkangeli and Others v Joubert and Others* 2001 (2) SA 1191 (CC) paras 7-11 where the court expressly held that the Extension of Security of Tenure Act 62 of 1997 applies only to rural land and agricultural land. See further Pienaar JM *Land reform* (2014) 399-416. In terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, the court held that "the existence of unlawfulness is the foundation for the inquiry" into unlawful occupation of land. See *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 32. See also Pienaar JM *Land reform* (2014) 702-709 for a discussion of the requirement of unlawfulness.

[59] *Leal and Co v Williams* 1906 TS 554 558; Van der Merwe CG *Sakereg* 2 ed (1989) 349; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 547; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 289-290.

[60] The estoppel limitation is discussed in section 2 3 2 below.

be found in some of the defences that existed in Roman-Dutch law, namely where the owner entrusted her goods to, in the first place, an agent and, in the second place, an untrustworthy person. With this background in mind, the next part delineates the origin and development of estoppel. This will allow for a better understanding of the relationship between the right to vindicate and the defence of estoppel by representation as a defence that can be raised in appropriate circumstances.

2 3 General principles of the doctrine of estoppel by representation

2 3 1 Historical background

2 3 1 1 English law

According to some scholars and South African court cases,[61] the origin of estoppel by representation can arguably be traced back to the estoppels described by Sir Edward Coke in the common law court during the seventeenth century.[62] In an early version of the English language, Sir Coke explained:

> "[T]here be three kinde (*sic*) of estoppels, viz. by matter of record, by matter in writing, and by matter *in paiis* (*sic*). *'Estoppe*', commeth (*sic*) from the French word *estoupe*, (*sic*) from whence the English word stopped: and it is called an estoppel or conclusion, because a man's own act or acceptance stoppeth (*sic*) or closet up his mouth to alleage (*sic*) or plead the truth."[63]

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[61] *Waterval Estate and Gold Mining Co Ltd v New Bullion Gold Mining Co Ltd* 1905 TS 717 722; *Morum Bros Ltd v Nepgen* 1916 CPD 392 398; *Trust Bank of Africa Ltd v Eksteen* 1964 (1) SA 72 (N) 82. See also De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 5-6; Visser PJ & Potgieter JM *Estoppel: Cases and materials* (1994) 10-11.

[62] Coke E *A commentarie upon Littleton* (1628) 352. See also Ewart JS *An exposition of the principles of estoppel by misrepresentation* (1900) 1-2; Turner AK *Spencer Bower and Turner: The law relating to estoppel by representation* 3 ed (1977) 3-4; Cooke E *The modern law of estoppel* (2000) 6; Handley KR *Estoppel by conduct and election* 2 ed (2016) para 1-001.See further De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 5-6; Harms LTC "Estoppel" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 18 Part 1 3 ed (2015) para 654.

[63] Coke E *A commentarie upon Littleton* (1628) 352. See also Handley KR *Estoppel by conduct and election* 2 ed (2016) para 1-001.

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The above passage identifies the three original forms of estoppel also known as the *formal estoppels*.[64] The three formal estoppels are of significance for this discussion as far as they arguably expound how the English legal system developed *estoppel by representation* that was later recognised in South African law as a valid defence against an owner's *rei vindicatio*. Estoppel by matter of record precluded a plaintiff from pleading a matter that a court of law already settled. In contemporary times, this form of estoppel is known as estoppel *rem judicatam*.[65] The defence of estoppel *rem judicatam* prevents a plaintiff from raising a matter that a court adjudicated on previously.[66] It refers to the same concept known in South African law as the *ne bis in idem* rule, which holds that no action can be instituted twice on the same facts.[67]

The second category of the formal estoppels that Sir Coke mentions is estoppel by writing. Estoppel by writing precludes a person from denying a statement of fact made in formal writing.[68] This estoppel can, specifically only be raised in proceedings that are brought based on written statements made in a properly executed deed.[69] In other words, the defence of estoppel by writing was not available to a defendant relying on statements that were not made in a deed; or statements that were made in a deed but where such deed was not properly executed.[70] Accordingly, the circumstances in which this defence could be raised were limited.

The third form of the formal estoppels mentioned in the above quote is estoppel in *pais*. Estoppel in *pais* is also known as estoppel as to title. Estoppel in *pais* arose after a relationship between grantor and grantee of a legal right over property was

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[64] *McIlkenny v Chief Constable* (1980) QB 283 CA 316. See further Cooke E *The modern law of estoppel* (2000) 6; Handley KR *Estoppel by conduct and election* 2 ed (2016) para 1-001.

[65] Turner AK *Spencer Bower and Turner: The law relating to estoppel by representation* 3 ed (1977) 3; Cooke E *The modern law of estoppel* (2000) 6; Handley KR *Estoppel by conduct and election* 2 ed (2016) para 1-001.

[66] Cooke E *The modern law of estoppel* (2000) 6.

[67] Van der Merwe CG *Sakereg* 2 ed (1989) 373.

[68] See *Roberts v Karr* (1809) 1 Taunt 495. See further Cooke E *The modern law of estoppel* (2000) 6-7; Handley KR *Estoppel by conduct and election* 2 ed (2016) para 1-001.

[69] Turner AK *Spencer Bower and Turner: The law relating to estoppel by representation* 3 ed (1977) 4; Cooke E *The modern law of estoppel* (2000) 6-7; Handley KR *Estoppel by conduct and election* 2 ed (2016) para 1-001.

[70] *Carpenter v Buller* (1841) 8 M &W 209. For a discussion of the other requirements of estoppel by way of writing, see Cooke E *The modern law of estoppel* (2000) 7.

established by way of simple writing, by verbal agreement, or by actions.[71] This estoppel precluded the parties to a legal relationship from disputing the validity of the legal relationship, meaning the rights created.[72] The grantor and the grantee were precluded from attacking the validity of the grant based on the alleged invalid title of the grantor, once a verbal agreement, agreement by actions or agreement by simple writing had been concluded.[73] Sir Coke in the passage quoted above goes further to explain the basic principle behind the operation of estoppel in *pais*. It is to preclude a person from pleading a certain set of facts based on such person's previous inconsistent conduct, where inconsistent conduct refers to conduct that suggested something other than what is pleaded.[74] Accordingly, this automatic bar in a sense prohibits inconsistency in the sense that the grantor cannot indicate that a certain state of affairs exists and then later on dispute that such state of affairs existed. Interestingly, no authority exists to the effect that *reliance* on the inconsistent behaviour was a prerequisite for estoppel in *pais* to be triggered.

When assessing the scope of the formal estoppels, it becomes apparent that estoppel by record and writing was confined to very specific circumstances. Estoppel by record was aimed at preventing a party from relying on certain facts due to the existence of a prior judicial pronouncement that had to decide on the same issue, and parties. Estoppel by writing was in turn aimed at preventing a party from relying on certain facts due to the existence of a prior written and properly executed deed concluded with another party. However, it seems as though estoppel in *pais* was intended to provide for those circumstances not covered by the narrow estoppels of record and writing, namely to prevent the denial of a certain state of affairs that is

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[71] *Thompson v Palmer* (1993) 49 CLR 502 547. See also Ewart JS *An exposition of the principles of estoppel by misrepresentation* (1900) 1-7; Cooke E *The modern law of estoppel* (2000) 9.

[72] Ewart JS *An exposition of the principles of estoppel by misrepresentation* (1900) 4; Cooke E *The modern law of estoppel* (2000) 8.

[73] Cooke E *The modern law of estoppel* (2000) 8-9. In the circumstances where the grantor had no title, an estate by estoppel existed. The existence of an estate by estoppel ensured that law treated the relationship between the parties as if the grantor had legal title to grant. See further Cooke E *The modern law of estoppel* (2000) 11; *Bruton v London and Quadrant Housing Trust* [1999] 149 NLJ 1001.

[74] Coke E *A commentarie upon Littleton* (1628) 352. See further Cooke E *The modern law of estoppel* (2000) 8.

inconsistent with prior conduct or statements where the parties failed to put their agreement into a properly executed deed.[75]

Although some scholars and case law suggest that estoppel by representation is a species of estoppel in *pais*, which implies that it is a developed form of the formal estoppels,[76] other scholars reject this suggestion. For instance, Cooke argues that the English estoppel by representation (also referred to as common law estoppel) is not a direct development of estoppel in *pais*.[77] Instead, she supports the contentions made by Ashburner, that estoppel by representation is a construct that has its origins in equity, while the formal estoppels constitute pure common law constructs.[78] This observation is of significance to this study because it may indicate that the estoppel that was received into the South African legal system, is perhaps not estoppel in *pais*, contrary to what some South African courts have held.[79] It seems more likely that estoppel by representation is a doctrine of equity, which originated in the courts of equity.[80] This finding will be particularly useful in chapter 5 when the question of whether the circumstances that ordinarily would give rise to a successful estoppel defence in South African law should result in more substantive consequences is considered.[81] Consequently, estoppel by representation is referred to as common law

[75] *Doe d. Jackson v Wilkinson* (1824) 3 B & C 413. See also Cooke E *The modern law of estoppel* (2000) 9.

[76] Ewart JS *An exposition of the principles of estoppel by misrepresentation* (1900) 4; Cooke E *The modern law of estoppel* (2000) 9; Turner AK *Spencer Bower and Turner: The law relating to estoppel by representation* 3 ed (1977) 4-8.

[77] Cooke E *The modern law of estoppel* (2000) 16.

[78] Cooke E *The modern law of estoppel* (2000) 16-19. See also Ashburner W *Principles of equity* (1902) 628.

[79] See *Waterval Estate and Gold Mining Co Ltd v New Bullion Gold Mining Co Ltd* 1905 TS 717 722; *Morum Bros Ltd v Nepgen* 1916 CPD 392 398; *Trust Bank of Africa Ltd v Eksteen* 1964 (1) SA 72 (N) 82. For a discussion of these cases, see Visser PJ & Potgieter JM *Estoppel: Cases and materials* (1994) 10-11.

[80] It is suggested by some scholars that estoppel by representation is a species of estoppel in *pais*, which implies that it is a developed form of the formal estoppels. See Visser PJ & Potgieter JM *Estoppel: Cases and materials* (1994) 10-11. However, other scholars reject this suggestion. See De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 1-5; Van der Merwe CG *Sakereg* 2 ed (1989) 368. This rejection of the idea that estoppel by representation is a species of estoppel in *pais* is found in the fundamental differences between the principles underlying these estoppels.

[81] See chapter 5 below.

estoppel merely because the common law courts adopted it from the courts of equity and after its adoption, developed it.[82] As a result, a new type of estoppel was introduced in the common law courts during the late seventeenth century and early eighteenth century, namely the common law estoppel or estoppel by representation.[83]

The *ratio* of the *Pickard v Sears*[84] case illustrates the acceptance of the common law estoppel or better known as *estoppel by representation* into the formal structures of the common law.[85] Moreover, the case shows how estoppel by representation differs from the formal estoppels described above. In the *Pickard* case, the plaintiff was the owner of machinery and instituted an action of trover for the recovery of the value of the machinery purchased by the defendant at an auction after sale in execution proceedings.[86] The defendant submitted that the plaintiff was estopped from bringing such a claim. The argument was that the plaintiff stood by and made no mention of his claim to the machinery when the sheriff attached and sold the machinery in execution

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[82] *Montefiore v Montefiore* (1762) 1 Wm Bl 363; *Heane v Rogers* (1829) 9 B & C 577 *Graves v Key* (1832) 3 B & Ad 318. Support for this argument by South African scholars can be found in De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 5-9; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 10-12. The fact that estoppel has its origins in equity explains why the common law courts often referred to estoppel by representation as an equitable doctrine. See Cooke E *The modern law of estoppel* (2000) 19. See also *William v Pinckney* (1897) 67 LJ Ch 34 66.

[83] See *Montefiore v Montefiore* (1762) 1 Wm Bl 363; *Heane v Rogers* (1829) 9 B & C 577; *Graves v Key* (1832) 3 B & Ad 318. See also Cooke E *The modern law of estoppel* (2000) 16-19; Handley KR *Estoppel by conduct and election* 2 ed (2016) para 1-004. Support for this argument by South African scholars can be found in De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 9; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 10-12.

[84] (1837) 6 A & E 469.

[85] Estoppel by representation can be described as another term for common law estoppel. See Cooke E *The modern law of estoppel* (2000) 8. In this dissertation, I will use the term estoppel by representation because of it being the term used in South African law, which forms the focal jurisdiction of this study. However, it is necessary to note that the relationship between common law estoppel and estoppel by representation is rather contested as far as describing estoppel by representation as encapsulating the same idea as common law estoppel. The argument has been made in English law that estoppel by representation is only a subcategory of common law estoppel along with estoppel by conduct and estoppel by negligence, rather than a synonym to the term common law estoppel. See *Sledmore v Dalby* (1996) 72 P & CR 196 CA 2017; Cooke E *The modern law of estoppel* (2000) 18. In South African law this argument has also been made, see De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 5.

[86] *Pickard v Sears* (1837) 6 A & E 469 469.

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to satisfy the mortgage debt of the mortgagee in whose possession the property was at the time.[87] The common law court demarcated the application scope of estoppel by representation when it explained that:

> "[W]here one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded (*sic*) from averring against the latter a different state of things as existing at the same time."[88] (Footnotes omitted)

The description of the circumstances in which estoppel by representation precludes a representor from succeeding with a claim against a representee, shows why estoppel by representation encapsulates a different kind of estoppel than estoppel in *pais*. Both estoppel by representation and estoppel in *pais* prevent a party from pleading certain facts where a representation was made. However, estoppel by representation clearly goes further than estoppel in *pais* does. Lord Denman CJ explains that estoppel by representation also requires (i) that the representor must have made the representation wilfully and (ii) that the representor must have induced the representee to rely on the representation to such an extent that the representee changed his position, in other words decided to act or refrain from acting due to the representation. This is different from estoppel in *pais* that merely requires inconsistent behaviour on the part of the representor.[89]

The basic requirements of estoppel by representation, which was laid down in *Pickard*, are: (i) that a representation was made to the representee; (ii) upon which the representee justifiably, or in good faith, relied on when altering her position; (iii) to her detriment; and (iv) that the representor attempted to act contrary to his previous representation.[90] As is evident from these requirements, the circumstances in which this doctrine is available are:

> "where a representor . . . has made a representation which justified the representee in believing that a certain state of fact exists, and in that belief the

[87] *Pickard v Sears* (1837) 6 A & E 469 474.

[88] *Pickard v Sears* (1837) 6 A & E 469 474.

[89] De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 5.

[90] Handley KR *Estoppel by conduct and election* 2 ed (2016) para 1-007.

> representee altered his position, the representor is not permitted to affirm against the representee that a different state of facts existed at that time, if the representee would be materially prejudiced by his change of position if a departure from the representation were permitted."[91]

The basic principle underlying estoppel by representation is to prevent inconsistent behaviour in the context of justifiable reliance where it would be detrimental to the representee.[92] Handley argues that the causal link between the representation and the changed position of the representee constitutes the first justification for estoppel by representation. Here, the "justice of holding a party to an estoppel . . . depends on his responsibility for the representee's change of position".[93] The second justification for estoppel by representation is found in the detriment suffered by the representee due to her changed position. Both the causal link question and the detriment question involves objective tests.[94] Moreover, these justifications together with the requirements of estoppel by representation in the English law, shows that the focus here falls on the representee's conduct and state of mind concerning the representation made, and not on the conduct and state of mind of the representor.[95] Therefore, the good faith belief and reliance on the representation results in prejudice that gives the representee the power to estop the representor from relying on facts other than the representation that was made.

The reasoning behind the existence of the defence of estoppel in English law can be ascribed to what estoppel aims to achieve as an equitable doctrine. In *Pickard*, the court held that the consequences of successfully relying on estoppel as a defence is that "the former [plaintiff] is concluded (*sic*) from averring against the latter [defendant] a different state of things as existing at the same time".[96] This means that before estoppel was received in South African law from English law the consequences of a successful estoppel defence depended on what was in the first place represented,

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[91] Handley KR *Estoppel by conduct and election* 2 ed (2016) para 1-005.

[92] Cooke E *The modern law of estoppel* (2000) 13; Handley KR *Estoppel by conduct and election* 2 ed (2016) para 1-007.

[93] Handley KR *Estoppel by conduct and election* 2 ed (2016) para 1-007.

[94] Handley KR *Estoppel by conduct and election* 2 ed (2016) para 1-008.

[95] Handley KR *Estoppel by conduct and election* 2 ed (2016) para 1-016.

[96] *Pickard v Sears* (1837) 6 A & E 469 474.

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since it was the representation that would be upheld and not the contrary state of affairs that the plaintiff attempted to plead. This however does not mean that where the owner made a representation to a *bona fide* purchaser (that the seller held the title to the property or at the least had the authority to dispose of the property) on which the *bona fide* purchaser relied to her detriment that the upholding of the representation would result in the purchaser acquiring title over the property.[97] What it arguably brings about in English law is that the purchaser would obtain the strongest right to possess since the owner cannot enforce her rights. This observation will be valuable in chapter 4 where a comparative analysis of the operation and consequences of estoppel by representation in South African law will be conducted with similar constructs in Scottish and English law.

2 3 1 2 The reception of estoppel by representation into South African law

In South African law, the strength of the owner's right to recover physical control of her property was determined by the *ubi rem meam invenio ibi* principle, which allowed the owner to recover her property from any unlawful possessor, even in the circumstances where such possessor was a *bona fide* purchaser.[98] However, the need for the protection of innocent purchasers arose in situations where the purchaser would suffer prejudice because of the owner's actions, words or omissions.[99] In these circumstances, fairness required that the innocent purchaser misled by the owner should be protected rather than the careless owner.[100] Such protection was achieved by the introduction of estoppel by representation as a defence against the careless owner's recovery claim.[101] For this purpose, the English doctrine was imported into the

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[97] *Low v Bouverie* [1891] 3 Ch 82 101. See also Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 383; Handley KR *Estoppel by conduct and election* 2 ed (2016) para 1-010. However, in English law there are other legal constructs and principles that would result in the purchaser becoming owner of the property. For a discussion of these legal constructs or principles, see chapter 4, section 4 3 below.

[98] See section 2 2 2 above.

[99] Milton JRL "Ownership" in Zimmermann R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 688.

[100] Milton JRL "Ownership" in Zimmermann R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 688.

[101] Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 52; *Merriman v William* 1880 Foord 135. Evidence of the use of the term and the doctrine in South Africa at the end of the

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South African legal system to counter the harsh consequences of the *ubi rem meam invenio ibi* principle from which the owner's right to vindicate flows.[102]

Both the Transvaal and Cape divisions were accustomed to apply the doctrine in legal proceedings.[103] Interestingly, case law also illustrates that the Supreme Court of Appeal readily applied the doctrine and engaged with its requirements often without asking questions about its origins or whether it was permissible to apply the common law doctrine as a defence against a Roman-Dutch civilian legal action.[104] When applying the doctrine, the courts generally only engaged with the English authorities and interpreted the requirements of the doctrine based on these authorities. However, there are a few Supreme Court of Appeal cases in which the court justified the use of the doctrine of estoppel by way of connecting the underlying principle of the doctrine with underlying principles of supposedly similar constructs that existed in Roman and Roman-Dutch law.[105] This implies that the courts and practitioners regarded estoppel as part of the South African legal system without question. Yet, it was only until the start of the 1920s that the Supreme Court of Appeal in *Rossouw and Steenkamp v Dawson*[106] expressly articulated that the doctrine of estoppel "as laid down in the

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nineteenth century can be seen in one of the earliest cases dealing with the issue. Although the court decided the case on another basis, it considered whether the party that made the representation could be said to be estopped from denying the representation. See *Merriman v William* 1880 Foord 135 172-176. See also *Beckett & Co v Gundelfinger* (1897) 4 Off Rep 77 78; *In Re the Contributories of the Rosemount Gold Mining Syndicate in Liquidation* 1905 TH 169 171; *Kristal v Rowell* 1904 TH 66 69. Hence, the doctrine of estoppel established itself as a term and principle used in legal proceedings in the late nineteenth and early twentieth century South Africa. See further De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 10-11; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 52.

[102] *Ubi rem meam invenio ibi* principle holds that an owner can vindicate her property wherever she finds it. See Milton JRL "Ownership" in Zimmermann R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 688; Zimmermann R "Good faith and equity" in Zimmermann R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 217-260 217.

[103] Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 52-55.

[104] See *Stracham v Blackbeard and Son* 1910 AD 282 290-296; *Vermeulen's Executrix v Moolman* 1911 AD 384; *Bowen v Daverin* 1914 AD 632 648; *Heyman NO v Napier v Rounthwaite* 1917 AD 456.

[105] See for example *Smit v Smit's Executrix* (1897) 14 SC 142; *Van Blommestein v Holliday* (1904) 21 SC 11.

[106] 1920 AD 173. See further Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 38.

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English cases" forms part of the South African law.[107] This express recognition failed to explain on what basis the doctrine formed part of South African law. Subsequently, the same court in *Baumann v Thomas*[108] not only confirmed that estoppel forms part of the South African law but also finally explained the basis for its recognition:

> "The word estoppel is one which has been taken over by us from the English law, and which is now freely used in our daily practice. The doctrine, however, is as much a part of our law as it is of that of England. In the case of *Waterval G.M. Co. v New Bullion G.M. Co.* (1905, T.S p. 722) it was pointed out by CURLEWIS, J. that the estoppel *in pais* of English law is analogus (*sic*) to what was known in Roman Law as the *exceptio doli mali.* In his judgment the learned judge says 'the application of the maxim of Roman Law *nemo contra suum factum venire debet,* would create the same legal consequences as estoppel in English law: it is practically the estoppel by conduct of the English law.' The subject, however, has been much more fully developed by the decisions of the English Courts than it has been in our own authorities, so that in practice we usually look for guidance to the former rather than to the latter."[109] (Footnotes omitted)

The above quote justifies the acceptance of the doctrine of estoppel on the basis of the historical analysis done previously in *Waterval GM Co v New Bullion GM Co*.[110] Curlewis J in *Waterval* explained that estoppel is comparable to similar constructs that existed in Roman and Roman-Dutch law. In the first place, he held that estoppel amounts to an extension of the principles underlying the *exceptio doli mali*.[111] Secondly, he held that estoppel has the same consequences as the Roman maxim *nemo contra suum factum venire debet*.[112] Based on the similarities highlighted by Curlewis J in *Waterval*, the court in *Baumann* was satisfied that estoppel was adopted into South African law as a more convenient expression of these Roman-Dutch law

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[107] *Rossouw and Steenkamp v Dawson* 1920 AD 173 181. However, the *Waterval Estate and Gold Mining Co Ltd v New Bullion Gold Mining Co Ltd* 1905 TS 717 722 judgment explained how the doctrine became part of South African law.

[108] *Baumann v Thomas* 1920 AD 428.

[109] *Baumann v Thomas* 1920 AD 428 434-435.

[110] 1905 TS 717.

[111] *Waterval Estate and Gold Mining Co Ltd v New Bullion Gold Mining Co Ltd* 1905 TS 717 722.

[112] *Waterval Estate and Gold Mining Co Ltd v New Bullion Gold Mining Co Ltd* 1905 TS 717 722.

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principles.[113] This reasoning was accepted in subsequent cases until the commencement of the period of purification.[114] Purism brought the application of the doctrine of estoppel in the South African legal system into question.[115] In this regard, Steyn LC one of the main proponent of the purism project, held in *Trust Bank of Africa Ltd v Eksteen*[116] that the previous courts erred in allowing the doctrine of estoppel to replace the law as articulated by the Roman and Roman-Dutch authorities. In other words, the courts should have simply applied the Roman-Dutch defence *exceptio doli* or the Roman maxim *nemo contra suum factum venire debet*, instead of applying the doctrine of estoppel to protect innocent purchasers.[117] Interestingly, another proponent of purism, JC de Wet, took a different position. He challenged the opinion of the previous court decisions that the English law doctrine of estoppel was the same as the Roman and Roman-Dutch maxims of *exceptio doli* and *nemo contra suum factum venire debet*.[118] In this regard, he showed that these constructs cannot be compared

[113] *Baumann v Thomas* 1920 AD 428 434-435. For a critical discussion of Curlewis J's findings in the *Waterval* case and Solomon J's findings in the *Baumann* case, see De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 11-14.

[114] The period of purification refers to a time during which South African scholars and judges from predominant Afrikaans medium law schools such as University of Stellenbosch and University of Pretoria embarked on a mission to remove English doctrine from South African law. See Zimmermann R "Good faith and equity" in Zimmermann R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 217-260 224.

[115] Zimmermann R "Good faith and equity" in Zimmermann R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 217-260 224.

[116] 1964 (3) SA 402 (A).

[117] *Trust Bank of Africa Ltd v Eksteen* 1964 (3) SA 402 (A) 410. Steyn LC held that:

> "Die beskouing dat ons eie outoriteite deur hierdie en dergelike uitsprake regtens of vir alle praktiese doeleindes vervang is deur Engelse gewysdes, met die meegaande implikasie dat ons Howe, en ook hierdie Hof, aan Engelse gewysdes gebonde is, sou ek as klaarblyklik en geheel en al ongegrond moet verwerp. Geen Hof, ook nie hierdie Hof nie, besit die bevoegdheid om ons gemene reg met die reg van enige ander land te vervang nie."

The above quote can be translated freely as: *The thought that these and similar rulings have legally and for all practical purposes replaced our own authorities with those of English precedent, with the concomitant implication that our Courts, and also this Court, are bound by it, I reject as completely unfounded. No Court, not even this Court, has the power to replace our common law with the law of any other country*. Steyn LC reiterated this sentiment in his majority judgment in *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A) 401.

[118] For De Wet's discussion on the differences between estoppel and the maxim *exceptio doli mali*, see De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation

to estoppel because there exist fundamental differences between these defences.[119] However, he conceded that although estoppel should not be equated to these maxims, it cannot be denied that the application thereof by the courts over the years has firmly established the doctrine as part of the South African law.[120]

In agreement with the views of De Wet, Rumpff J in the minority judgment of *Johaadien v Stanley Porter (Paarl) (Pty) Ltd*[121] expressed himself in favour of estoppel:

> "Dit moet aanvaar word, as 'n voldonge feit, dat die regsfiguur 'estoppel' vanuit die Engelse reg in ons reg geresipieer is . . . Terstond moet egter bygevoeg word dat hierdie regsfiguur, al sou hy voldoen aan so 'n gloeiende beskrywing, nie teenstrydig met, of los van, die grondslae van ons eie reg kan of behoort te funksioneer nie."[122]

Rumpff J's strong statements in the above quote emphasised that it is a fact that the doctrine of estoppel by representation forms part of the South African law and that the doctrine cannot be said to conflict with South African law. Zimmermann notes that the strong views of Steyn LC in the *Trust Bank* decision could potentially have marked the end of the debate around the doctrine of estoppel in South Africa law, if not for Rumpff JA's *ratio* on this issue in the *Johaadien* case. Subsequent cases followed the rationale of Rumpff JA and the question of whether estoppel forms part of South African law and the justifications as to why and how was finally settled. Once the above questions were settled, the focus shifted to the application of the estoppel doctrine. The section below sets out the basic principles underlying the doctrine of estoppel in South African law

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Stellenbosch University 1939) 83-89. Furthermore, for De Wet's discussion on the differences between estoppel and the maxim *nemo contra suum factum venire debet*, see De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 89-92.

[119] De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 83-92.

[120] De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 15.

[121] 1970 (1) SA 394 (A).

[122] *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A) 409. Here is a free translation of the quoted text: *It must be accepted as an established fact that "estoppel" as legal figure was received from English law into our law [...] It must, however, be added immediately that this legal figure, even if it conforms to such a glowing description, can and should not function contrary to, or separate from, the foundations of our own law*.

and its requirements, which are important when considering when and how the doctrine can be used by a party.

2 3 2 South African law

After the importation of estoppel, the doctrine was developed in accordance with the demands of the South African civilian legal system.[123] Tebbut J described this process as follows:

> "Having once received the English doctrine of estoppel into our law, our courts have not allowed it to retain its English form undisturbed and unaltered but have sought to fashion it to the mould of South African principles."[124]

Today, the doctrine of estoppel is often described as the most important limitation on an owner's right to vindicate her property.[125] However, the availability of estoppel as a defence against the *rei vindicatio* is confined to the requirements of the defence. The estoppel defence is only available in the circumstances where the owner culpably leads a *bona fide* purchaser to believe that the disposer of the property is legally

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[123] Holmes JA held that reference to English cases will only be useful in so far as their principles and interpretations can be reconciled with the decisions of the Supreme Court of Appeal in the *Grosvenor Motors* and *Johaadien* cases. See *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) 452. See also *Trust Bank of Africa Ltd v Eksteen* 1964 (1) SA 74 (N) 82; *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A) 406-408. See further Visser PJ & Potgieter JM *Estoppel: Cases and materials* (1994) 26-27; Milton JRL "Ownership" in Zimmermann R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 688; Zimmermann R "Good faith and equity" in Zimmermann R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 217-260 223. Furthermore, proof of the development of the doctrine in line with South African law is evident in the inclusion of *culpa* as a requirement for a successful defence of estoppel. See *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A) 427; *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A) 409; *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) 452; *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 19.

[124] *Sonday v Surrey Estate Modern Meat Market (Pty) Ltd* 1983 (2) SA 521 (C) 527.

[125] Carey Miller DL *The acquisition and protection of ownership* (1986) 306; Van der Merwe CG *Sakereg* 2 ed (1989) 368; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 472; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 552; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 257. For a discussion of the estoppel doctrine that is not only limited to the doctrines function as a defence against the *rei vindicatio* in South Africa, see De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939); Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012).

entitled to do so and the *bona fide* purchaser acts according to this representation to her own detriment.[126] The argument has been made that the Roman-Dutch limitation on an owner's right to vindicate pertaining to *agents for sale* has merged with,[127] or has been replaced by, the availability of the doctrine of estoppel as defence against the *rei vindicatio*.[128] The discussion below assumes that this merger between the estoppel and agent limitation of Roman-Dutch law has taken place in South African law.

As mentioned above, the circumstances in which a party may rely on, and succeed with, estoppel are restricted by the unique requirements of the defence.[129]

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[126] Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 218; Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 81-89; Van der Merwe CG *Sakereg* 2 ed (1989) 368; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 473; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 552; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 274.

[127] An agent refers to someone who is authorised to act on behalf of another (the principle). The actions of agents may include transferring ownership over property on behalf of the owner (also the principle). Factors and brokers are examples of agents. For cases in which estoppel was considered where there was a misrepresentation of agency (authority to dispose), see *Pretorius v Loudon* 1985 (3) SA 845 (A) *West v Pollak & Freemantle* 1937 TPD 64; *Electrolux (Pty) Ltd v Khota and Another* 1961 (4) SA 244 (W). For a discussion of these cases, see Visser PJ & Potgieter JM *Estoppel: Cases and materials* (1994) 40-45.

[128] See section 2 2 1 2 above. Furthermore, the Roman-Dutch *agent and factor for sale* limitation on the *rei vindicatio* prevented the owner of goods from reclaiming her goods from a *bona fide* purchaser who acquired the goods from an agent or factor of the owner, unless the owner paid to the *bona fide* purchaser the purchase price. See *Morum Bros Ltd v Nepgen* 1916 CPD 392. See also Carey Miller DL *The acquisition and protection of ownership* (1986) 311; Van der Merwe CG *Sakereg* 2 ed (1989) 367; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 269-278. The Appellant Division in *Pretorius v Loudon* 1985 (3) SA 845 (A) 862 indicated that it is unclear whether this rule still finds application in South African law and if so, what its scope and contents are. In light of this uncertainty, some scholars have proposed that the agent and factor limitation has been replaced or merged with estoppel. See Carey Miller DL *The acquisition and protection of ownership* (1986) 324; Van der Merwe CG *Sakereg* 2 ed (1989) 367-368; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 474; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 548. One of the earliest cases in which estoppel was applied in the context where there was an alleged misrepresentation of agency is *Kristal v Rowell* 1904 TH 66 69.

[129] Van der Merwe CG *Sakereg* 2 ed (1989) 368; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 473; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 552 Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 274.

Therefore, whether a defendant will succeed with estoppel depends on the first question that is raised with regard to estoppel, namely whether such defendant can satisfy the requirements of the defence. The second question, which is the question that this dissertation is focussed on, is what the consequences of successfully relying on the defence are. The origin and content of estoppel may be used as a starting point in this regard. An analysis of case law in which the courts have suggested and have articulated the consequences of estoppel will furthermore assist in determining the second question, namely, what the consequences of estoppel are. This will be explored after consideration is given to the first question below.

With regard to the first question, the Supreme Court of Appeal judgment in *Oakland Nominees (Pty) Ltd v Gelria Mining*[130] affirmed the basic requirements of estoppel. These are:

> "(i) There must be *a representation by the owner*, by conduct or otherwise, that the person who disposed of his property was the owner of it or was entitled to dispose of it . . .
>
> (ii) The representation must have been made *negligently* in the circumstances.
>
> (iii) The representation must have been *relied upon* by the person raising the estoppel.
>
> (iv) Such person's reliance upon the representation must be the *cause of his acting to his detriment.*"[131] (Own emphasis added)

There can be no reliance on estoppel by representation in the absence of an actual *representation*.[132] A representation would be present in the situation that is the focus of this dissertation, namely where the owner created the impression that the seller of the property was the owner of the property or that she had the right to dispose of the property.[133] From the outset it must be noted that a representation must result from

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[130] 1976 (1) SA 441 (A).

[131] *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) 452.

[132] Carey Miller DL *The acquisition and protection of ownership* (1986) 310; Van der Merwe CG *Sakereg* 2 ed (1989) 368-369; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 473; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 552; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 48; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 274.

[133] *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) 452. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 310; Van der Merwe CG

human communication which can be express (spoken or written words) or tacit (deduced from action; inaction or silence) made by a person (the owner) to another (the *bona fide* purchaser).[134] To determine whether a communication qualifies as a representation under estoppel a two-fold objective-subjective test is used.[135] The contents of the test depend on whether the communication that is argued to constitute the representation is in the form of a commission or an omission. If the communication is in the form of a commission the two-fold test merely consists of an objective leg and a subjective leg. Under the objective leg the question for determination is whether a reasonable person would have been misled by the communication.[136] It is trite that the owner merely entrusting another with possession of her property does not per se create the required representation under the objective leg of the test.[137] More than the

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Sakereg 2 ed (1989) 368-369; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 473; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 552; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 48; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 274.

[134] Carey Miller DL *The acquisition and protection of ownership* (1986) 310; Van der Merwe CG *Sakereg* 2 ed (1989) 368; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 552; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 275. The difference between a representation made by way of express statements and conduct was succinctly set out in *Concor Holding (Pty) Ltd t/a Concor Technicrete v Potgieter* 2004 (6) SA 491 (SCA) 495; *B&B Hardware Distributors (Pty) Ltd v Administrator, Cape and Another* 1989 (1) SA 957 (A) 964-965.

[135] Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 101-122.

[136] *Electrolux (Pty) Ltd v Khota and Another* 1961 (4) SA 244 (W) 246; *Pretorius v Loudon* 1985 (3) SA 845 (A) 849. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 311-312; Van der Merwe CG *Sakereg* 2 ed (1989) 369; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 553; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 101-122. Interestingly, when dealing with a representation made by words the estoppel raiser's reliance will automatically be reasonable if the representation by word was precise and unambiguous. See *Concor Holding (Pty) Ltd t/a Concor Technicrete v Potgieter* 2004 (6) SA 491 (SCA) 495; *B&B Hardware Distributors (Pty) Ltd v Administrator, Cape and Another* 1989 (1) SA 957 (A) 964-965. See also Van der Merwe CG *Sakereg* 2 ed (1989) 370.

[137] *Morum Bros Ltd v Nepgen* 1916 CPD 392 404. In *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A) 411 where Rumpff JA held:

> "In ons reg word dit vandag geag dat 'n eienaar nie 'n skyn verwek waarop 'n koper kan vertrou deur blote besitsoordrag aan iemand anders nie. Daarom behou die eienaar die *rei vindicatio* indien hy bv. 'n saak aan iemand leen en die lener dit sonder magtiging sou verkoop."

Here is a free translation of the quoted text: *In our law today, the mere transfer of ownership to someone else is considered not to create an appearance upon which a purchaser can rely. The owner, therefore, retains the rei vindicatio if he e.g. lends a thing to someone and the borrower sells it without*

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entrusting of possession is required, namely entrustment with the scenic apparatus of the *indicia* of ownership or consent to dispose of the property to establish a representation.[138] Interestingly, the court in *Electrolux (Pty) Ltd v Khota*[139] held that "owner's mere entrusting a person (not being a factor, broker or agent for selling) with the possession of its articles is not sufficient to produce the representation" that is required for estoppel.[140] Accordingly, the entrusting of the possession of the thing to the agent or factor will be sufficient for the purchaser to establish a representation for purposes of estoppel. The communication must also be clear and unambiguous to meet the objective leg of the test. If the communication was not clear and was ambiguous it is accepted that a reasonable person would not have been misled by the communication.[141] If it can be shown that a reasonable person would have been misled by the communication, the inquiry turns to the subjective leg of the commission test,

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authorisation. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 312; Van der Merwe CG *Sakereg* 2 ed (1989) 369; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 552-553; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 48; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 275. See also *Electrolux (Pty) Ltd v Khota and Another* 1961 (4) SA 244 (W) 246. This is in line with De Wet's submission that the *ubi rem meam invenio, ibi vindico* maxim means that if the owner puts another in possession of her property it does not preclude her to recover her property if such property lands up in the hands of a third party. See De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 56.

[138] Such *indicia* is derived from the circumstances in which, and the manner in which, the owner entrusted the possessor with the property. The question is whether the circumstances would have indicated to a reasonable person that the disposer was the owner, or had the authority to dispose, of the property. In this regard, see Carey Miller DL *The acquisition and protection of ownership* (1986) 312; Van der Merwe CG *Sakereg* 2 ed (1989) 369; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 552-553; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 275. See also *Electrolux (Pty) Ltd v Khota and Another* 1961 (4) SA 244 (W) 246; *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) 452; *Absa Bank Ltd v Knysna Auto Services CC* (266/2015) [2016] ZASCA 93 (1 June 2016) para 17.

[139] 1961 (4) SA 244 (W).

[140] *Electrolux (Pty) Ltd v Khota and Another* 1961 (4) SA 244 (W) 246. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 312.

[141] *Baumann v Thomas* 1920 AD 428 435-436; Carey Miller DL *The acquisition and protection of ownership* (1986) 311-312. See also *Concor Holding (Pty) Ltd t/a Concor Technicrete v Potgieter* 2004 (6) SA 491 (SCA) 495-496; *Absa Bank Ltd v Knysna Auto Services CC* (266/2015) [2016] ZASCA 93 (1 June 2016) para 18.

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which establishes whether the purchaser actually relied on the representation created by the owner.[142]

The subjective leg concerns the question whether the purchaser as the representee was indeed misled by the communication made by the owner as the representor.[143] The *bona fides* of the estoppel raiser plays a role. In *Hauptfleish v Caledon Division Council*,[144] Corbett AJ held:

> "He must act upon the representation believing it to be true. If he knows, or believes, that the real facts are not as stated in the representation, he cannot be heard to say that he was induced to act to his prejudice on the faith of the representation."[145]

In other words, if the estoppel raiser acted *mala fide* (in other words, she knew or should have known that the seller was not the owner or that the seller had no authority to dispose of the property), the subjective test for the establishment of a representation will not be met and therefore estoppel would fail.[146] However, if the subjective test is answered in the affirmative a representation would be established from the commission and the inquiry would proceed to the second requirement of estoppel.

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[142] *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) 458-459. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 312-313; Van der Merwe CG *Sakereg* 2 ed (1989) 369-370; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 552; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 274. See also *Concor Holding (Pty) Ltd t/a Concor Technicrete v Potgieter* 2004 (6) SA 491 (SCA) 495-496; *Absa Bank Ltd v Knysna Auto Services CC* (266/2015) [2016] ZASCA 93 (1 June 2016) para 18.

[143] In *Standard Bank of SA Ltd v Stama (Pty) Ltd* 1975 (1) SA 730 (A) 743 the respondent (the bank) failed to prove actual reliance on the representation made by the owner of the scrip. The respondent could not show that it was because of the fraudulent stockbroker's possession of the scrip documents that it granted the overdraft facilities. Instead, it was clear that the respondent granted the facilities due to its reliance on the *bona fides* of the fraudulent stockbroker.

[144] 1963 (4) SA 53 (C).

[145] *Hauptfleish v Caledon Division Council* 1963 (4) SA 53 (C) 57.

[146] See *Blackie Swart Argitekte v Van Heerden* 1986 (1) SA 249 (A) 261 in which the court held that a representation could not be established on the facts since the representee had knowledge of the true state of affairs. See also See *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1987 (2) SA 835 (A) 849; *Apostoliese Geloofsending van Suid-Afrika (Maitland Gemeente) v Capes* 1978 (4) SA 48 (C) 56. See further Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 105, 108.

Should the communication be in the form of an omission (failure to act or speak up), the test for the establishment of a representation would look slightly different, in that a threshold test is added to the two-fold objective-subjective test. The threshold test concerns the establishment of a legal duty to act or speak up.[147] Since no general legal duty to act or speak up exists in South African law, it must be determined whether such duty existed based on the facts of the case. The test applied to determine whether there was a legal duty on the representor to act or speak up concerns the question whether the representee should have reasonably expected or foreseen (based on the type of information, legislative regulation and the relationship between herself and the representee) that her inaction or silence could result to the representee relying on the omission to her detriment.[148] If this question is answered in the affirmative, a legal duty to act or speak up is established and the two-fold objective-subjective test will be applied in order to establish that the omission is indeed a representation for purposes of estoppel.

The second requirement for a successful estoppel defence is that the representation must be the result of the owner's *culpable conduct*.[149] The requirement

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[147] *Garlick Ltd v Phillips* 1949 (1) SA 121 (A) 132-133; *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) 642-643. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 310-311; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 160-180.

[148] A recent example of a factual scenario that gave rise to a legal duty to act is found in *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 18. See further Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 165. The reasonable person test that is applied to establish a legal duty for purposes of satisfying the requirement that a representation in the form of an omission is present should not be confused with the reasonable person test that is applied when establishing the owner's blameworthiness (negligence). See chapter 4, section 4 3 2 below for a discussion of the difference between the tests for establishing these two distinct elements of estoppel.

[149] *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) 452. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 314; Van der Merwe CG *Sakereg* 2 ed (1989) 371; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 553; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 277. See also *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A) 427. Interestingly, the court in *Johaadien* suggested that negligence would not always be a requirement for the estoppel defence in light of the possible application of the Roman law *exceptio doli* on the grounds of fairness. See *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A) 409. However, the court in *Saflex (Pty) Ltd v Group Five Building (East Cape) (Pty) Ltd* 1990 (4) SA 626 (E) 634 has indicated that estoppel without *culpa* might not be possible in South

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that *culpa* on the owner's part must be present was confirmed in *Grosvenor Motors (Potchefstroom) Ltd v Douglas*.[150] Steyn JA held that:

> "[T]he common law principle . . . appears to be that an owner forfeits his right to vindicate where the person who acquires his property does so because, by the *culpa* of the owner, he has been misled into the belief that the person from whom he acquires it, is entitled to dispose of it."[151] (Own emphasis added)

The requirement of blameworthiness or more specifically culpability entails that the owner at the very least must have acted negligently when she made the representation.[152] In this regard, negligence would be present when a reasonably prudent person in the owner's position would have foreseen that another person (purchaser) could be prejudiced because of her misleading communication and would have taken steps to prevent the foreseeable prejudice.[153] Accordingly, the court applies an objective test by using the standard of a reasonable person in the owner's position. It is, however, noteworthy that *culpa* does not have to be proven in all instances that give rise to an estoppel defence. In particular, in the context where a *bona fide* purchaser buys property from an agent who fraudulently sold the property,

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African law after the decision of *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) held that the *exceptio doli generalis* does not form part of the South African law.

150 1956 (3) SA 420 (A).

151 *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A) 427.

152 Blameworthiness includes the intentional (*dolus*) or negligent (*culpa*) creation of the impression that the disposer was the owner or that the disposer had the authority to dispose of the property. See Carey Miller DL *The acquisition and protection of ownership* (1986) 313-314; Van der Merwe CG *Sakereg* 2 ed (1989) 371; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's ThelLaw of property* 6 ed (2019) 276. Notably, Sonnekus and Rabie submit that where the owner (the representor) made the misleading communication *intentionally* reliance on estoppel will not be wise since the purchaser (the representee) would arguably have a much stronger case under the principles of fraudulent misrepresentation that not only provides the purchaser with a defence but also with a cause of action. Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 241-242. This is perhaps the reason why almost all of the reported cases concerning the estoppel defence deals with negligence as an indicator of blameworthiness as opposed to intention.

153 *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A) 427; *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A) 411. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 314-315; Van der Merwe CG *Sakereg* 2 ed (1989) 371-312; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 553; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 242-243.

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such purchaser when raising estoppel against the owner's *rei vindicatio*, would not be expected to prove *culpa*.[154]

The final requirement is that the reliance on the owner's representation must have resulted in the estoppel raiser exercising physical control over the property with the *animus domini* to her own detriment.[155] This prerequisite for a successful estoppel defence requires both detriment on the part of the estoppel raiser and that the detriment should be the direct consequence of the owner's culpable representation.[156] In terms of the former, the detriment that estoppel is concerned with refers to the prejudice that the estoppel raiser suffered or will suffer if the owner is allowed to deny the representation and successfully reclaim her property.[157] With regard to the latter, a causal link between the owner's representation and the detriment should be established.[158]

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[154] The case in which the court distinguished fraudulent sellers in general from non-agents who fraudulently sells property to *bona fide* purchasers in circumstances that gives rise to an estoppel defence is *Pretorius v Loudon* 1985 (3) SA 845 (A) 859-860. See also Carey Miller DL *The acquisition and protection of ownership* (1986) 319; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 269-270.

[155] *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) 459. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 319; Van der Merwe CG *Sakereg* 2 ed (1989) 370; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 473; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 552; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 274. See also *Apostoliese Geloofsending van Suid-Afrika (Maitland Gemeente) v Capes* 1978 (4) SA 48 (C) 56; *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 27; *Absa Bank Ltd v Knysna Auto Services CC* (266/2015) [2016] ZASCA 93 (1 June 2016) para 16.

[156] *Baumann v Thomas* 1920 AD 428 436; *Poort Sugar Planters (Pty) Ltd v Minister of Lands* 1963 (3) SA 352 (A) 363.

[157] *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) 643. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 319; Van der Merwe CG *Sakereg* 2 ed (1989) 370; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 473; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 553; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 193-202.

[158] *Pretorius v Loudon* 1985 (3) SA 845 (A) 859. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 321-323; Van der Merwe CG *Sakereg* 2 ed (1989) 371; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 552; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 274; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 221-244.

After all the requirements of the doctrine of estoppel have been met, the court will order in favour of the estoppel raiser. It is at this point, where the second question pertaining to estoppel should crop up in cases, but rarely does, namely, what the consequences or effects are of the successful reliance on estoppel as a defence against the *rei vindicatio*. The premise underlying estoppel is that estoppel estops (prevents) a person *from denying the truth of the representation* previously made by such person to another, in the circumstances where the latter relied on the representation to her detriment.[159] In the context of vindication, this means that the plaintiff who institutes the *rei vindicatio* may not deny that the fraudulent seller had the authority to dispose of the property (*ius dispondendi*) or the right of ownership (*domimium*).[160] Yet, the premise of estoppel in the context of vindication has been interpreted inconsistently in South African law. For instance, it has been held to mean that the person is estopped from "evad[ing] the consequences of his own act".[161] Other courts have held that the person is "estopped from disputing the defendant's [meaning the *bona fide* purchaser's] title".[162] It has also been stated that it means that the person is estopped from asserting her right to vindicate against the successful estoppel raiser.[163]

The latter interpretation of the underlying premise of estoppel is generally accepted amongst scholars and entails that where estoppel succeeds against the *rei*

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[159] *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd* 1981 (3) SA 274 (A) 291. For confirmation of this position in the context of the law of property, see Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 472; Harms LTC "Estoppel" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 18 Part 1 3 ed (2015) para 652.

[160] Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 218-219; Van der Merwe CG *Sakereg* 2 ed (1989) 373; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 472.

[161] *Smit v Smit's Executrix* 1897 SC 142 147.

[162] *United SA Association Ltd v Cohn* 1904 TS 733 744; *Morum Bros Ltd v Nepgen* 1916 CPD 392. See also *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) paras 7, 15 where one of the questions that emerged from the material factual disputes was "whether the appellant is estopped from challenging the first respondent's title".

[163] Van der Merwe CG *Sakereg* 2 ed (1989) 372; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 259; Pelser FB "Aspekte van eiendomsverkryging deur estoppel" (2005) 38 *De Jure* 153 153. See also the following cases in which the courts expressed this notion: *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) 452; *BLC Plant Company (Pty) Ltd v Maluti-A-Phofung Local Municipality and Others* (6054/2017) [2018] ZAFSHC 25 (8 March 2018) para 4.

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vindicatio, it means that on the one hand, the owner's entitlement to vindicate the property in the hands of the successful estoppel raiser is suspended.[164] In other words, the plaintiff is prohibited from recovering the property from the successful estoppel raiser. Conversely, because of the plaintiff's suspended right to vindicate, the successful estoppel raiser may remain in possession of the property indefinitely.[165] These consequences are referred to, throughout this dissertation, as the traditional consequences ascribed to estoppel at common law and are said to be supported by case law. Yet, some scholars have challenged the traditional consequences arguing that case law shows that estoppel in fact leads to acquisition of ownership in favour of the successful estoppel raiser.[166] Given these diverging accounts pertaining to the consequences of estoppel, the section that follows analyses case law in chronological order to determine how the courts have been interpreting the consequences of a successful estoppel defence. This will be valuable since the main purpose of this chapter is to ascertain what the current position, meaning the traditional consequences ascribed to a successful estoppel defence are. This is done with the hope of obtaining an accurate reflection of the law as it currently stands to ultimately enable assessment of the best way forward for this area of the law in the chapters to follow.

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[164] Van der Merwe CG *Sakereg* 2 ed (1989) 373; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 473; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 554. See also *Apostoliese Geloofsending van Suid-Afrika (Maitland Gemeente) v Capes* 1978 (4) SA 48 (C) 58; *Absa Bank Ltd v Knysna Auto Services CC* (266/2015) [2016] ZASCA 93 (1 June 2016) para 20.

[165] Van der Merwe CG *Sakereg* 2 ed (1989) 373; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 259; *Apostoliese Geloofsending van Suid-Afrika (Maitland Gemeente) v Capes* 1978 (4) SA 48 (C) 58; *Absa Bank Ltd v Knysna Auto Services CC* (266/2015) [2016] ZASCA 93 (1 June 2016) para 20.

[166] Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 96; Van der Merwe CG *Sakereg* 2 ed (1989) 373; Van Heerden HJO "Estoppel: 'n Wyse van eiendomsverkryging" (1970) 33 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 19 25; Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 234; Visser PJ "Estoppel en die vekryging van eiendomsreg in roerende eiendom" (1994) 57 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 633 636; Pelser FB "Aspekte van eiendomsverkryging deur estoppel" (2005) 38 *De Jure* 153 157.

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2 4 Case law on the consequences of a successful estoppel defence

2 4 1 *Morum Bros Ltd v Nepgen*

Morum Bros Ltd v Nepgen[167] is the earliest case that is often relied on to advance the argument that the traditional consequence of a successful estoppel defence is that of acquisition of ownership*.* In this case, the plaintiffs sold and delivered two horses to one Slabbert who on occasion speculated in horses. The sale between the plaintiffs and Slabbert was subject to a suspensive condition that ownership will only pass to Slabbert once the purchase price was paid in full to the plaintiffs.[168] However, before Slabbert paid the purchase price in full he sold the horses to the defendant, who purchased the property *bona fide* and for value.[169] The plaintiffs instituted the *rei vindicatio* against the defendant to reclaim the horses. The defendant argued that the plaintiffs knew that Slabbert was a speculator in horses and therefore should be estopped from denying that Slabbert was the owner of the horses in his possession. In the court of first instance, judgment was given in favour of the defendant and the plaintiffs appealed the decision.[170]

The Appellant Division considered the authority on which the defence of the defendant rested in South African law. Such authority included the legislative exceptions to the owner's extensive right to vindicate (*ubi rem meam invenio*) that existed in Roman-Dutch law.[171] These were, first that an owner could reclaim her movable property, unless she entrusted her property to an agent (a representative with a specific or general mandate and power to perform juristic acts on behalf of someone else, which includes factors) who subsequently sold the movable property without her consent to *a bona fide* party.[172] Secondly, where the owner carelessly entrusted her movable property to an untrustworthy person, she could also not recover her property from the *bona fide* purchaser for value.[173] The court found that these exceptions where

[167] 1916 CPD 392.

[168] *Morum Bros Ltd v Nepgen* 1916 CPD 392 393.

[169] *Morum Bros Ltd v Nepgen* 1916 CPD 392 394.

[170] *Morum Bros Ltd v Nepgen* 1916 CPD 392 392.

[171] See section 2 2 1 2 above.

[172] *Morum Bros Ltd v Nepgen* 1916 CPD 392 395-396.

[173] *Morum Bros Ltd v Nepgen* 1916 CPD 392 398.

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sufficiently encapsulated in the English doctrine of estoppel, which prevented a titleholder from asserting her title against a good faith purchaser for value who acquired the property as a result of a representation created by the owner. In this regard, the court held that the principle found in both Roman-Dutch exceptions and the English doctrine of estoppel is that:

> "[I]t would be inequitable that an owner, who 'has led others into the reasonable belief that the person to whom he has entrusted the goods is entitled to dispose of them, should be allowed to recover such goods from a person who has acquired them honestly and for value, unless the owner tenders to repay such value.'"[174] (Footnotes omitted)

However, since the defendant could not prove a representation, the defence failed and the court ordered the return of the horses to the appellants (the plaintiffs in the court of first instance).[175] Interestingly, the court's findings pertaining to the historical analysis of the Roman-Dutch legislative exceptions led South African scholars like Van Heerden and Louw, to argue that the case is authority for the proposition that where these exceptions were successfully raised against the *rei vindicatio*, the result was that the plaintiff would lose ownership. This was the rule unless such plaintiff was willing to reimburse the purchase price to the *bona fide* possessor. The argument followed that the successful reliance on estoppel, which is based on the same underlying principle as the Roman-Dutch exceptions, has the same consequence of loss of ownership.[176] In contrast, Sonnekus emphasises that under these defences the owner was merely precluded from recovering her property, unless she paid the purchase price to the *bona fide* purchaser for value. The principle that the owner could still claim for the return of the property where the owner reimbursed such purchaser is more likely indicative that the plaintiff remained owner. The owner merely loses her right to assert her ownership (right to vindicate) until she reimburses the purchaser. Since the latter reasoning pertaining to the consequences of the exceptions was followed in the subsequent case of *Barclays Western Bank Ltd v Fourie,*[177] Sonnekus is of the opinion that *Morum Bros*

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[174] *Morum Bros Ltd v Nepgen* 1916 CPD 392 403.

[175] *Morum Bros Ltd v Nepgen* 1916 CPD 392 404-405.

[176] Van Heerden HJO "Estoppel: 'n Wyse van eiendomsverkryging" (1970) 33 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 19 21; Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 233.

[177] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C).

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cannot be relied on as authority from a historical perspective that estoppel can have as a consequence acquisition of ownership in favour of the successful estoppel raiser.[178]

In my view, the court in *Morum Bros* did not pronounce on whether the *bona fide* purchaser could acquire ownership. Instead, it only explained: two of the limitations on the owner's right to vindicate found in Roman-Dutch law; how these relate to the English doctrine of estoppel; and how the exceptions could apply to the facts of the case. These exceptions were that an owner was unable to recover her goods from an innocent acquirer for value where the owner entrusted the goods to a factor or agent for sale or an untrustworthy person that later sold it to a *bona fid*e purchaser, unless the owner paid to such purchaser the purchase price. These two situations were regarded as exceptional to the owner's extensive right to vindicate her property in terms of the *ubi rem meam invenio, ibi vindico* maxim. Whether the result of these limitations was that the innocent acquirer became owner of the goods in Roman-Dutch law remains uncertain and inconclusive. However, since the Supreme Court of Appeal in *Barclays Western Bank* subsequently expressed that it is of the opinion that the owner did not lose ownership to the *bona fide* purchaser in these circumstances, especially because she was allowed to recover her goods after reimbursing the innocent purchaser, it appears that in South Africa the interpretation is that ownership is not lost. Accordingly, *Morum Bros* together with the *Barclays Western Bank* decision shows that at least from a historical perspective, these Roman-Dutch exceptions to an owner's right to vindicate did not result in acquisition of ownership in favour of the innocent purchaser. This means that it would be impossible to make an argument that since the owner lost ownership under these circumstances in Roman-Dutch law, an owner who fails to recover her property due to estoppel should also lose ownership under South African law. However, the case does provide justification for the operation of the defence of estoppel in South African law. Moreover, it specifically emphasises that the need to protect *bona fide* purchasers for value is not novel but rooted and reflected in both the civilian legal tradition and the common law legal tradition. Reliance on the *Morum Bros* case to argue for or against acquisition of ownership based on estoppel is therefore misplaced, since the court did not articulate the consequences of estoppel in the case.

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[178] Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 353-354.

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2 4 2 *West v Pollak & Freemantle*

After the *Morum Bros* case, the Transvaal Provincial Division in *West v Pollak & Freemantle*[179] made some interesting remarks pertaining to the consequences of a successful estoppel defence. Consequently, the *Pollak* case is frequently relied on to argue that our courts support the idea that the traditional consequences of estoppel entail acquisition of ownership.[180] In this case, the appellant (also the applicant) pledged scrip (a certificate that entitles the holder of it to obtain a formal share certificate and dividends) and signed blank transfer documents with the bank's stockbroker, one Hunt. The pledge was meant to secure a loan that the appellant was obliged to repay on a stipulated date.[181] In terms of the agreement between the appellant and Hunt, Hunt had no right to dispose of the property prior to the date upon which the loan amount became due. Only in the event of the appellant failing to repay the loan on the stipulated date, would Hunt be able to sell the property in terms of the real security right.[182] Contrary to the agreement, Hunt instructed the respondents (as between broker and broker) to find a purchaser for the shares. The respondents regularly entered into transactions of this nature with Hunt. Upon Hunt's instruction, the respondents sold the shares to purchasers and delivered other scrips plus the blank transfer documents to them, as was custom and in accordance with JSE practices.[183] Hereafter, the respondents paid the purchase price to Hunt and in exchange, the respondents received the scrips and documents from Hunt.[184] Before the stipulated date for the payment of the loan and while Hunt's estate was sequestrated, the appellant became aware that the shares were disposed of. These events led to the appellant's application to prevent the respondents from registering

[179] 1937 TPD 64.

[180] Van Heerden HJO "Estoppel: 'n Wyse van eiendomsverkryging" (1970) 33 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 19 22-23; Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 234; Carey Miller DL *The acquisition and protection of ownership* (1986) 324-325; Visser PJ & Potgieter JM *Estoppel: Cases and materials* (1994) 40-45; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 345-355.

[181] *West v Pollak & Freemantle* 1937 TPD 64 66.

[182] *West v Pollak & Freemantle* 1937 TPD 64 66.

[183] *West v Pollak & Freemantle* 1937 TPD 64 66.

[184] *West v Pollak & Freemantle* 1937 TPD 64 67.

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the shares in their registers on behalf of the purchasers. The application was based on the appellant's ownership of the shares. The refusal of the court *a quo* of the relief sought resulted in the appeal.[185] As defence, the respondents submitted that:

> "[They] took innocently and could pass ownership. They subsequently acquired ownership from the prior owner. [Also] [t]he prejudice [with regard to estoppel] is not cured."[186]

Greenberg J who heard the appeal considered the argument of the respondents pertaining to estoppel and the passing of ownership and reasoned as follows:

> "*Estoppel operates by preventing a person from denying the truth of a representation he has made*. In the present case the representation which is relied upon is the representation created through the documents, namely, that by giving the scrip and the blank transfer forms to Hunt, appellant represented that Hunt was authorised to deal with the shares. It appears to me that the *effect of estoppel is that the appellant is not entitled to deny that he gave this authority which ostensibly he gave*, with the result that in proceedings to which estoppel applies he is deemed to have given the authority. *The transaction is looked upon as if he has actually given the authority, and as a result of this authority, combined with the delivery, ownership to the shares passes*. *In my opinion, the position is not that the appellant is estopped from denying the title of the person to whom delivery is given; he is estopped from denying that he gave authority and as a result of this estoppel and the subsequent delivery actual title is created*."[187] (Own emphasis added)

As a starting point, the court explained the function of estoppel, namely that it prevents or estops a person from denying that the representation made by such person is the true state of affairs. It is from this understanding of what a successful defence of estoppel does, that the court identified the particular type of representation that was made in this case. As mentioned earlier,[188] there are two types of representations that make the defence of estoppel available to a defendant, namely, a representation made by the owner that the person selling the property had the authority to dispose of the property or that the owner made a representation that the person selling the property

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[185] *West v Pollak & Freemantle* 1937 TPD 64 66.

[186] *West v Pollak & Freemantle* 1937 TPD 64 65.

[187] *West v Pollak & Freemantle* 1937 TPD 64 68.

[188] See section 2 3 2 above.

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was the owner. The court identified that the representation made on the facts was that the seller was authorised to sell the property on behalf of the owner, in other words, that the seller was the agent of the owner. The court held that the effect of estoppel is that the owner may not deny her representation, namely that the seller had authority. Thereby creating ostensible authority for the sale of the property in terms of the principles of agency and estoppel.

Furthermore, the court held that the respondents are therefore relying on the right they acquired, namely ownership. As a result, the court opined that the transaction should be viewed in retrospect as if the appellant indeed gave authority to Hunt (the fraudulent seller) to dispose of the shares. The fact that delivery of the transfer documents took place together with the ostensible authority that cannot be denied due to estoppel the consequence was that ownership over the shares passed to the respondents.[189] Accordingly, the court held that the respondents had valid title. Moreover, in response to the argument made by the appellants, that *dominium* cannot be acquired by estoppel, Greenberg J held:

> "As regards the question of *dominium,* it is contended on appellant's behalf that *dominium* cannot be acquired by estoppel. An analogy taken from the case of fixed property may be of use in dealing with this point. If A, who is the registered owner of fixed property, represents to B that C is authorised to sell and transfer this property and receive the price, and B, acting on this representation, buys it and pays the price to C, and receives transfer from C, I can see no ground for holding that B is not the owner, even though as between A and C the latter had no authority to transfer. If after transfer a third party damaged or trespassed on the property, B, and B alone, would be entitled to take action as owner. If in the hypothetical case I have put A intervened after the sale, but before the transfer, and repudiated C's authority, he could nevertheless be compelled to pass transfer to B."[190]

The court expressed its opinion that not only can estoppel result in a transfer of ownership when dealing with movables but also when dealing with "fixed property" (or immovables). The cause of action would however not be estoppel. Rather, the cause of action would be the *authority of the seller*, meaning agency of the seller, which the

[189] *West v Pollak & Freemantle* 1937 TPD 64 68.

[190] *West v Pollak & Freemantle* 1937 TPD 64 69.

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original owner would not be able to deny due to the operation of the evidentiary estoppel principle.[191]

Sonnekus argues that the court's dicta concerning the effects of a representation made to a *bona fide* purchaser cannot mean that estoppel can by itself result in the acquisition of ownership.[192] He contends that what the court was stating was that one could indirectly use estoppel to supplement a cause of action so that the combined effect of estoppel plus an independent cause of action results in the establishment of ownership in favour of the estoppel raiser.[193] In this regard, Sonnekus agrees with Carey Miller's suggestion that where a defendant asserts ownership on the basis of agency, she would be able to use estoppel against a principal's argument that the agent lacked authority to transact or transfer ownership. The combined effect of estoppel (creating ostensible authority) and the cause of action based on the assertion of transfer of ownership by way of agency would establish ownership.[194] However, in the absence of a valid cause of action separate and independent from estoppel for establishing ownership, estoppel will only function as a defence against the *rei vindicatio*.[195] In other words, estoppel on its own cannot establish ownership in favour of the estoppel raiser.

Interestingly, Sonnekus and Carey Miller's account of the *Pollak* case illuminates two important developments of the law. In the first place, it confirms that estoppel is an umbrella defence that encompasses sales made by agents (including factors and brokers) where the owner created a representation that the agents had the authority to sell the property (in other words power of attorney to conclude juristic acts on behalf of the owner).[196] In the second place, it shows that there is a distinction to be drawn

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[191] *West v Pollak & Freemantle* 1937 TPD 64 69.

[192] Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 355.

[193] Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 355.

[194] Carey Miller DL *The acquisition and protection of ownership* (1986) 324; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 355.

[195] Carey Miller DL *The acquisition and protection of ownership* (1986) 324; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 355.

[196] For the principles pertaining to agency, see Hutchison D & Pretorius C (eds) *The law of contract in South Africa* 3 ed (2017) 233-234; Cassim FI & Cassim MF "The authority of company representatives and the turquand rule revisited" (2017) 134 *South African Law Journal* 639 649-652. See *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) paras 44-47.

between these two classes of non-authorised sellers especially with regard to the proprietary remedies available to a *bona fide* purchaser. When dealing with non-agents and therefore the specific representation that the seller was the owner, the argument of Sonnekus and Carey Miller suggests that the only proprietary recourse available to a *bona fide* purchaser under this type of representation would be to raise estoppel as a defence against the owner's *rei vindicatio*. This recourse would at least provide the *bona fide* purchaser with hedged possession. However, when dealing with the particular representation that the seller had the authority to dispose of the property (in other words where the impression is created that the seller is the agent of the owner), as was the case in *Pollak*, a *bona fide* purchaser will not only be able to merely refute the owner's *rei vindicatio* with estoppel as defence. Such purchaser could rely on a separate and independent cause of action, namely agency, to argue that she acquired ownership, since a valid estoppel defence will show ostensible authority on the part of the agent. Therefore, to claim ownership, she will have to claim an independent cause of action, namely authority by agency, and the defence of estoppel. Sonnekus and Carey Miller's account acknowledge that estoppel has the potential to remedy lack of authority and reallocate ownership when used in conjunction with a separate and independent cause of action and when dealing with unauthorised sales by agents.

In contrast to the arguments advanced by Sonnekus and Carey Miller, Louw proffers that the *Pollak* case constitutes clear and unambiguous authority for the proposition that a successful estoppel defence can lead to acquisition of ownership when dealing with all types of sellers. He argues that this is the case since the court was aware of the arguments against acquisition when it handed down the decision that ownership passed to the respondents.[197] Visser and Potgieter support the view that estoppel should be able to *transfer ownership* in favour of the successful estoppel raiser. They argue that there is no reason why the court's *ratio* in *Pollak* should be restricted to holding that estoppel merely plays a part in the passing of ownership.[198]

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[197] *West v Pollak & Freemantle* 1937 TPD 64 69. See Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 231-232. See also Van Heerden HJO "Estoppel: 'n Wyse van eiendomsverkryging" (1970) 33 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 19 22-23 where Louw states that the *Pollak* case is clear authority that estoppel results in acquisition of ownership.

[198] Visser PJ & Potgieter JM *Estoppel: Cases and materials* (1994) 42-43.

The above arguments submitted by Louw, Visser and Potgieter are not entirely convincing. Their submissions are not entirely supported by what the court held in *Pollak*. A clear distinction should be drawn between the application of estoppel in agent cases (where the representation was one of authority) and the other unauthorised seller cases. As argued by Carey Miller and Sonnekus when dealing with sales by agents, a *bona fide* purchaser can raise estoppel as defence against the *rei vindicatio* and in conjunction thereof, as a counterclaim, allege ownership because of agency. Considering the above, it seems as though *Pollak* does take the acquisition of ownership where estoppel is involved one step further, in that it shows how estoppel can play a role in acquisition of ownership. However, it cannot be submitted that the judgment indicates that estoppel can, on its own, pass ownership.

It is unclear whether the court applied the estoppel by representation doctrine or the contract law doctrine of estoppel by agency/ostensible/implied authority doctrine. However, it seems plausible that both could have been applied. These contract law doctrines are different from the doctrine of estoppel by representation that is the focus of this dissertation. Estoppel by agency and the ostensible or implied authority doctrine in contract law is used to remedy the situation where there is an agency relationship between the agent and the principle but the agent has no actual authority to bind the principal in the transaction that caused the dispute. These doctrines allow the court to find that the agent had authority to bind the principal after considering the circumstances of the case and determining whether objectively speaking the circumstances implies authority.[199]

If the dicta in *Pollak* rather referred to estoppel by agency or ostensible authority, it would mean that the court did not apply estoppel by representation, which is used in instances of representations in general. The remarks of the court in this case, would accordingly not be relevant for the topic on the consequences of a successful estoppel defence, where the focus is on estoppel by representation. It is also not clear whether the court's finding in *Pollak* about estoppel by agency or ostensible authority also applies to estoppel by representation. Consequently, after the *Pollak* decision, the traditional consequences ascribed to estoppel arguably remained, namely mere

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[199] Hutchison D & Pretorius C (eds) *The law of contract in South Africa* 3 ed (2017) 233-234; Cassim FI & Cassim MF "The authority of company representatives and the turquand rule revisited" (2017) 134 *South African Law Journal* 639 657-662. See *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) paras 44-47.

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suspension of the owner's *rei vindicatio* giving the *bona fide* purchaser for value only hedged possession.

2 4 3 *Apostoliese Geloofsending van Suid Afrika (Maitland Gemeente) v Capes*

Contrary to the case discussed above, *Apostoliese Geloofsending van Suid Afrika (Maitland Gemeente) v Capes*[200] is a case generally accepted to imply that estoppel does not result in acquisition of ownership. In this matter, the applicant was the owner of two plots namely plots 10 and 11 between which it had built a wall. The wall was, however, not built on the boundary line between the plots. The applicant then sold one of the plots, plot 11, to one Jona who in turn sold the plot to Capes, the defendant. When the defendant purchased the plot from Jona, they were both under the impression that the land on which the wall was built was also transferred with plot 11 to Jona from the plaintiff and then to the defendant from Jona. This impression was created by the written deed of sale that identified a portion of plot 10 on which the wall was erected together with plot 11 as the object of the sale. However, when the applicant informed the defendant that it was going to demolish the wall to make better use of the property situated on its plot, the defendant objected to the demolition of the wall, arguing that the applicant cannot demolish the wall since the wall is not situated on the applicant's plot. Consequently, the applicant approached the court for a declaratory order. The court was requested to declare that: (i) the boundary line between the two plots were correctly reflected in the relevant deed of transfer and the map that is attached to it; (ii) that the applicant is the sole owner of the land on which the wall was built and therefore can deal with it as it sees fit; and (iii) that the applicant is the owner of its plot up till the boundary line of the plot and can, therefore, do on the plot as it sees fit. The defendant opposed the application based on estoppel submitting that the applicant was estopped from arguing that the wall formed part of its property and that the wall was not transferred to the defendant with plot 11. The defendant's defence of estoppel was based on the written deed of sale that was concluded between the appellant and the first purchaser, Jona, as well as the written deed of sale that was concluded between Jona and the defendant, which included as object of the sale the portion of land on which the wall was erected together with plot 11. The applicant, however, argued that since it remains owner of the plot even if the defendant succeeds

[200] 1978 (4) SA 48 (C).

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with estoppel, it is still entitled to do on the property as it sees fit, including demolishing the wall, regardless of estoppel. In response to the applicant's submission, the court held that:

> "Nieteenstaande die feit dat eiser geregtig is op 'n bevel wat verklaar dat die grens tussen die twee persele korrek weergegee word op Jones se transportakte, kan eiser ten opsigte van die betwiste strook grond of die muur as sulks nie al sy regte as eienaar uitoefen nie. Desondanks die feit dat verweerder nie in sy teeneis slaag nie, slaag eiser ook nie in wese nie, aangesien hy nie al sy regte as eienaar ten opsigte van die betwiste grond of die muur mag uitoefen nie."[201]

The court's statement by implication confirms that the applicant remains owner of the property after estoppel has successfully been raised. The court's choice of words shows that the applicant remains owner although it is unable to disturb the defendant's possession of the thing.[202] In other words, the owner may not exercise its normal ownership entitlements over the property.

This judgment indicates that estoppel simply gives the estoppel raiser hedged possession against the owner, rather than ownership, where the hedged possession of the estoppel raiser is protected because the owner may not interfere with her possession. As a result, it seems to confirm the traditional interpretation of the consequences of estoppel, namely that a successful estoppel defence against an owner's *rei vindicatio*, on the one hand, results in suspension of the owner's entitlement to vindicate the property in the hands of the successful estoppel raiser.[203] This means that the owner is prohibited from claiming back her property from the *bona fide*

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[201] *Apostoliese Geloofsending van Suid-Afrika (Maitland Gemeente) v Capes* 1978 (4) SA 48 (C) 60. Here is a free translation of the quoted text: *Notwithstanding the fact that the plaintiff is entitled to an order declaring the boundary between the two premises reproduced on Jones' deed of transfer as correct, the plaintiff may not exercise all his rights as owner in respect of the disputed strip of land or the wall as such. Despite the fact that defendant's counterclaim did not succeed, the plaintiff, in essence, also did not succeed as he is not allowed to exercise all his rights as owner in respect of the disputed land or the wall*.

[202] *Apostoliese Geloofsending van Suid-Afrika (Maitland Gemeente) v Capes* 1978 (4) SA 48 (C) 60. See further Van der Merwe CG *Sakereg* 2 ed (1989) 373.

[203] Van der Merwe CG *Sakereg* 2 ed (1989) 373; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 473; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 554. See *Apostoliese Geloofsending van Suid-Afrika (Maitland Gemeente) v Capes* 1978 (4) SA 48 (C) 58; *Absa Bank Ltd v Knysna Auto Services CC* (266/2015) [2016] ZASCA 93 (1 June 2016) para 20.

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possessor against whom she unsuccessfully asserted her *rei vindicatio*. On the other hand, the successful estoppel raiser is allowed to remain in possession of the property indefinitely and is protected against interference with the property by the owner.[204] The judgment, in essence, provides clarity on the impact of estoppel on the owner's assertion of her rights in general, although the court's dicta does not articulate these consequences by way of express statements. It affirms that the applicant remains the owner after estoppel, but that her entitlements are severely limited by the successful estoppel defence. The precise extent of the protection provided to the estoppel raiser and the extent of the limitation that estoppel places on the owner's entitlements will be explored in chapter 5.[205]

2 4 4 *Barclays Western Bank Ltd v Fourie*

The *Barclays Western Bank* case affirms the stance taken in *Apostoliese Geloofsending* above in that its *ratio* supported the so-called traditional interpretation of the consequences of estoppel. In *Barclays Western Bank* the plaintiff claimed delivery of a certain agricultural tractor from the defendant who at the time was in possession of the tractor.[206] The defendant contended that it became the owner of the tractor when it concluded a sale and leaseback agreement with AVO.[207] The defendant responded to the allegations made by the plaintiff by conceding that he is in possession of the tractor, but denying that the plaintiff is the owner of the tractor based on evidence that at the time the plaintiff concluded the sale agreement with AVO, AVO was not the owner.[208] The owner of the tractor was Powtrac. Powtrac sold tractors to AVO in terms of agreement where the tractors would be delivered to AVO immediately. However, Powtrac would remain the owner of tractors until AVO paid the purchase price in full. This agreement between Powtrac and AVO expressly stipulated that AVO is not an

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[204] Van der Merwe CG *Sakereg* 2 ed (1989) 373; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 259; *Apostoliese Geloofsending van Suid-Afrika (Maitland Gemeente) v Capes* 1978 (4) SA 48 (C) 58; *Absa Bank Ltd v Knysna Auto Services CC* (266/2015) [2016] ZASCA 93 (1 June 2016) para 20.

[205] See chapter 5, section 5 2 below.

[206] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 158.

[207] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 160.

[208] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 158.

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agent of Powtrac.[209] The specific tractor in dispute was sold to AVO in terms of the above agreement, meaning, ownership was reserved by Powtrac at all material times due to AVO's failure to pay the purchase price to Powtrac.[210]

The plaintiff instituted the *rei vindicatio* against the defendant. However, to refute the *rei vindicatio*, the defendant showed that the plaintiff was not the owner of the property.[211] Subsequently, the onus shifted to the plaintiff to prove its ownership. The plaintiff submitted the following:

> "[B]ecause Powtrac had entrusted the tractor to a dealer for sale and allowed it to be displayed in the dealer's showroom, Powtrac had represented to members of the public that AVO was either the owner of the tractor of (*sic*) was authorised by the owner to dispose of it on its behalf. If a purchaser was misled by this representation, and in reliance thereon had altered his position to his prejudice, such a purchaser would have been able to raise a defence by way of an estoppel against Powtrac if Powtrac had sought to vindicate the tractor from him. But Powtrac is not seeking to vindicate the tractor from the plaintiff, and to meet this Mr *Levitan* submitted that, if the circumstances were such that a successful plea of estoppel could have been raised against Powtrac, then those circumstances would actually bring about a passing of *dominium*. That being so plaintiff became the owner, Powtrac lost its rights of ownership."[212]

In other words, the plaintiff argued that if the circumstances were as such that estoppel would have succeeded against Powtrac as the true owner of the tractor, those circumstances would have brought about the passing of ownership from Powtrac to the plaintiff.[213] In support of this argument, the plaintiff relied on the *Pollak* judgment and academic literature.[214] Moreover, the plaintiff submitted that if the court finds otherwise, meaning that ownership did not pass to the plaintiff based on estoppel,

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[209] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 158.

[210] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 160.

[211] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 160.

[212] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 160.

[213] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 160.

[214] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 160. The plaintiff referred to the case of *West v Pollak & Freemantle* 1937 TPD 64 69 in which the court supposedly held that estoppel can be used as a cause of action in terms of which ownership can pass to a *bona fide* purchaser for value. The plaintiff used as support for this argument Van Heerden HJO "Estoppel: 'n Wyse van eiendomsverkryging" (1970) 33 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 19 19.

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anomalous consequences would ensue doctrinally and that such a finding will run contrary to the needs of modern trade and commerce.[215] In the alternative, the plaintiff submitted on the basis of the *Morum Bros* case that it acquired ownership because AVO was acting as agent or factor of Powtrac.[216] Based on these submissions the plaintiff contended that it was the owner of the tractor. The defendant refuted this argument on procedural grounds. He submitted that it was not open for the plaintiff to rely on acquisition of ownership by way of estoppel because this was not pleaded in the plaintiff's pleadings and no evidence was led in court to establish compliance with the requirements of estoppel.[217]

The court held that the argument made by the plaintiff, namely that it acquired ownership by way of estoppel, is contrary to the notion that estoppel can only be raised as a defence and not as a cause of action.[218] However, the reason why the court rejected the plaintiff's argument was not based on the fact that estoppel was a defence and not a cause of action. Instead, it rejected the acquisition of ownership argument made by the plaintiff on procedural grounds; in particular, that estoppel was not included in the plaintiff's pleadings nor was the compliance with the requirements of estoppel shown.[219] Furthermore, the court rejected the acquisition by agency argument made by the plaintiff. The court reasoned that the old authorities do not provide for ownership to be acquired by a *bona fide* purchaser who purchase goods from an unauthorised agent, since the old authorities indicate that the owner could recover the property by refunding the purchaser.[220] This was indicated in the *Morum Bros* case above.[221]

The court rejected the argument made by the plaintiff regarding the potential anomalous situations that will ensue if the court does not find that ownership passed to the plaintiff. The anomalous situations that the plaintiff referred to arises due to unresolved doctrinal issues that would likely crop up if *bona fide* purchasers for value

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[215] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 160.

[216] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 161-162.

[217] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 160-161.

[218] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 160.

[219] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 161.

[220] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 162.

[221] See the discussion of the *Morum Bros case* at section 2 4 1 above.

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is not seen to acquire the disputed property in the circumstances that would result in estoppel succeeding. The plaintiff specifically highlighted three questions that crop up in this regard to which there are no answers and therefore legal uncertainty. These were: “if the purchaser were to lend the article back to the original owner, would he be able to recover it, or, if the article were to get damaged through the negligence of a third party, would he be able to sue for damages, or, if it was stolen from the purchaser, would he be able to sue for its return”.[222] Without going into the detail regarding these alleged anomalies, the court held that these uncertainties are not more problematic than possible problems that could arise with the sale of property by a non-owner in general. The court opined that a seller’s only obligation by law is to provide vacant possession and not to provide transfer of ownership to the purchaser. Based on this *ratio*, the court held that it was not persuaded that the results would be so problematic to necessitate recognising that ownership is acquired by the *bona fide* purchaser. In other words, the court found that the anomalies caused by the traditional consequences ascribed to estoppel is not enough reason to find that estoppel should have acquisition of ownership as a consequence.

The court’s analysis of the legal uncertainties that arise from the traditional consequences of estoppel leaves much to be desired. It is the first case in which the court had the opportunity to pronounce, although *obiter*, on the unforeseen results of the traditional consequences ascribed to estoppel, that some scholars at the time labelled as problematic.[223] Yet, all the court in *Barcalys Western Bank* did was to equate the issues that results from estoppel with the issues that generally could crop up where property belonging to another is sold by a seller and to emphasise that such seller does not have an obligation to transfer ownership to the purchaser. This *ratio* is questionable. The estoppel situation cannot merely be equated to the situation where sale of property that belongs to someone other than the seller takes place in general. Instead, the estoppel situation constitutes a distinct situation, since it is required that the purchaser must have relied on and incurred prejudice due to specifically the owner’s blameworthy representation, and not that of the seller, which would ordinarily be the case in general sale by non-owner cases. The direct link to the owner of the property surely requires a distinction to be drawn between general cases of sales by

[222] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 160.

[223] For a discussion of the problematic doctrinal consequences identified by scholars, see chapter 5, section 5 2 2 below.

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non-owners. The court's focus on the seller's obligation of vacant possession seems misplaced, since the issue was the fact that the traditional consequences of estoppel were problematic between the original owner and the *bona fide* purchaser for value to the exclusion of the seller. These reasons indicate that the assumptions made by the court about the anomalies that results from the traditional interpretation of the consequences of estoppel were likely incongruous and inaccurate. Consequently, it would seem that re-evaluating the anomalies raised by the plaintiff in *Barcalys Western Bank* regarding the consequences of estoppel might be in order. This will be done in chapter 5 of this dissertation.[224]

Moreover, in *Barcalys Western Bank* the court rejected the plaintiff's argument that modern commerce requires estoppel to have acquisition of ownership consequences. Without investigating the matter, the court merely dismissed the argument.[225] Since it is not clear from the case what the plaintiff meant with the interest of modern-day commerce, it will be assumed that the plaintiff referred to the economics of free trade, in particular the promotion of trade and commerce.[226] The failure of the court to investigate this submission, however, should be ascribed to the plaintiff's submission lacking enough detail and persuasion. Nevertheless, just because the court did not deal with this argument does not mean that the argument does not have significance or weight when contemplating the justifiability of the consequences ascribed to estoppel. The needs of modern-day commerce in the context of estoppel will be looked into in chapter 5 of the dissertation that deals with policy considerations.[227]

Sonnekus and Rabie argues that the court's *ratio* in *Barclays Western Bank* demonstrates that a successful estoppel raiser cannot acquire ownership by way of estoppel. First, they rely on the court's dicta regarding the function of estoppel, namely that estoppel can only be used as a defence and not as a cause of action.[228] Secondly, they rely on the court's finding that the anomalies that results from estoppel which were

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[224] See chapter 5, section 5 2 2 below.

[225] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 162.

[226] See chapter 5, section 5 3 1 below.

[227] See chapter 5, section 5 3 1 below.

[228] Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 351-352. See also *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 162.

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mentioned by the plaintiff is not sufficient reason to recognise acquisition of ownership.[229]

In contrast, Visser and Potgieter argue that the remarks made by Watermeyer J in *Barclays Western Bank* are insufficient to argue that a successful estoppel defence may not have acquisition of ownership as a consequence. They contend that the dicta of the court in this regard can only be accepted as *obiter* because estoppel was not properly pleaded and not in issue in the case.[230] Likewise, Pelser reminds us that the court in *Barclays Western Bank* did not decide on the acquisition of ownership by way of estoppel because estoppel was not raised as a defence. These authors emphasise that one can only grapple with the consequences of estoppel where the defence was raised and not where the *bona fide* purchaser failed to raise the defence. This view is supported by Watermeyer J's finding:

> "There is consequently no need for me to express any opinion on whether or not Powtrac lost its right of ownership on account of an estoppel, because an estoppel has not been established on the facts."[231]

In my view, the *Barclays Western Bank* judgment cannot be relied on as explicit authority to argue for the acquisition of ownership by way of estoppel because the court expressly left this question open. However, the court made *obiter* remarks pertaining to the consequences of a successful estoppel defence. These *obiter* remarks indicate that if estoppel were properly pleaded, the court would most probably have explicitly dealt with the consequences of estoppel.

2 4 5 *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC*

Significantly, when the Supreme Court of Appeal recently had the opportunity to confirm the *obiter* statements made in the *Barclays Western Bank* case, the court in

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[229] Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 351-352. See *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 162.

[230] Visser PJ & Potgieter JM *Estoppel: Cases and materials* (1994) 48. Pelser agrees with Visser and Potgieter that the court's dicta in this regard can only be accepted as *obiter* remarks. See Pelser FB "Aspekte van eiendomsverkryging deur estoppel" (2005) 38 *De Jure* 153 156.

[231] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 161.

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Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others[232] seemingly ascribed an opposing interpretation to the consequences of a successful estoppel defence.[233] In *Oriental Products,* the third respondent (a previous agent of the appellant) fraudulently transferred immovable property, owned by the appellant, to the second respondent without the appellant's permission.[234] It is worth mentioning here, that estoppel is available in both instances of movable and immovable property and that no distinction is drawn in this regard.[235] Subsequent to this transfer, the second respondent transferred the property to the first respondent.[236] This transfer occurred two months after the appellant discovered that the property was no longer registered in its name. The appellant however only instituted proceedings to vindicate the property after the property was transferred into the name of the first respondent.[237] The legal proceedings instituted by the appellant was based on the appellant's ownership over the disputed property and that this property had been transferred to the first and second respondent fraudulently and without its knowledge or authority. In this regard, the appellant submitted that it is the owner of the property and that the title deed should be rectified accordingly.[238] In other words, the owner instituted the *rei vindicatio* to recover the immovable property and sought to rectify the entry in the deeds registry.

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[232] 2011 (2) SA 508 (SCA).

[233] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 20. For further discussion of this case see Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 259; Van der Merwe CG & Pienaar JM "The law of property (including real security)" 2011 *Annual Survey of South African Law* 890-995 933-935.

[234] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 10.

[235] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) paras 19-20. See section 2 3 2 above.

[236] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 4.

[237] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 5.

[238] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 2.

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In turn, the first respondent relied on the doctrine of estoppel by representation as a defence against the appellant's claim.[239] The first respondent argued that the appellant had made a negligent representation by creating the impression that the second respondent had the right to dispose of the property as the registered owner. This negligent representation was created when the appellant failed to rectify the deeds registry immediately after becoming aware that the second respondent was reflected as the registered owner of the property since it had the means to do so before the transfer took place.[240] In an attempt to refute the first respondent's defence, the appellant argued that estoppel is a defence and not a weapon to claim that transfer of ownership had occurred.[241]

The court was satisfied that the defendant complied with all the requirements of estoppel, since the appellant created an impression that the second respondent was the owner when the appellant failed to rectify the title deed after learning of its deregistration, causing the respondent's reasonable reliance to its detriment. Therefore, by omitting to correct the incorrect entry in the deeds registry immediately, the appellant created a negligent representation. It is noteworthy that the representation did not concern the authority of the agent, since the focus was not on the first sale to the second respondent, but rather on the second sale to the first respondent and specifically the failure of the owner to act timeously to rectify the entry in the deeds registry. Therefore, the lack of authority on the part of the agent was not a deciding factor in this matter.

The court also dismissed the appellant's submission that estoppel cannot create rights because it operates as a defence and not as a cause of action. In this regard, the appellant contended that:

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[239] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 15.

[240] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 18.

[241] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 20.

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> "[Estoppel] is by its nature, a weapon of defence, it cannot be used as a weapon of attack, to transfer ownership of a property which, but for the operation of estoppel, would not have been transferred."[242]

In response to this submission, Shongwe JA held that

> "[i]n my view, it is still a defence entitling the possessor to continue exercising that right. In the present case, transfer had already occurred long before the defence was raised. We were not referred to any unequivocal authority, nor have I found any; to the effect that estoppel can or cannot be used in cases involving the transfer of ownership of immovable property".[243]

Shongwe JA's statement is significant since it seems to expand on what estoppel can do according to the court. The court held that the acquired right is protected by the defence of estoppel. The acquired right presumably referring to ownership since the court explains that transfer already occurred before the defence was raised.[244] Moreover, that the right referred to is arguably ownership is further supported by the court's reliance on the academic writings of Louw and Van Heerden as authority for the remark, since these authors argue that the consequences of estoppel should be ownership acquisition.[245]

I cannot agree with Shongwe JA's remark that ownership transferred before estoppel was raised. Although registration might have taken place before estoppel was raised, there was no intention on the part of the original owner to transfer. As will become evident in chapter 3, intention is a key requirement in the real agreement that is necessary for the transfer of ownership. Without the intention to transfer being

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[242] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 20.

[243] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 20.

[244] Van der Merwe CG *Sakereg* 2 ed (1989) 373; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 259; *Apostoliese Geloofsending van Suid-Afrika (Maitland Gemeente) v Capes* 1978 (4) SA 48 (C) 58; *Absa Bank Ltd v Knysna Auto Services CC* (266/2015) [2016] ZASCA 93 (1 June 2016) para 20.

[245] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 20. See also Van Heerden HJO "Estoppel: 'n Wyse van eiendomsverkryging" (1970) 33 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 19 25; Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 234-235.

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present, transfer could not have occurred.[246] Moreover, the scholars Louw and Van Heerden whom the court relied on are silent on how transfer could take place without the owner having the intention to transfer ownership to the purchaser. Since the law is rather clear on how transfer of ownership may occur, it would seem that the interpretation ascribed to the quoted remark made by Shongwe might be incorrect, because it is arguably unlikely that the court would not be cognisant of the requirements for transfer. However, the further remarks made by Shongwe JA towards the end of his judgment supports the interpretation that estoppel results in ownership acquisition. In this regard, Shongwe JA held that:

> "In the context of this case, the appellant is entitled to retransfer of the property but for the fact that it cannot assert its right of ownership because of estoppel. Hence, the applicant *loses its ownership* of the property."[247]

This dicta of Shongwe JA clearly suggests that the appellant would have had a right to retransfer of the property if the defendant had not raised estoppel against the appellant's claim. The implication being that the plaintiff is not entitled to rectification of the deeds registry. This means that the property remains registered in the name of the defendant. In the context of movable property, this means that the plaintiff would not be entitled to an order for the return of the property into the plaintiff's hands and that the property would consequently remain in the defendant's possession. This consequence surely has implications for the publicity principle that is a cornerstone principle of property law. What these implications may be, will be investigated in chapter 3, especially since Shongwe JA held that it would mean that the plaintiff lost his ownership.

Shongwe JA's finding on the issue whether estoppel can transfer ownership stands in stark contrast to the previous findings of the same court in *Apostoliese Geloofsending* and *Barclays Western Bank*. Harms DP who wrote the concurring judgment in *Oriental Products* endorsed the idea that ownership is lost in this context. In this regard, he reasoned that:

> "Whether this formalistic approach [namely that, estoppel is simply a defence in our law] can still be justified need not be considered in this case even though the

[246] See chapter 3, section 3 3 below where this submission is dealt with in detail.

[247] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 23.

> effect of the successful reliance on estoppel has the effect *(sic)* that *the appellant may not deny that the first respondent holds the unassailable title in the property or that the deeds registry entry is correct*. *This means that should the latter wish to dispose of the property the appellant would not be able to interfere*. *If this means that ownership passed by virtue of estoppel so be it*. The better view would be that *the underlying act of transfer is deemed to have been validly executed*."[248] (Own emphasis added)

This dictum of Harms DP deviates from the traditional consequences that previous cases (and the majority of scholars) ascribed to estoppel. In the first place, it departs from the same court's finding in *Apostoliese Geloofsending.* In *Apostoliese Geloofsending* it was held that the "owner" may not interfere with the estoppel raiser's possession of the property, whereas the court in *Oriental Products* went further than this when it pronounced that the "owner" may not deny the ownership of the estoppel raiser. In addition, Harms DP stated that: "[i]t could not be said with any measure of confidence that the first respondent [the estoppel raiser] did not take transfer in light of this representation [the omission on the part of the appellant]".[249] These statements provide that the successful estoppel raiser actually became owner of the property.

However, the dictum of the judges in this decision are conflicting, specifically when regard is had to the terminology used to refer to the manner of acquisition of ownership. Harms DP's reasoning that "ownership *passed* by virtue of estoppel"[250] seemingly points to the suggestion that estoppel results in the successful estoppel raiser acquiring ownership by way of transfer and therefore derivative acquisition of ownership. The statement by Shongwe JA, in turn, hints that the "applicant *loses* its ownership of the property" when the defendant is successful with a claim based on estoppel also creates the impression that, at least theoretically, estoppel may result in the successful estoppel raiser acquiring ownership, however by way of an original mode of acquisition.[251] Consequently, this inconsistent use of acquisition terminology

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[248] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 31.

[249] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 29. See also Van der Merwe CG & Pienaar JM "The law of property (including real security)" 2011 *Annual Survey of South African Law* 890-995 934.

[250] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 31.

[251] See chapter 3 below where the different modes of acquisition of ownership are discussed.

creates uncertainty with regard to the correct category of acquisition that should (or could) apply in this context.

Van der Merwe is of the opinion that the remarks made by the court in *Oriental Products* were made *obiter*. In particular, the remarks pertaining to whether the traditional formalist view that estoppel is merely a cause of action still has a place in our law and therefore whether ownership is now acquired in these circumstances. He takes this stance since the first respondent did not expressly argue that ownership was transferred by way of estoppel. However, he points out that the court's dicta indicate that the court may be open to accepting that acquisition of ownership can take place by way of estoppel.[252] Interestingly, Sonnekus concedes that the court in the *Oriental Products* case held that estoppel creates ownership.[253] However, he opines that Harms DP failed to reflect properly on the consequences of his remarks in this regard.[254] Furthermore, he relies on a subsequent case of the same court, namely *Knox NO v Mofokeng*[255] to argue that the court has revoked its statements regarding estoppel having the potential of creating rights.[256]

It should be noted that estoppel was not pleaded in the *Knox* case and that the court did not pronounce on the consequences of estoppel.[257] As a result, the *Knox* case cannot be relied on to argue that the court has revoked its statements concerning the proprietary consequences of estoppel. Yet, it would seem that Sonnekus' recognition that the statements made by the court in *Oriental Products* was not made *obiter*, but rather creating precedent, is possibly correct.[258] This may be so since the court's statements in *Oriental Products* were made in direct response to the applicant's

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[252] Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 259.

[253] Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 331; Sonnekus JC "Eienaars en ander reghebbendes mag ervaar dat swye nie altyd goud werd is nie" 2013 *Tydskrif vir die Suid Afrikaanse Reg* 326 331. See also *Knox NO v Mofokeng* 2013 (4) SA 46 (GSJ).

[254] Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 349.

[255] 2013 (4) SA 46 (GSJ).

[256] Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 355.

[257] *Knox NO v Mofokeng* 2013 (4) SA 46 (GSJ) para 30.

[258] Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 331; Sonnekus JC "Eienaars en ander reghebbendes mag ervaar dat swye nie altyd goud werd is nie" 2013 *Tydskrif vir die Suid Afrikaanse Reg* 326 331.

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attempt to refute the estoppel defence when the applicant argued that ownership cannot be acquired through estoppel. However, this cannot be said with absolute certainty.

2 4 6 *Rossouw v Land and Agricultural Development Bank of South Africa*

Subsequent to *Oriental Products* it remained uncertain whether the court will follow this precedent in future cases, since the court has over the years been inconsistent in its interpretation of the consequences of a successful estoppel defence. In 2013, the Supreme Court of Appeal had the opportunity to confirm its position when it heard the unreported case of *Rossouw v Land and Agricultural Development Bank of South Africa*.[259] In this case however the court rejected the Land Bank's contention that the bank acquired property by way of estoppel. A simplified version of the factual matrix that resulted in estoppel being relied on to argue for ownership acquisition in the *Rossouw* case is as follows. The Land Bank as the plaintiff in the *court a quo* and the respondent in the Supreme Court of Appeal lent and advanced an amount of R2 716 737.55 to the SJP Family Trust ("the Trust") for the purchase of irrigation equipment consisting of ten pivots.[260] This loan was granted by way of a typical tripartite instalment sale and supplier sale agreement with the various stakeholders. The instalment sale agreement amongst other things reserved ownership in favour of the Land Bank until the Trust repaid the loan amount. The supplier sale agreement was concluded with the supplying company, Andrag, in terms of which the bank purchased the ten pivots from Andrag for "on-sale" to the Trust.[261] In terms of the sale agreement the payment of the purchase price was made conditional to the bank receiving two declarations, one from the Trust and one from Andrag. The declaration entailed a confirmation that the pivots were delivered to the Trust, were successfully installed and in working condition. Both the Trust and Andrag signed the declarations as required and the Land Bank accordingly made payment of the purchase price for the ten pivots to Andrag.[262] However, after receiving payment, Andrag delivered only six of the ten

[259] 2013 JDR 2038 (SCA).

[260] *Rossouw v Land and Agricultural Development Bank of South Africa* 2013 JDR 2038 (SCA) para 2. See also Boggenpoel ZT "Property" (2013) 4 *Juta's Quarterly Review* para 2.3.1.

[261] *Rossouw v Land and Agricultural Development Bank of South Africa* 2013 JDR 2038 (SCA) para 2.

[262] *Rossouw v Land and Agricultural Development Bank of South Africa* 2013 JDR 2038 (SCA) para 2.

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pivots to the Trust. The Trust then disposed of the six pivots without the knowledge of the bank and failed to make any payments to the bank. Unbeknown to the bank, the Trust and Andrag colluded to defraud it. The Trust's failure to pay the instalments as per the agreement led to the bank to institute proceedings against the Trust in the High Court for the recovery of the ten pivots, in the alternative for the payment of the value of the 10 pivots in terms of the *actio ad exhibendum*. Since the pivots were no longer in the possession of the Trust, the bank could not succeed with the *rei vindicatio* but succeeded with its alternative claim for the value of the ten pivots based on the *actio ad exhibendum*.[263] The Trust appealed against the order of the High Court. It submitted that ownership over the ten pivots never passed to the bank. The argument followed that, four of the ten pivots were never delivered to the bank and therefore the bank could not become owner of the four undelivered pivots since transfer of ownership over movable property requires actual or at least constructive delivery. In respect of the six pivots that were delivered, the Trust argued that the sale agreement between the bank and Andrag was null and void due to Andrag's fraudulent intentions in this regard and therefore ownership over the six pivots never passed to the bank.[264]

The court confirmed that ownership over the six delivered pivots was indeed transferred to the bank since the validity of the underlying agreement was of no consequence for the transfer of ownership. An abstract system of transfer is followed in South African law, which merely requires a valid real agreement rather than a valid underlying agreement giving rise to the transfer.[265] The court then proceeded to examine the bank's argument that it was also the owner of the four undelivered pivots based on estoppel. The bank argued that

> "Van den Berg [Andrag's technician who signed the declaration] was the Trust's agent and he was clothed with ostensible authority; alternatively Van der Merwe had provided the 'scenic apparatus' that enabled Van den Berg to commit the fraud on the Bank; consequently 'considerations of policy and fairness require that the Trust be held to the contents and consequences' of the signed declaration".[266]

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[263] *Rossouw v Land and Agricultural Development Bank of South Africa* 2013 JDR 2038 (SCA) para 3.

[264] *Rossouw v Land and Agricultural Development Bank of South Africa* 2013 JDR 2038 (SCA) para 5.

[265] *Rossouw v Land and Agricultural Development Bank of South Africa* 2013 JDR 2038 (SCA) para 9-10.

[266] *Rossouw v Land and Agricultural Development Bank of South Africa* 2013 JDR 2038 (SCA) para 15.

In other words, the bank attempted to hold the Trust liable for the undelivered pivots based on "deemed transfer of ownership to the bank through estoppel". [267] The court was unprepared to entertain the bank's submission based on estoppel being a defence rather than a cause of action. The court confirmed that estoppel cannot be brought as a cause of action and that no authority exists that can justify using estoppel as a sword rather than a shield. In this regard, the court held that:

> "It is well established in our law that estoppel is a defence and not a cause of action. Junior counsel for the Bank sought to transform it from a shield to a sword by relying on . . . the signed declaration . . . There [however] is not a single authority in which it was ever employed as a cause of action. In the end counsel abandoned the argument, which was in any case stillborn."[268]

The question that the above *ratio* of the court gives rise to is whether the court's finding on the estoppel argument advanced by the bank indicates that the court has retracted from the statements it made in *Oriental Products* about the consequences of estoppel possibly being acquisition of ownership. If this is the case, then it would mean that the uncertainty that was created by *Oriental Products* as to the consequences of estoppel has ostensibly been cleared up since the court has by way of its dicta in *Rossouw* confirmed the traditional position regarding the consequences of estoppel. However, if the court's remarks in *Rossouw* for some reason do not indicate the court's withdrawal from what it held in *Oriental Products* regarding the consequences of estoppel then it would mean that the uncertainty around the consequences of estoppel remains.

In my view, the *Rossouw* case can be distinguished from the *Oriental Products* case, based on the *Rossouw* court's emphasis on the fact that the deemed ownership by way of estoppel argument was brought as a cause of action and not as a defence. It is clear from this emphasis that the court's rejection of the deemed ownership argument was solely based on the way the bank sought to use estoppel, namely as a cause of action and not as a defence. As a result, the immediate dismissal of the argument was based on a procedural ground and not on the merits of the submission that estoppel can result in ownership acquisition. Conversely, estoppel in the *Oriental Products* case was raised as a defence and not a cause of action. The implications of this is that the remarks made by the court regarding the consequences of estoppel

[267] *Rossouw v Land and Agricultural Development Bank of South Africa* 2013 JDR 2038 (SCA) para 15.

[268] *Rossouw v Land and Agricultural Development Bank of South Africa* 2013 JDR 2038 (SCA) para 15.

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possibly entailing ownership acquisition in favour of the purchaser applies to when estoppel is correctly brought as a defence. It can therefore be argued that the *Rossouw* case does not indicate that the Supreme Court of Appeal has departed from what it held in *Oriental Products*. Instead, the *Rossouw* case, showed that where a party incorrectly relies on estoppel as a cause of action, the court will not entertain the claim, since pleading estoppel in this way is against estoppel merely being a defence and not a cause of action. Therefore, consideration of "deemed ownership by way of estoppel" cannot take place. However, where a party relies on estoppel as a defence, the court's remarks in *Oriental Products* will arguably apply to the consequences of the defence. In other words, only if estoppel is brought correctly does the possibility of ownership acquisition by way of estoppel arise, as will be argued in chapter 3.[269] This means the uncertainty as to whether the purchaser becomes the owner subsequent to a successful estoppel defence following the *Rossouw* case arguably still exists.

The analysis of case law in the above section indicates that our courts have not dealt with the consequences of a successful estoppel defence carefully and unambiguously causing the uncertainty around the traditional consequences of a successful estoppel defence to persist. After the *Oriental Products* case the traditional consequences ascribed to estoppel seems to be ownership acquisition in favour of the estoppel raiser, but whether this is the only interpretation that can be ascribed to the effect of the judgment remains questionable. Also, the further question pertaining to the method of acquisition of ownership is left open by the court due to the way it used derivative *and* original acquisition terminology interchangeably. It is this issue that will be elaborated on further in chapter 3.

2 5 Concluding remarks

This chapter sets out to describe and discuss the general principles pertaining to the *rei vindicatio*, the defence of estoppel, and case law in which the court pronounced on the proprietary consequences of a successful estoppel defence. The aim was to determine the legal position regarding the consequences of a successful estoppel defence. The analysis of the *rei vindicatio* showed that the *ubi rem meam invenio* maxim of the late Roman era, which provided owners with expansive powers to recover

[269] See chapter 3, section 3 4.

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property generally from *bona fide* and *mala fide* purchasers in instances of both voluntary and involuntary loss of ownership, informed the *rei vindicatio* in Roman, Roman-Dutch and later on South African law.

The reach of the *ubi rem meam* maxim through the *rei vindicatio* and the extensive power it gave the owner to recover her property existed in Roman times as is evident in the maxims *nemo plus iuris ad alium transferri potet quam ipse haberet* (no one can transfer to someone else more rights than he has) and *id quod nostrum est sine facto nostro ad alium transferri non potest* (that which is ours cannot be transferred to another without our act). This extensive power was adopted into customary Dutch law from Roman law to oppose the *mobilia* rule. The replacement of the *mobilia* rule with the *ubi rem meam* principle encapsulated in the *rei vindicatio* was a response to the growth of trade and commerce and the corresponding need to not only protect the owner from involuntary loss of possession but also to protect the owner in circumstances of a voluntary loss of possession. Interestingly, as time progressed, the owner's right to vindicate was limited by way of statutes that codified to a certain extent the *mobilia* rule, especially as trade and commerce required increased protection on the part of innocent purchasers of goods. Importantly, when Roman-Dutch law was received into South African law, the extensive power of the owner to reclaim her property survived and the *mobilia* rule was found to not form part of the law. Therefore, many of the limitations known in the Dutch provinces were not received into the South African legal system. However, there are still a number of limitations that can be imposed on the owner's right to vindicate in South African law. Many of these limitations have taken on a uniquely South African character as they were developed and received to counter the harsh consequences of the *ubi rem meam invenio* maxim.

The analysis of the extent of the owner's power to vindicate in Roman and Roman-Dutch law, therefore, showed that the owner's *rei vindicatio*, although extensive, was defeated in instances where the need arose to protect certain persons who acquired the property in specific circumstances. In particular, interesting exceptions to the owner's strong right to vindicate, such as the sales made by agents and those made by persons whom the owner carelessly entrusted the property to, seem to correlate with the idea behind estoppel which is also to protect *bona fide* purchasers in circumstances where the owner created a culpable representation to such purchaser. The analysis showed clearly that estoppel did not form part of the Roman-Dutch law and was also not received into South African law as part of the

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common law, but that the above-mentioned exceptions carved out a place for the defence of estoppel in the South African legal system.

Part two of the chapter illustrated that estoppel by representation is an English law doctrine that has its roots in the courts of equity and that it was subsequently developed in the common law courts of England and received into South African law as a defence against an owner's *rei vindicatio*. The chapter showed that the particular doctrine of estoppel, which was received into South African law is not likely to be estoppel in *pais* but rather estoppel by representation. Furthermore, estoppel was received into South African law because fairness required that in some instances the *bona fide* purchaser of property should be protected, rather than the careless owner. This again emphasises the need for protection of *bona fide* purchasers in legal systems in which the *ubi rem meam* principle applies. Although estoppel infiltrated the South African Roman-Dutch law tradition as an alien doctrine of the common law legal tradition, it anchored itself firmly into the legal system because of its ostensible similarities with certain Roman and Roman-Dutch law principles and is now regarded part of South African law. Today, the doctrine of estoppel is known as the most important limitation on an owner's right to vindicate her property in circumstances where the owner culpably leads a *bona fide* third party to believe that the disposer of the property is legally entitled to dispose of the property to the detriment of the *bona fide* third party. Furthermore, the chapter indicated that the factor and agent for sale limitation to the owner's *rei vindicatio* that existed in Roman-Dutch law arguably merged with the estoppel defence. Once an understanding of the relationship between the *rei vindicatio* and the estoppel defence was established, it was necessary to turn to investigate what the consequences of a successful estoppel defence are. This was particularly important since the analysis of estoppel indicated that inconsistency and uncertainties regarding the consequences of estoppel exists in literature and case law.

Significantly, the discussion of the case law regarding the consequences of a successful estoppel defence, in the third part of the chapter, showed that in contrast to the attention generally given to the requirements of estoppel in South African law, the consequences of estoppel are still uncertain. In this regard, the majority of scholars opine that the traditional consequences are not as far-reaching, in that the owner's entitlement to vindicate the property in the hands of the successful estoppel raiser is merely suspended. Despite this opinion, case law has not been consistent regarding the interpretation of estoppel's consequences.

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The critical analysis performed in part three of this chapter showed that the *Morum Bros* case together with the *Barclays Western Bank* decision indicate, at least from a historical perspective, that the Roman-Dutch law limitations placed on an owner's right to vindicate did not result in the acquisition of ownership by the innocent acquirer. Accordingly, this means that it would be impossible to make an argument that ownership was lost to the innocent purchasers in these circumstances in Roman-Dutch law and that an owner unsuccessful with her *rei vindicatio*, should therefore, lose ownership in South African law.

Furthermore, the discussion of the *Pollak* decision illustrated that the court seemed to have taken the argument for acquisition of ownership one step further, in that it showed how a *bona fide* purchaser can acquire ownership in circumstances where estoppel is involved. However, it was submitted that *Pollak* cannot be used as authority to argue that estoppel can create ownership by itself and in all cases, since estoppel will have to be used in conjunction with an independent and separate cause of action such as agency to ensure the transfer of ownership. Therefore, it seems as if the acquisition of ownership might only be possible where the representation is one of contractual authority and not of ownership. Interestingly, whether estoppel by representation was the estoppel that was applied in this case is questionable since it is more likely that the court applied the doctrine of agency by estoppel or the doctrine of ostensible or implied authority that finds application in contract law. This is deduced from the terminology the court used in the case.

The chapter furthermore revealed that the subsequent Supreme Court of Appeal case, *Apostoliese Geloofsending*, provided some content to the proprietary consequences of a successful estoppel defence. After ordering in favour of the estoppel raiser, the court continued to refer to the plaintiff as the owner of the property and held that the owner may not interfere with the successful estoppel raiser's possession of the property. This dictum confirmed the traditional view that a successful estoppel raiser does not become the owner of the disputed property and that she merely receives hedged possession over the property against the owner. In line with the Supreme Court of Appeal in *Apostoliese Geloofsending,* the *Barclays Western Bank* judgment also made *obiter* remarks that favoured the view that ownership cannot be acquired by estoppel.

Contrary to *Apostoliese Geloofsending* and *Barclays Western Bank*, the court's remarks in the more recent *Oriental Products* case indicate that estoppel can give rise

to the acquisition of ownership in favour of a successful estoppel raiser. Moreover, the court in *Oriental Products* was willing to go further than the court in *Pollak* in that its remarks clearly show the circumstances under which estoppel, on its own, can create ownership. The court's dicta recognised that the substantive effect of estoppel is arguably not limited to hedged possession but rather the acquisition of ownership.[270] Interestingly, a cursory look at the *Rossouw* case, which was decided after *Oriental Products*, created the impression that the Supreme Court of Appeal departed from the statements it made about ownership acquisition in *Oriental Products*. However, a closer look at the case revealed that the court's dictum solely focussed on the fact that estoppel was pleaded as a cause of action. The court's dismissal of the argument that the respondent acquired ownership over the concerned property by way of estoppel was therefore not directed to the merits of such an argument but rather to the fact that estoppel was incorrectly pleaded as a cause of action and not as a defence. Therefore, the *Rossouw* case can be argued to first confirm that estoppel in its current application is not a cause of action subsequent to *Oriental Products*, meaning it remains available only as a defence. This obviously has implications for how a purchaser that can satisfy the requirements of estoppel will be able to assert her ownership right since she will not be able to for instance approach the court for a decaratory order, if we accept that a successful estoppel *defence* may result in the acquisition of ownership. Moreover, this raises questions about the appropriateness of allowing estoppel in its defence form to result in ownership acquisition. This question will be assessed in the remainder of the dissertation. Secondly, the *Rossouw* case purportedly does not take away from the impression created in *Oriental Products* that where estoppel is successfully raised as a *defence* (not a cause of action) it arguably results in ownership acquisition in favour of the purchaser.

The discussion of the cases showed that the precise consequences of a successful estoppel defence at common law (meaning the traditional consequences) constitutes an uncertain topic, contrary to the seemingly clear account provided by some traditional textbooks on the topic.[271] Although, it could be said with relative certainty that estoppel merely suspended the *rei vindicatio* before, the same cannot be

[270] See section 2 4 above.

[271] See section 2 3 2 above.

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said after the remarks made by the Supreme Court of Appeal in the *Oriental Products* case.

The result is that a proper and clear interpretation of the common law principles regarding the consequences of estoppel is lacking. The issues regarding estoppel's consequences cannot be resolved by interpretation, since the interpretation is the problem. It would seem that development of the consequences of estoppel is arguably required to eliminate the uncertainties that exist in this regard, since historical analysis and interpretation in case law is not particularly helpful regarding the consequences of estoppel.[272] In addition, the express move away from the English rules and principles governing estoppel, towards the uniquely South African estoppel by representation, seems to favour development for purposes of certainty and coherence. However, further justification for the development of the consequences of estoppel, in light of the uncertainty that exists in this regard, will be explored in more detail in the chapters to follow from a comparative (chapter 4), policy (chapter 5), and constitutional (chapter 6) perspective. The question will be whether there are justifiable comparative, policy and/or constitutional reasons for the development of the law to allow for acquisition of ownership in favour of the successful estoppel raiser.

Although the Constitution must now guide any development of the law, it is still imperative that the development remains coherent with the current structure of the common law.[273] In this regard, the chapter that follows will first aim to determine whether the development of the consequences of estoppel to the effect that the successful estoppel raiser acquires ownership would fit into the existing modes of acquisition in terms of the common law. The remarks made in *Pollak* and *Oriental Products* with regard to acquisition of ownership, if valid, raises the question whether

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[272] This rationale for the development of the common law is based purely on the pre-constitutional approach to the development of the common law that primarily focussed on doctrinal reason for development. This is however, not the extent of the justification for development of the common law that is considered in this dissertation. In this dissertation, development of the common law is considered not only in light of doctrinal considerations but also with comparative, policy and most importantly constitutional considerations.

[273] See chapter 6 below in which the constitutional validity of the uncertainty of the common law position is considered. The Constitutional Court in *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para 55 has indicated that common law development must also be "appropriate for the common law within its own paradigm". See also Michelman FI "Expropriation, eviction and the gravity of the common law" 24 *Stellenbosch Law Review* (2013) 245 248.

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estoppel results in acquisition of ownership by way of the original or derivative category of acquisition. This is a necessary consideration, given the contradictory acquisition terminology used in both these cases concerning the most appropriate mode of acquisition of ownership for acquisition by way of estoppel. As a result, the next chapter aims to determine, if the post-*Oriental Products* consequences of estoppel indeed involves acquisition of ownership, whether such acquisition should constitute an original or derivative mode of acquisition of ownership.

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Chapter 3: Modes of acquisition

3 1 Introduction

The question that will be investigated in this chapter stems directly from the uncertainty surrounding the consequences of a successful estoppel defence, which crystallised in the previous chapter. In particular, the question considered here is, in the event that estoppel is developed to have ownership acquisition as its consequence, under which recognised mode of acquisition of ownership should such acquisition fall? Accordingly, this chapter will describe and critically analyse the various modes of acquisition of ownership in South African law, for purposes of determining whether estoppel will fit best as a mode of original or derivative acquisition. In addition, the chapter will also consider some practical questions that may emerge when envisaging estoppel as a mode of acquisition of ownership.

A cursory historical overview of the modes of acquisition of ownership shows that the various modes that exists in South African law comprises of the modes that essentially existed in Roman law and which were further developed in Roman-Dutch law.[1] They are *occupatio* (appropriation), *accessio* (attachment), *specificatio* (manufacture), *commixio et confusio* (mixing of articles and mingling of liquids), acquisition of fruits, *thesauri inventio* (treasure trove), prescription and *traditio* (transfer). Although South African law received the modes as developed in Roman-Dutch law, the classification and categorisation of the modes underwent extensive adjustments in South African law.[2]

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[1] The Roman-Dutch law modes of acquisition of ownership were received into the South African legal system during the mid-seventeenth century. See Carey Miller DL "Transfer of ownership" in Zimmermann R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 727-758 727.

[2] Van der Merwe CG *Sakereg* 2 ed (1989) 216. Van der Merwe indicates that even in Dutch law the outdatedness of the Roman-Dutch categorisation of the modes of acquisition of ownership was commented on by the Roman Dutch Scholar Ven der Keesel. See for example Van der Keessel 2.3.10: Full citation Van der Keesel DG *Praelectiones Iuris Hodierni ad Hugonis Grotii Introductionem ad Iurisprudenctiam Hollandicam* (translated by Van Wamelo P, Coertze LI, Gonin HL & Pont D Voorlesinge for die hedendaagse reg na aanleiding van De Groot se "Inleidinge tot De Hollandse Rechtsgeleerdheyd") 1961-1967. This could potentially be the reason why the South African

As a rule, a *numerus clausus* of categories of acquisition of ownership exist in the South African common law.[3] This entails that a new method of acquisition can be recognised by the courts provided that it fits into the mould of an established category.[4] In other words, it is generally accepted that for a new mode of acquisition of ownership to be recognised at common law, it must have all the characteristics of an existing category.[5]

In South African law, the recognised modes of ownership acquisition are divided into two distinct categories, namely original and derivative acquisition.[6] This categorisation is often said to be based on whether cooperation of a predecessor in title is required for ownership to vest in a new owner, and whether the acquirer receives unburdened or burdened title.[7] The modes that are categorised as original, under the common law, are appropriation, manufacture, attachment, mingling and mixing and the acquisition of fruits.[8] In addition, statutory original modes are expropriation, forfeiture and confiscation, statutory passing of ownership and prescription.[9] The primary mode of derivative acquisition dealt with under the law of property is transfer. This can occur

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categorisation underwent extensive adjustment. See Carey Miller DL *The acquisition and protection of ownership* (1986) 117-118.

[3] This means that a closed list of categories of acquisition of ownership exists. See Van der Merwe CG *Sakereg* 2 ed (1989) 215.

[4] Van der Merwe CG *Sakereg* 2 ed (1989) 215.

[5] Van der Merwe CG *Sakereg* 2 ed (1989) 215.

[6] Van der Merwe CG *Sakereg* 2 ed (1989) 216; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 287; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 488; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 83. See also *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1000.

[7] Van der Merwe CG *Sakereg* 2 ed (1989) 216; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 488; *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1000.

[8] Treasure trove is another mode of original acquisition of ownership that exists in South African law. It will, however, not be included in the discussion of the original modes of acquisition in this chapter since it seems to have fallen into disuse in South African law and would arguably not add anything new to the discussion of the acquisition principles. For a discussion of the principles of treasure trove see Voet 41.1.11; Van der Merwe CG *Sakereg* 2 ed (1989) 228-229; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 298-299; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 174.

[9] See section 3 2 3 below where the various modes of acquisition of ownership are elaborated on.

by way of delivery or registration, although various other modes of transfer existed previously.[10]

When considering the defence of estoppel as a potential mode of original or derivative ownership acquisition, it is necessary to first establish whether this possibility has been considered in case law. Such consideration would provide a clear indication of which mode the courts would most probably opt for if estoppel was to be clearly developed to constitute a self-standing mode of acquisition. As shown in the preceding chapter, the court in the early case of *West v Pollak & Freemantle*[11] used derivative terminology when it described how the defendant acquired ownership over the shares. Importantly, however, the derivative terminology described how ownership is acquired in terms of an independent cause of action (ostensible authority of an agent) working together with estoppel as a defence and not only because of the operation of estoppel.[12] This means that the court's *ratio* in the *Pollak* case is arguably not the most appropriate authority to follow when considering estoppel as an independent mode of acquisition of ownership through derivative means.

Interestingly, the court in the relatively recent *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others*[13] case used both derivative and original terminology when it referred to the consequences of a successful estoppel defence. For instance, Harms DP seems to have suggested that, at least theoretically, it should be possible to recognise that ownership *passed* from the original owner to the purchaser who was successful with its plea of estoppel, meaning that ownership was transferred by way of the derivative mode of acquisition.[14] However, Shongwe JA's statement in the same judgment alludes to the fact that the *applicant loses its ownership of the property* when the defendant is successful with a defence based on estoppel.[15] This creates the impression, contrary to Harms DP's statement, that

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[10] See section 3 3 below for a discussion of transfer as mode of derivative acquisition of ownerhsip.

[11] 1937 TPD 64.

[12] *West v Pollak & Freemantle* 1937 TPD 64 68.

[13] 2011 (2) SA 508 (SCA).

[14] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 31.

[15] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 23.

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estoppel may result in a new form of the original acquisition of ownership, rather than derivative acquisition.[16] As a result, the courts' dicta in these two cases illuminate that our courts have not refined and carefully thought through the precise method of acquisition and, as a result, uncertainty remains.

Considering the above, the chapter will explore the extent to which the circumstances that give rise to a successful estoppel defence could be described as occasioning original acquisition of ownership rather than derivative, or *vice versa*. The first part of the chapter will focus on determining whether estoppel would be better suited to being categorised as an original mode of ownership acquisition. Under this part, the concerns raised by scholars regarding categorising estoppel as an original mode will be considered. On a cursory analysis of scholars' main concerns, it appears that these concerns pertain to the characteristics of the original category. Therefore, these characteristics will be described and critically analysed in the second section of part one.

The third section of part one will then proceed to test whether these characteristics seemingly ascribed to the original category of acquisition are to some extent flexible or whether they must be adhered to strictly when the potential recognition of a new mode of acquisition such as acquisition by way of estoppel is considered. This will be done by setting out the recognised modes of original acquisition and determining the extent to which each mode strictly adheres to the outlined characteristics and consequences of the original category of acquisition. These findings will then be utilised to engage critically with the reason(s) raised by scholars as to why it might not be appropriate to categorise estoppel as an original mode.

The second main part of the chapter will consider whether estoppel can appropriately be recognised as a derivative mode of acquisition. The same questions raised in the first part dealing with original acquisition of ownership will be raised and dealt with similarly in relation to derivative acquisition of ownership. This will be done to ultimately determine whether the concerns raised by scholars against recognising

[16] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 23.

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estoppel as a mode of derivative acquisition are in fact true obstacles for estoppel to constitute a mode of derivative acquisition of ownership.

The third and final part of this chapter will consider the question of how acquisition in practical terms would take place by focussing on two issues. The first one being how the defence of estoppel should be developed to operate as a mode of acquisition and the second issue concerns the question at what moment ownership over property should vest in the *bona fide* purchaser that finds herself in the situation that would meet the current requirements of estoppel.

3 2 Estoppel as a mode of original acquisition of ownership

3 2 1 Introduction

Shongwe JA in *Oriental Products,* held that:

> "In the context of this case, the appellant [as owner] is entitled to retransfer of the property but for the fact that it cannot assert its right of ownership because of estoppel. Hence, the applicant *loses its ownership* of the property."[17] (Own emphasis added)

The statement made by Shongwe JA, which mentions that the "applicant loses its ownership of the property" when the defendant is successful with a plea based on estoppel, creates the impression that, at least theoretically, estoppel may result in a new form of original acquisition of ownership.[18] However, some scholars have indicated that categorising estoppel as an original mode may not be wise. Van der Merwe and Pelser indicate that one of the characterisitics of original acquisition of ownership is that upon acquisition of ownership the property that is acquired is unburdened, meaning acquired without any rights that limit the ownership.[19]

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[17] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 23.

[18] Boggenpoel ZT *Property remedies* (2017) 81-85; Boggenpoel ZT & Cloete C "The proprietary consequences of estoppel in light of section 25(1): Testing Van der Walt's hypotheses" in Muller G, Brits R, Slade B & Van Wyk J (eds) *Transformative property law: Festschrift in honour of AJ van der Walt* (2018) 147-172 166-171.

[19] Van der Merwe CG *Sakereg* 2 ed (1989) 373; Sonnekus JC "Eienaars en ander reghebbendes mag ervaar dat swye nie altyd goud werd is nie" 2013 *Tydskrif vir die Suid Afrikaanse Reg* 326 337; Pelser FB "Aspekte van eiendomsverkryging deur estoppel" (2005) 38 *De Jure* 153 159.

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Considering this characteristic, their concern regarding recognising estoppel as an original mode is that limited real rights over movable or immovable property that would be acquired by way of estoppel will automatically be extinguished when a successful estoppel raiser acquires ownership over the burdened property. Due to the belief that original modes of ownership acquisition cannot allow the acquisition of ownership over the property with existing burdens, these scholars submit that the only viable method for acquisition of ownership by way of estoppel is the derivative mode.[20] Taking this concern further, Sonnekus raises another related issue that may arise due to the termination of burdens on the property at original acquisition of ownership over such property in the context of estoppel. Sonnekus points out that original acquisition in the context of estoppel may prove problematic since it may lead to the violation of limited real right holders' constitutional property rights as enshrined in section 25(1) of the Constitution of the Republic of South Africa, 1996 (the Constitution).[21] This is presumably because all rights that existed over the property prior to the original acquisition, will terminate. Due to the potential violation of section 25 that may result from recognising estoppel as mode of original acquisition, Sonnekus suggests that caution must be exercised when trying to rethink the consequences of a successful estoppel defence.

Given that the concerns of the scholars pertain to a characteristic that is ascribed to the original mode of acquisition, the section below will describe and critically analyse the characteristics and consequences usually attributed to the original category of ownership acquisition. These are that all original modes of acquisition of ownership take place by operation of law (*ipso iure*)[22] and that the consequence of original acquisition, unlike derivative acquisition, is that all existing burdens and benefits over

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[20] Van der Merwe CG *Sakereg* 2 ed (1989) 373; Pelser FB "Aspekte van eiendomsverkryging deur estoppel" (2005) 38 *De Jure* 153 159.

[21] Sonnekus JC "Eienaars en ander reghebbendes mag ervaar dat swye nie altyd goud werd is nie" 2013 *Tydskrif vir die Suid Afrikaanse Reg* 326 339. See also Boggenpoel ZT *Property remedies* (2017) 81-85. The constitutionality of acquisition of ownership by way of the original mode of acquisition in favour of the successful estoppel raiser will be considered extensively in chapter 5 of the dissertation. For a cursory analysis of whether estoppel as a mode of original acquisition would potentially result in violation of section 25(1), see Boggenpoel ZT *Property remedies* (2017) 81-85; Boggenpoel ZT & Cloete C "The proprietary consequences of estoppel in light of section 25(1): Testing Van der Walt's hypotheses" in Muller G, Brits R, Slade B & Van Wyk J (eds) *Transformative property law: Festschrift in honour of AJ van der Walt* (2018) 147-172 166-171.

[22] See section 3 2 2 1 above.

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the property are extinguished when property is acquired through original means.[23] In addition, the recognised modes of original acquisition of ownership will be described and it will be tested whether the identified characteristics are strict requirements or whether they in fact are flexible in the context of several existing original modes. If this is the case, it may be possible to deviate from these characteristics under newly recognised modes of original acquisition.

3 2 2 The characteristics of the original category

3 2 2 1 By operation of law

As a rule, original acquisition of ownership ensues by operation of law.[24] This means objective law creates ownership in favour of the acquirer.[25] In other words, ownership is not transferred from one person to another, but rather created by law, hence the name "original". This does not mean that original acquisition will only ensue where there is no predecessor in title.[26] Rather, the emphasis falls on the fact that the cooperation of the predecessor is not required for ownership acquisition. In other words, whether the previous owner intended or wanted ownership to be acquired is irrelevant to the determination of whether ownership was acquired by original means since it is the compliance with objective legal requirements that results in ownership

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[23] See section 3 2 2 2 above.

[24] Van der Merwe CG *Sakereg* 2 ed (1989) 216; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 287; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 488; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 161; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 84.

[25] Van der Merwe CG *Sakereg* 2 ed (1989) 217; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 287; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 488-519; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 161; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 84.

[26] Examples of the original modes of acquisition where property was not previously owned are appropriation (*occupatio*) of an ownerless thing (*res nullius*) or of a thing that was abandoned (*res derelicta*). Things that were previously owned by another can be acquired by way of original means through attachment, manufacture, prescription, expropriation, forfeiture and confiscation and statutory passing of ownership. In all of the mentioned examples, the consent of the owner is not required for ownership to vest in the newly created owner.

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being acquired unilaterally by the acquirer.[27] When considering the content of the requirements of estoppel, it is evident that whether the requirements of estoppel are complied with are objectively determined and does not require cooperation (in the form of intention or consent) on the part of the owner. For instance, the requirements of representation, negligence, reasonable reliance and prejudice are determined by using the objective reasonable person test, and in the case of determining the prejudice requirement, the circumstances of the case are instructive.[28] These requirements are satisfied irrespective of whether the owner intended to create a negligent representation to the detriment of the purchaser. Furthermore, the owner's intention is most certainly not considered when determining whether the purchaser was reasonable in her reliance on the representation.[29] Consequently, the protection afforded to the successful estoppel raiser is compelled by the existence of a specific combination of objective circumstances that warrants the protection of the purchaser above the protection of the owner. Such protection does not result from the owner's will. Instead, such protection is in direct conflict with what the owner wanted or intended since the owner seeks to rely on her ownership to recover the property from the purchaser with the *rei vindicatio* when estoppel is raised.[30] In view of this, it seems that estoppel is a protection mechanism that is by nature objective. Consequently, in the event that it is developed to constitute a self-standing mode of acquisition, this characteristic of the requirements of estoppel indicates that it will most probably fit quite easily into the mould of the category of original acquisition.

In addition, it is often said that the exercise of *corpus* and *animus domini* by the acquirer is an indication of the unilateral act that is needed for ownership to be acquired by operation of law.[31] Therefore, the existence of these two elements can be described as characteristics of the original category of acquisition. The element of *corpus* refers

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[27] Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 287; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 161.

[28] See chapter 2, section 2 3 2 above for an overview of the requirements of estoppel by representation.

[29] See chapter 2, section 2 3 2 above where the blameworthiness element of estoppel is discussed.

[30] See chapter 2, section 2 3 2 above.

[31] Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 161.

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to the physical control over the property that must be sufficient and effective.[32] The element of *animus*, in turn, refers to the intention with which the property is held. The *animus* required here is the *animus domini*, which means that the acquirer must hold the property as if she is the owner of the property or with the deliberate intention to be the owner and not merely with the *animus ex re commodum acquirendi* (intention to derive a benefit from the property).[33]

When estoppel is assessed to determine if these above-mentioned elements are encapsulated in the requirements of the defence, it becomes even more evident that the circumstances of estoppel have characteristics that strongly resemble original acquisition of ownership. This is because the estoppel raiser must prove to the court that she reasonably relied on the representation to her detriment, meaning that she truly was under the impression that she was purchasing the concerned property and became the owner of the property at payment and delivery/registration.[34] This requirement as a point of departure entails *bona fides* on the part of the estoppel raiser and therefore indicates that the estoppel raiser, at the time of the purchase, believed that she was becoming the owner of the property when she took possession thereof. This shows that she took possession intending to become owner and that when she took possession, she exercised effective control over the property. Accordingly, both the required intention of *animus domini* and the element of *corpus*, which are both elements that are generally present in the various original modes of acquisition, are also present when estoppel is successfully pleaded against the *rei vindicatio*.

Considering the above, it would seem appropriate to conclude that estoppel would fit well into the original category of acquisition. Estoppel not only has the characteristic of being determined objectively, which relates to the *ex lege* attribute of the original category of acquisition, it also includes elements of *animus domini* and *corpus* on the part of the successful estoppel raiser. However, since the concern with

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[32] Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 161.

[33] Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 161. For a detailed analysis of the nature and function of this requirement in the context of *occupatio*, see Van Oosten H *Die omskrywing en funksies van die fisiese beheerelement in die sakereg* (unpublished LLD dissertation University of South Africa 1995) 260. Also for an overview of the diverging implications of holding property with *animus domini* versus *animus ex re commodum acquirendi* see chapter 5, section 5 2 2 2 below.

[34] See chapter 2, section 2 3 2 above.

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categorising estoppel as an original mode, pertains to the idea that the ownership acquired by way of original acquisition is clean, meaning without burdens, and the implications of this for the property clause in the Constitution, this characteristic will be described and considered in the part below.

3 2 2 2 Termination of burdens and benefits

3 2 2 2 1 Termination of limited real rights over movable property

If the acquirer complies with the requirements of the different modes of original acquisition, ownership is created in favour of the acquirer. The previously held real right of ownership is extinguished when the new real right of ownership vests in favour of the acquirer. In this regard, it is often suggested that it is not only ownership as a real right that terminates at this point, but that all "benefits and burdens" that previously existed over the property are also extinguished.[35] Pienaar and Sonnekus respectively indicate that the terminology used, namely "benefits and burdens" arguably include limited real rights registered over the property, although the traditional property law textbooks do not expressly identify limited real rights as the so-called "burdens and benefits".[36]

As mentioned, it is often said that original acquisition of ownership extinguishes any pre-existing limited real rights over the property, hence the concerns raised by scholars for recognising estoppel as an original mode of acquisition. These concerns specifically relate to the fact that termination of real rights in the context of estoppel may violate section 25(1) of the Constitution. Interestingly, Pienaar shows that the termination of real rights in the context of original acquisition is arguably correct in so far as it refers to limited real rights over *movable property*.[37] While focussing on

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[35] Van der Merwe CG *Sakereg* 2 ed (1989) 216; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 488; *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1000.

[36] See Sonnekus JC "*Sub hasta*-veilings en die onderskeid tussen oorspronklike en afgeleide wyses van regsverkryging" 2008 *Tydskrif vir die Suid Afrikaanse Reg* 696 697; Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1480 where these scholars deal with limited real rights as burdens or infirmities in this context.

[37] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1480.

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movable property, Pienaar explains what the reason for the termination of limited real rights over movable property acquired by original means is:

> "The main reason for this [termination of limited real rights over movable property] is that it is normally required that limited real rights in respect of movables are exercised by means of physical control of the property, which control cannot be exercised by the holder of a limited real right in circumstances where the property is in the physical control of the acquirer (*mobilia non habent sequelam*)."[38]

In other words, limited real rights that existed over movable property are said to be extinguished when the property is acquired in an original manner.[39] For a limited real right to be exercised over movable property, the holder of such a right is required to exercise physical control (*corpus*) over the movable property. However, for ownership (ownership being a real right) to be acquired originally, it is usually also required that the acquirer exercises physical control (*corpus*) over the movable property. The impossibility of the simultaneous exercise of physical control over the movable property seems to be expressed in the maxim *mobilia non habent sequelam* (you cannot follow movable property into the hands of its possessor).[40] This means that the continued existence of limited real rights over movable property depends on whether the holder of the right continues exercising physical control over the movable property. It is when the holder of the limited real right gives up the physical control over the movable thing and as a result loses her limited real right, that it becomes possible for another party to acquire the movable property by way of original acquisition. Since *corpus* is required for the continued existence of limited real rights over movables, it is arguably incorrect to hold that the limited real right is extinguished *due to* original acquisition. Limited real rights are rather terminated due to the holder of the limited real right losing *corpus* of

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[38] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1480. The *mobilia non habent sequelam* maxim means that an owner cannot follow movable property into the hands of its possessor. See chapter 2, section 2 2 1 2 above where a brief historical overview of this maxim is provided.

[39] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1480.

[40] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1480. For a discussion on the *mobilia* adagium, see Van Rensburg JF *Opvolging van roerende goed in die derde hand* (unpublished LLD dissertation Stellenbosch University 1930) 15; Milton JRL "Ownership" in Zimmermann R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 687, 729.

the movable property and thereby allowing another to exercise *corpus* over the movable property with the intention of acquiring ownership over the property.

Therefore, from a logical and practical point of view, acquisition of ownership over movable property by original means can generally not ensue if a limited real right exists over the movables. As explained above, it is impossible for both the limited real right holder and the acquirer to exercise physical control over the movable property simultaneously.[41] Accordingly, it seems as though the consequence attached to the original modes of acquisition, namely, that "all benefits and burdens terminate" at original acquisition, of specifically movables, does not refer to a consequence attached to the original mode of acquisition itself but rather to the factual impossibility of the simultaneous exercise of physical control over movable property.

Also, even where the holder of a limited real right over a movable thing changes the *animus* with which she holds the *corpus* over the property from the intention to derive a benefit from the property (*animus ex re commodum acquirendi*) to one of *animus domini* (ownership intent) to acquire ownership over the movable thing by way of an original mode, her limited real right will not terminate because of a characteristic of the category of original acquisition of ownership. Rather, the limited real right will be extinguished due to the rule that you cannot have a limited real right over your own property.[42] This submission, namely that it is not the category of ownership acquisition that causes the right to terminate is supported by what happens in the same situation, but for the acquisition taking place in terms of the derivative mode of acquisition, namely transfer. In this context, the limited real right would also terminate due to the rule that you cannot have a limited real right over your own property when the limited

[41] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1480. However, special notarial bonds qualify as an exception to this statement, because special notarial bonds allow the holder of the special notarial bond to acquire a valid limited real right over movable property without the holder of the limited real right being put in control of the movable property. See the Security by Means of Movable Property Act. See also *Bokomo v Standard Bank van SA Bpk* 1996 (4) SA 450 (C) 457; *Ikea Trading and Design AG v BOE Bank Ltd* 2005 (2) SA 7 (SCA) para 22. See further Brits R "Two decades of special notarial bonds in terms of the Security by Means of Movable Property Act" (2015) 27 *South African Mercantile Law Journal* 246-274 253-261; Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1480; Brits R *Real security law* (2016) 250-254.

[42] Van der Merwe CG *Sakereg* 2 ed (1989) 536; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 9.

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real right holder acquires the property. The category of acquisition does not affect the termination of the limited real right.

The idea that limited real rights over movable property do not automatically terminate at original acquisition of ownership due to the acquisition itself but rather due to other legal principles, is significant when thinking about the argument made against recognising estoppel as an original mode of acquisition. It shifts the reason for why limited real rights terminate from the specific catergory of acquisition to the loss of physical control over the movable property by the limited real right holder. This means that the concern as to the violation of section 25 of the Constitution pertaining to limited real rights may not be a valid concern.

However, the only situation in which it would be possible for the limited real right to continue to exist while the holder thereof does not have *corpus* over the movable property that is burdened by the right, is where such right is a special notarial bond. A special notarial bond allows the holder of the bond to acquire a valid limited real right over movable property without the holder of the right exercising physical control over the movable property. In this sense, a special notarial bond constitutes a "possessionless pledge".[43] However, although a special notarial bond does not require *corpus* on the part of the holder of the special notarial bond, it does require that the special notarial bond must be registered in a registry in the Deeds Office.[44] Interestingly, due to it being difficult to determine before registration whether the movable property's description complies with the definition of a special notarial bond in section 1(1) of the Security by Means of Movable Property Act 57 of 1993, special notarial bonds are rarely used as real security.[45] It, therefore, seems unlikely that a

[43] See Security by Means of Movable Property Act 57 of 1993. See also *Bokomo v Standard Bank van SA Bpk* 1996 (4) SA 450 (C) 457; *Ikea Trading and Design AG v BOE Bank Ltd* 2005 (2) SA 7 (SCA) para 22. See further Brits R "Two decades of special notarial bonds in terms of the Security by Means of Movable Property Act" (2015) 27 *South African Mercantile Law Journal* 246-274 253-261; Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1480; Brits R *Real security law* (2016) 250-254.

[44] Section 1(1) of the Security by Means of Movable Property Act. Also, see Brits R *Real security law* (2016) 244-245.

[45] In particular, determining whether the property has been specified properly to comply with the definition of a special notarial bond as stipulated in section 1(1) of the Security by Means of Movable Property Act is not clear. See *Ikea Trading and Design AG v BOE Bank Ltd* 2005 (2) SA 7 (SCA) para 24. See further Brits R *Real security law* (2016) 244-250.

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situation would arise where someone has a special notarial bond registered over movable property and ownership over such movable property is subsequently acquired by way of an original mode of acquisition. However, considering that the reason for the termination of limited real rights over movable property is not original acquisition itself, it cannot be assumed that the limited real right holder would in the case of notarial bonds lose her limited real right over the property. It would seem that no general rule to this effect exists.

Considering the above, it seems that if estoppel were to constitute a recognised original mode with which movable property can be acquired, existing limited real rights over the movable property would have been extinguished the moment that the holder of the limited real right gave up *corpus* over the movable. Such action then allows the estoppel raiser to start exercising *corpus* over the property that is already free from any limited real right. This means that it is not the original acquisition of ownership over the movable thing that would be the reason why the limited real right is extinguished. Rather the limited real right holder would decide to give up physical control of the movable property and to thereby terminate her limited real right that would be the reason why the estoppel raiser would acquire unburdend property. Also, in the very unlikely event that a notarial bond burdened the movable property and the property is subsequently acquired by way of an original mode of acquisition, such a bond would arguably continue to exist and not terminate where the movable property is acquired by the estoppel raiser. This would be the situation since the impossibility of simultaneous exercise of *corpus* would not arise here, because there is no reason why the limited real right should terminate. As a result of all the above, it would seem that no section 25(1) concerns could be raised against the acquisition of ownership of movable property by an original mode and therefore also not against estoppel as a potential mode of original acquisition. The question that however remains is whether the same can be said of original acquisition of ownership of *immovable property*? Therefore, the part below explores the issue of the termination of limited real rights at original acquisition of ownership, in the context of immovable property.

3 2 2 2 2 Termination of limited real rights over immovable property

The question of whether limited real rights over immovable property is extinguished as a result of the ownership over the property being acquired originally seems to be

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unresolved in South African law. Since the same argument about impossibility of simultaneous control cannot be made in the context of immovable property, due to the focus on registration rather than delivery for publicity and validity purposes, justification for limited real rights falling away when dealing with immovable property has to be found elsewhere.[46] Beyond the general statement that differentiates between derivative acquisition and original acquisition of ownership based on the termination of burdens and benefits that existed over the property,[47] there seems to be no rule or principle currently found in the common law that expressly supports this proposition in the context of immovable property.

Sonnekus and Pienaar have diverging opinions regarding whether limited real rights are extinguished when original acquisition of ownership takes place in the context of immovable property. Sonnekus submits that limited real rights over immovable property that are in existence before original acquisition of ownership takes place, terminates when ownership is acquired He submits that the nature of original acquisition and the relationship between ownership and limited real rights do not allow for the continued existence of limited real rights that previously burdened ownership of the predecessor in title.[48] Sonnekus explains that:

> "Die nuwe reg wat gevestig word by oorspronklike wyses van regsverkryging is 'n spreekwoordelike onbesproke blad en nie onderworpe aan byvoorbeeld enige reeds bestaande beperkte saaklike regte nie, want 'n beperkte saaklike reg (*ius in re aliena*) kan slegs bestaan mits dit per definisie 'n ander reghebbende se eiendomsreg beperk."[49]

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[46] The element of physical control for purposes of the publicity principle is not met with delivery in the context of immovable property. Instead it is satisfied when the immovable property is registered in the name of the acquirer. As a result, the same issues regaring simultaneous control over the property for the continued existence of the real rights on the one hand and the acquisition of ownership on the other hand does not arise. See section 3 3 3 below for a discussion of the publicity principle.

[47] See section 3 1 above.

[48] Sonnekus JC "*Sub hasta*-veilings en die onderskeid tussen oorspronklike en afgeleide wyses van regsverkryging" 2008 *Tydskrif vir die Suid Afrikaanse Reg* 696 699.

[49] Sonnekus JC "*Sub hasta*-veilings en die onderskeid tussen oorspronklike en afgeleide wyses van regsverkryging" 2008 *Tydskrif vir die Suid Afrikaanse Reg* 696 697. Here is a translation of the quoted text: *The new right, which is established through original modes of acquisition, is a proverbial flawless page and not subject to, for example, any already existing limited real rights, because a limited real right (ius in re aliena) can only exist provided it, by definition, restricts another right holder's property rights*.

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In this quote, Sonnekus, in essence, states that the new right that is created by original acquisition can be described as a figurative empty page and that it is not subject to any limited real rights that may have existed over the property before the new ownership was created. He reasons that this is the case since a limited real right can only exist as long as it limits the right of ownership over the property.

In this sense, Sonnekus opines that limited real rights depend on the existence of a particular individual's ownership. Ownership is the mother right and all limited real rights registered over the property is temporary and dependent upon the existence of the mother right of a particular individual. Moreover, limited real rights also referred to as daughter rights stem from the mother right of ownership.[50] Once the mother right is extinguished, all limited real rights that limited the predecessor in title's ownership are also extinguished.[51] This is because limited real rights can only exist if the mother right exists.[52] Accordingly, when ownership is acquired by way of original acquisition, the predecessor's ownership terminates and as a logical consequence of the termination of ownership, all limited real rights also terminate. This justification for the termination of limited real rights upon the original acquisition of ownership is known as the mother right argument. The mother right argument essentially rests on the premise that limited real rights burden the real right (ownership) itself. In this regard, the mother right argument does not account for the relationship between limited real rights and the property it burdens; it only focusses on the relationship between ownership and limited real rights.[53]

Sonnekus also explains that simply because the limited real rights of the predecessor in title is still reflected on the title deed of the immovable property after

[50] Van der Merwe CG *Sakereg* 2 ed (1989) 175. See also Sonnekus JC "*Sub hasta*-veilings en die onderskeid tussen oorspronklike en afgeleide wyses van regsverkryging" 2008 *Tydskrif vir die Suid Afrikaanse Reg* 696 697; Boggenpoel ZT & Pienaar JM "Mother rights and daughter rights: The relationship between ownership and *habitatio* in the eviction context" in Schlemmer EC (ed) *Liber amicorum: Essays in honour of JC Sonnekus* (2017) 321-332 321.

[51] Sonnekus JC "*Sub hasta*-veilings en die onderskeid tussen oorspronklike en afgeleide wyses van regsverkryging" 2008 *Tydskrif vir die Suid Afrikaanse Reg* 696 697.

[52] Sonnekus JC "*Sub hasta*-veilings en die onderskeid tussen oorspronklike en afgeleide wyses van regsverkryging" 2008 *Tydskrif vir die Suid Afrikaanse Reg* 696 698.

[53] For a contrasting argument that takes into account the relationship between limited real rights and the burdened property see Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480-1505.

the acquisition of ownership does not mean these rights are not terminated at the moment of original acquisition of the ownership over the immovable property.[54] He argues that the termination of the rights is instead unaffected by its continued registration on the deed by showing what happens in a similar situation in the context of a *ususfructus*. He explains that the personal servitude of *ususfructus* terminates at the death of the holder of the right, irrespective of the fact that the *ususfructus* is still registered as a limited real right over the property years after the death of its holder. In this example, the information in the deeds registry has no substantive consequences. In the same way, limited real rights of the predecessor in title, which are reflected in the deed of the immovable property by original acquisition also have no substantive effect.[55] This argument is in line with the negative system of registration that finds application in South African law, although Sonnekus does not expressly recognise this fact.[56] The negative system of registration does not guarantee rights registered against the title deed of property. Instead, the deeds registry system is subject to the factual reality and will be rectified on application if necessary.[57]

To my mind, the reason advanced by Sonnekus is not convincing as to why clean ownership (meaning ownership that is free from any limited real rights) will always be the result of original acquisition from a doctrinal perspective. His reason refers to the idea that a limited real right will only continue to exist if it limits a right of ownership (the mother right). This idea seems to ignore the nature of and relationship between limited real rights *vis-à-vis* the property it burdens. Pienaar has exhibited how the relationship between limited real rights and the property it burdens is important when considering whether limited real rights can survive the acquisition of ownership by way of original means over the property it burdens.[58] This will be discussed below.

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[54] Sonnekus JC "*Sub hasta*-veilings en die onderskeid tussen oorspronklike en afgeleide wyses van regsverkryging" 2008 *Tydskrif vir die Suid Afrikaanse Reg* 696 700.

[55] Sonnekus JC "*Sub hasta*-veilings en die onderskeid tussen oorspronklike en afgeleide wyses van regsverkryging" 2008 *Tydskrif vir die Suid Afrikaanse Reg* 696 700-701.

[56] Carey Miller DL *The acquisition and protection of ownership* (1986) 170-171; Van der Merwe CG *Sakereg* 2 ed (1989) 342; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 213.

[57] See section 3 3 3 below.

[58] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1484.

Pienaar argues that limited real rights that burdened immovable property prior to the property being acquired originally do not terminate upon the acquisition of ownership. He rejects the mother right argument put forth by Sonnekus and proposes that limited real rights continue to exist after acquisition by original means.[59] In the first place, Pienaar points out that no authority exists in direct support of the proposition that existing limited real rights are extinguished in these circumstances. He points out that scholars may have accepted this proposition based on old authorities indicating that in the case of movable property, limited real rights are not acquired when ownership is acquired by an original mode.[60] Another reason for this assumption is found in the terminology often used to describe the nature of the right acquired by original means, namely "new" and "clean" as opposed to the nature of the right acquired by way of derivative acquisition that is described as "burdened".[61] However, Pienaar argues that this stems from an oversimplification of the general principles of acquisition of ownership and an overstatement of the notion that ownership is acquired free from any burdens or benefits when it is acquired through an original mode. In this regard, he asserts that the only fundamental difference between derivative and original acquisition is that with derivative acquisition the predecessor's cooperation is required for valid acquisition, and with original acquisition, the predecessor's cooperation is not required. In the latter case, ownership is acquired by operation of law.[62] The reference to new ownership in the context of original acquisition of ownership merely refers to the new subject-object relationship being created by operation of law (*ex lege*).[63]

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[59] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480-1505.

[60] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1482.

[61] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1482. See Van der Merwe CG *Sakereg* 2 ed (1989) 216; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 155.

[62] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1482-1483.

[63] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1493.

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Regarding the mother right argument, Pienaar refutes the theory underlying the notion that ownership is the mother right.[64] This is called the hierarchy of property rights theory in terms of which ownership is the most powerful property right. It is seen to be the pinnacle of the property rights within a hierarchy where limited real rights and other rights and interests are regarded as inferior and temporary in nature.[65] Pienaar points out that whether the hierarchy of rights theory still finds application in South African law is questionable.[66] First, Pienaar emphasises that the notion of absoluteness of ownership that underpins the mother right argument was unknown in Roman and Roman-Dutch law. It is trite that the Roman-Dutch law scholar, Grotius, developed the distinction between ownership and limited real rights, however, this distinction did not give ownership an absolute character. Rather, it was the Pandectist's interpretation of the Grotius distinction between ownership and limited real rights that resulted in the overstatement that ownership is absolute.[67] Moreover, Boggenpoel and Pienaar also dispute the validity of the hierarchy of rights theory in South African law

[64] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1493-1487.

[65] Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 75. See also Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1484. Boggenpoel ZT & Pienaar JM "Mother rights and daughter rights: The relationship between ownership and *habitatio* in the eviction context" in Schlemmer EC (ed) *Liber amicorum: Essays in honour of JC Sonnekus* (2017) 321-332 325.

[66] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1484-1485. See in this regard Van der Walt AJ & Dhliwayo P "The notion of absolute and exclusive ownership: A doctrinal analysis" (2017) 134 *South African Law Journal* 34-52; Boggenpoel ZT & Pienaar JM "Mother rights and daughter rights: The relationship between ownership and *habitatio* in the eviction context" in Schlemmer EC (ed) *Liber amicorum: Essays in honour of JC Sonnekus* (2017) 321-332 325.

[67] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1484-1485. See D 41.2.17: Full citation *Digesta Iustiniani* in *Corpus Iuris Civilis* eds T Mommsen & P Krüger translated by Watson A *The Digest of Justinian* Vol IV (1985); Grotius 2.22.1. See also Van der Walt AJ "Marginal notes on powerful(l) legends: Critical perspectives on property theory" (1995) 58 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 396 396-410; Van der Walt AJ & Dhliwayo P "The notion of absolute and exclusive ownership: A doctrinal analysis" (2017) 134 *South African Law Journal* 34 40-42.

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in light of recent case law.[68] In *Hendricks v Hendricks*[69] the court held that the holder of the right of *habitatio* (a personal servitude that is a limited real right) of residential property could evict the owner of the property, where the owner occupies the property without the consent of the holder of the *habitatio*.[70] Boggenpoel and Pienaar show that this finding is in direct conflict with the basic premise of the hierarchy of rights theory, which is that ownership trumps "lesser" rights, since in *Hendricks* it was the "lesser" right of *habitatio* that trumped the so-called strongest right of ownership. Similarly, in a more recent case, *Sturdy v Pirezenthal*,[71] the court based on *Hendricks* affirmed that the relationship between ownership and limited real rights (such as *ususfructus* in the case) was not one where ownership is the pinnacle of all other rights when it also held that the holder of the *ususfructus* could evict the owner.[72]

Secondly, after refuting the historical validity of the mother right argument, Pienaar shows that the constitutional concept of property does not support the notion of absoluteness of ownership. This is evident in that limited real rights qualify for constitutional protection under section 25(1) of the Constitution independent of ownership.[73] Accordingly, Pienaar submits that the mother right argument must fail on theoretical grounds because ownership is no longer viewed as absolute in South African law.

Pienaar also rejects the mother right argument for doctrinal reasons. In this regard, he rejects the premise upon which the mother right argument rests, since the premise fails to take into account the relationship between ownership and the property

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[68] Boggenpoel ZT & Pienaar JM "Mother rights and daughter rights: The relationship between ownership and *habitatio* in the eviction context" in Schlemmer EC (ed) *Liber amicorum: Essays in honour of JC Sonnekus* (2017) 321-332 325. See, for instance, *Hendricks v Hendricks* 2016 (1) SA 511 (SCA) and more recently *Sturdy v Pirezenthal* (2147/15) [2018] ZAECPEHC 13 (27 February 2018).

[69] 2016 (1) SA 511 (SCA).

[70] *Hendricks v Hendricks* 2016 (1) SA 511 (SCA) para 7. See also Boggenpoel ZT & Pienaar JM "Mother rights and daughter rights: The relationship between ownership and *habitatio* in the eviction context" in Schlemmer EC (ed) *Liber amicorum: Essays in honour of JC Sonnekus* (2017) 321-332 323.

[71] (2147/15) [2018] ZAECPEHC 13 (27 February 2018).

[72] *Sturdy v Pirezenthal* (2147/15) [2018] ZAECPEHC 13 (27 February 2018) para 11.

[73] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1485-1489. In *Ex parte Optimal Property Solutions CC* 2003 (2) SA 136 (C) paras 4-6 the Western Cape High Court held that limited real rights also constitute property for purposes of the property clause.

it burdens.[74] Pienaar examines whether this proposition is in fact true.[75] He points out that limited real rights function in terms of two separate but related relationships. The first relationship is a subject-object relationship between the holder of the limited real right and the object over which the limited real right exists. The second relationship is a subject-subject relationship that concerns the relationship between the holder of the limited real right and third parties, which includes the owner of the object. This latter relationship concerns the obligation on third parties to respect the right of the limited real right holder. Pienaar argues that these two relationships show that the owner of the object of the right does not transfer her entitlements to the right holder. Instead, the entitlements of the owner are limited in a specific way because of the existence of the right holder's limited real right over the property.[76] Therefore, the essential characteristic of a limited real right is that it exists independently from ownership. As a result, it is not dependent on the ownership of the owner.[77] Pienaar substantiates this argument that limited real rights exist separately from ownership by way of an exhibition of case law in which courts have had to interpret the relationship between ownership and limited real rights. He specifically looks at the "subtraction from the *dominium*" test that has been developed by South African courts to determine whether a right can be classified as real or personal. The first case examined in this regard is *Ex parte Geldenhuys*.[78] In *Ex parte Geldenhuys*, De Villiers JP held:

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[74] Sonnekus JC "*Sub hasta*-veilings en die onderskeid tussen oorspronklike en afgeleide wyses van regsverkryging" 2008 *Tydskrif vir die Suid Afrikaanse Reg* 696 700.

[75] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1484-1485.

[76] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1489-1490. Support for this argument is also found in the fact that the "bundle of sticks" theory does not explicitly find application in South African law. In this regard, see Van der Merwe CG *Sakereg* 2 ed (1989) 174; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 249. For more on the bundle of sticks theory, see Bell A & Parchomovsky G "A theory of property" (2005) 90 *Cornell Law Review* 531 585; Johnson DR "Reflections on the bundle of rights" (2007) 32 *Vermont Law Review* 247 247-272; Di Roblant A "Property: A bundle of sticks or a tree" (2013) 66 *Vanderbilt Law Review* 869 877-886.

[77] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1490.

[78] 1926 OPD 155.

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> "[O]nly real rights can be registered against the title deed of land . . . such rights as constitute a burden upon the servient land, and are a deduction from the dominium."[79]

The same *ratio* was followed in *Lorentz v Melle*[80] when Nestadt J held:

> "[The] essence of a praedial servitude [is] that it burdens the land to which it relates and that it provides some permanent advantage to the dominant land (as distinct from serving the personal benefit of the owner thereof)."[81]

Subsequently, in *Pearly Beach Trust v Registrar of Deeds,*[82] *Erlax Properties (Pty) Ltd v Registration of Deeds*,[83] *Cape Explosive Works Ltd v Denel (Pty) Ltd*[84] and *Willow Waters Home Owners Association (Pty) Ltd v Koka*[85] the courts reiterated the idea that the essence of a limited real right is that it burdens the object of the limited real right. However, it is the *effect* or consequence of the burden on the object of the limited real right that constitutes a subtraction from the *dominium* (ownership) of the owner and successors in title.[86] In terms of this line of case law, Pienaar argues that the *essence* of a limited real right is that it burdens the object of the right. He points out that the

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[79] *Ex parte Geldenhuys* 1926 OPD 155 162.

[80] 1978 (3) SA 1044 (T).

[81] *Lorentz v Melle* 1978 (3) SA 1044 (T) 1049.

[82] 1990 (4) SA 614 (C). King J held that limited real rights constitute "a charge on the property which is binding on successive owners". See *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) 618.

[83] 1992 (1) SA 879 (A). Joubert JA held that: "a real right consists basically of a legal relationship between a legal subject (holder) and an object or thing (res) which bestows on the holder of the right a direct power of absolute control over the thing. The content of the absolute control may vary depending on various real rights which may range from full ownership to *jura in re aliena* and other real rights". See *Erlax Properties (Pty) Ltd v Registration of Deeds* 1992 (1) SA 879 (A) 884-885.

[84] 2001 (3) SA 569 (SCA). Streicher JA held that "the nature of the right or condition must be such that the registration of it results in a 'subtraction from *dominium*' of the land against which it is registered". See *Cape Explosive Works Ltd v Denel (Pty) Ltd* 2001 (3) SA 569 (SCA) para 12.

[85] 2015 (5) SA 303 (SCA). Maya JA held that "[to] determine whether a right or condition in respect of land is real, two requirements must be met: (a) the intention of the person who creates the right must be to bind not only the present owner of the land, but also successors in title; and (b) the nature of the right or condition must be such that its registration results in a 'subtraction from dominium' of the land against which it is registered". See *Willow Waters Home Owners Association (Pty) Ltd v Koka* 2015 (5) SA 303 (SCA) para 16.

[86] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1491. See also *Ex parte Geldenhuys* 1926 OPD 155 163-165.

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essence of a limited real right cannot only be the limitation on the owner's entitlements because this is not unique to limited real rights. Various other means can limit an owner's entitlements. This is so since personal rights and statutory measures limit the owner's entitlements as well. Therefore, Pienaar maintains that the essence of a limited real right is rather it being a real burden on the property: the real burden being enforceable against all third parties including the owner and subsequent owners of the property.[87] Accordingly, because limited real rights are dependent only on the object of the right, the argument that ownership is the mother right upon which limited real rights are dependent for their continued existence must fail.

Both Sonnekus and Pienaar make compelling arguments for the termination or continued existence of limited real rights at or after original acquisition of ownership. However, it seems as though Pienaar's argument, which pertains to the essence of limited real rights, is more plausible. He reminds us that limited real rights not only have a relationship with ownership but also has a relationship with the object it burdens. In this regard, limited real rights are also real rights just like ownership although ownership represents the most complete real right while limited real rights represent rights limited by their specialised nature. However, both ownership and limited real rights remain real rights independent from each other and dependent on the property they burden. As shown earlier, recent case law supports this understanding of the relationship between limited real rights and ownership over property. Therefore, it can be argued that the nature of real rights allows for the continued existence of limited real rights over immovable property even after original acquisition of ownership has taken place in respect of immovable property.

Considering the analysis of the nature of real rights detailed above it seems probable that limited real rights that existed over immovable property will not necessarily terminate at original acquisition of ownership. Instead, it is more likely that limited real rights over immovable property would survive original acquisition of ownership of the concerned immovable property. In other words, a limited real right that burdned property continue to exist as long as it limits ownership, be it the intitial ownership or a right of ownership subsequently acquired by either original or derivative means over the property that is burdened by the limited real right. This view does not

[87] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1491.

only take account of the relationship between limited real rights and ownership, but also the relationship between limited real rights and the property such right burdens. It would be interesting to see if this doctrinal approach to the continued existence of limited real rights is reflected in the existing common law modes of original acquisition that relates to immovable property. If no example of an approach where limited real rights terminate the moment ownership terminates can be found in the various common law modes of original acquisition it would mean that the idea that limited real rights are extinguished at original acquisition is unsupported.

The part below will assess each recognised mode of original acquisition of ownership, keeping in mind the distinction between the acquisition of movable and immovable property throughout, to determine the extent to which the theoretical arguments are reflected in how the various original modes of ownership acquisition operate. This is an important consideration, since the main argument against categorising estoppel as an original mode of acquisition of ownership concerns the claim that when ownership is acquired, originally, the existing burdens (limited real rights) terminate resulting in the potential violation of property rights in terms of section 25(1) of the Constitution. If the analysis below indicates that limited real rights are not extinguished, , the submissions made against recognising estoppel as a mode of original acquisition could be disregarded.

3 2 3 Modes of original acquisition of ownership

3 2 3 1 Common law modes of original acquisition

There are various common law modes of acquiring ownership over property in an original manner. Appropriation is a mode of original acquisition whereby ownership is acquired through the taking of possession of unowned property.[88] The principles regarding appropriation of unowned things in South African law, has not changed much

[88] Carey Miller DL *The acquisition and protection of ownership* (1986) 1; Van der Merwe CG *Sakereg* 2 ed (1989) 217; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 288; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 163; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 171; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 155.

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from those which existed under appropriation in Roman and Roman-Dutch law.[89] Two categories of unowned things still exist, namely, things owned by no one (*res nullius*)[90] and things previously owned by someone but subsequently abandoned (*res derelictae*).[91] From the description of appropriation, the requirements for valid acquisition by means of appropriation are evident, namely (i) that the nature of the

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[89] For an overview of acquisition of *occupatio* in Roman law, see D 41.1.3; 47.2.43.5: Full citation *Digesta Iustiniani* in *Corpus Iuris Civilis* eds T Mommsen & P Krüger translated by Watson A *The Digest of Justinian* Vol IV (1985); Inst 2.1.12: Full citation *Institutiones Iustiniani* (533) translated by Thomas JAC *The Institutes of Justinian: Text, Translation and Commenta*ry (1975). See also Kaser M *Römisches Privatrecht* 6 ed (1960) translated by Dannenbring R *Roman private law* 2 ed (1968) 109; Van Oosten H *Die omskrywing en funksies van die fisiese beheerelement in die sakereg* (unpublished LLD dissertation University of South Africa 1995) 17-20; Borkowski A & Du Plessis P *Textbook on Roman law* 3 ed (2005) 191. Furthermore, for an overview of *occupatio* in Roman-Dutch law, see Grotius 4.3-36.

[90] Examples of *res nullius* proper are wild animals, fish, insects and birds in their natural state. If these animals escaped after being captured and subsequently remained unattainable or out of site, they would then be regarded as *res nullius*. See *Mathenjwa NO v Magudu Game Co (Pty) Ltd* 2010 (2) SA 26 (SCA) 44. See also Carey Miller DL *The acquisition and protection of ownership* (1986) 3-5; Van der Merwe CG *Sakereg* 2 ed (1989) 217; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 288; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) paras 172-175. Interestingly, a number of statutes impact on the common law principles of appropriation. The Game Theft Act 105 of 1991 now regulates the appropriation of wild animals in certain circumstances and qualifies the common law principles in this regard. See sections 2(1) and 2(2) of the Game Theft Act 105 of 1991. In addition, legislation such as the Marine Living Resources Act 18 of 1998; the Sea Fishery Act 12 of 1988 and the Cape Town Foreshore Act 26 of 1950 regulate the appropriation of sea life. See further Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 164; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 172; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 155.

[91] An example of a *res derelictae* is a shipwreck that has not been salvaged by its owner. A distinction should be drawn between abandoned property and lost property. The former becomes susceptible to appropriation while the latter remains the property of its owner. This is because the owner of the lost property had no intention of abandoning her property. For property to become abandoned the owner must have intended to divulge of ownership. See *Salvage Association of London v SA Salvage Syndicate Ltd* 1906 (23) SC169 171; *Reck v Mills* 1990 (1) SA 751 (A) 757; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 163. Furthermore, the common law principles regulating the salvage of shipwrecks is regulated by the International Convention of Salvage of 1989 that is now codified in the Wreck and Salvage Act 94 of 1996 of South Africa. Moreover, the National Heritage Resources Act 25 of 1999 may also have an impact on the principles of appropriation regarding property older than sixty years. See further Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 163; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 173; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 158.

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property should be an unowned corporeal thing (*res nullius* or *res derelictae*), (ii) and that the acquirer should exercise physical control over the thing (iii) as if owner (*animus domini*).[92] Interestingly, whether immovable corporeal property (land) can be abandoned is questionable in South African law. This is because for land to become capable of being appropriated it must first become abandoned property (*res derelicta*). In South African law unallocated land is deemed to vest in the state and therefore, in the event of a private owner abandoning her ownership over land, the dominant view is that ownership over the abandoned land would rather vest in the state.[93] Consequently, since appropriation of immovable property is potentially not possible in South African law, it would mean that only movable property could be acquired by way of appropriation as an original mode of acquisition of ownership.

When appropriation of movable property is analysed to determine to what extent it reflects the characteristics of "by operation of law" and the "termination of all burdens and benefits", the following becomes apparent. Appropriation clearly encapsulates a mode of acquisition by operation of law since it is the compliance with objectively determined requirements and the actions of the acquirer that result in ownership being acquired. The consent or intention of the previous owner, when dealing with abandoned movable property, is irrelevant. Therefore, the characteristic of "by operation of law" is prevalent in appropriation as a mode of original acquisition of ownership. Also, when determining whether acquisition by way of appropriation

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[92] Carey Miller DL *The acquisition and protection of ownership* (1986) 1-11; Van der Merwe CG *Sakereg* 2 ed (1989) 217; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 288; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 489-492; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 163; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 172; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 155. For a recent study of the common law principles of abandonment of property, see Cramer R "The abandonment of landownership in South African and Swiss law" (2017) 134 *South African Law Journal* 870-906.

[93] Carey Miller DL *The acquisition and protection of ownership* (1986) 8-9; Van der Merwe CG *Sakereg* 2 ed (1989) 227; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 492; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 164; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 173; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 158-160. For a contrasting view, see Sonnekus JC "Abandonnering van die eiendomsreg op grond en aanspreeklikheid vir grondbelasting" 2004 *Tydskrif vir die Suid Afrikaanse Reg* 747 752-753.

terminates limited real rights over appropriated movable property, it becomes apparent that it is not the appropriation that essentially terminates limited real rights that once burdened the property. Rather, in the movable property's abandoned state, any limited real rights would arguably have already been terminated for the movable property to enter its state of abandonment. Therefore, the original mode of appropriation confirms that it is not the acquisition of ownership that results in the acquirer receiving unburdened movable property; it is rather the loss of *corpus* on the part of the previous holder of a limited real right that enables the acquirer to acquire unburdened movable property. Therefore, the characteristic that limited real rights terminate at original acquisition of ownership over movables is not encapsulated in appropriation as a mode of original acquisition.

Another mode of acquisition that is said to take place without the cooperation of the owner is manufacture. Manufacture is a mode of acquisition in terms of which a person or entity (the manufacturer) that uses the movable materials of another without their permission to create a new movable thing (*nova species*) acquires ownership over the newly manufactured thing.[94] However, if the new movable thing is capable of being reduced back to its original materials, the owner of the material remains owner thereof, since manufacture would not have taken place in that case. In this regard, the rules of manufacture as a mode of acquisition of ownership only applies to those instances where the newly created movable thing cannot be restored to its original materials. Only then, the owner of the materials loses her ownership and ownership of the new thing vests in the manufacturer.[95] When determining to what extent manufacture exudes the characteristics generally ascribed to the category of original acquisition of

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[94] *S v Riekert* 1977 (3) SA 181 (T) 182; Carey Miller DL *The acquisition and protection of ownership* (1986) 80; Van der Merwe CG *Sakereg* 2 ed (1989) 258; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 505; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 176; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 188; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 175.

[95] For a detailed discussion of when ownership acquisition takes place through manufacture, see Carey Miller DL *The acquisition and protection of ownership* (1986) 40-45; Van der Merwe CG *Sakereg* 2 ed (1989) 258-263; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 306; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 505-507; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 176-178; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 176.

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ownership, it must be noted from the outset that only movable property can be acquired by way of manufacture and not immovable property. Furthermore, the requirements of manufacture clearly reflect acquisition by operation of law, since it is the factual situation of whether a new product has been created and whether the created thing can be reduced back to its original materials that determines whether manufacture has taken place and thereby results in ownership being acquired by the manufacturer. The consent or intention of the owner of the material pre-manufacture is not a consideration. Interestingly, whether limited real rights terminate at acquisition of ownership by way of manufacture again shows that at the time of acquisition by way of manufacture, any limited real rights that potentially existed would have terminated before the process of manufacture could even start. The only person that could potentially have had a limited real right over the property, due to the *corpus* requirement, is the manufacturer. In these circumstances, when manufacture takes place and the manufacturer acquires ownership, the limited real right would not extinguish as a result of the process of manufacture, but rather because of the principle that you cannot have a limited real right in your own property.[96] This will cause the limited real right that was previously held by the manufacturer to terminate.

South African law also recognises attachment as an original mode of acquisition of ownership. A distinction is drawn between the attachment of movable things to movable things, movable things to immovable things and immovable things to immovable things.[97] Attachment of movable things to movable things takes place when two movables attach to each other and create a composite thing in such a way that one of the two things loses its independence and becomes a component of the other. The thing that loses its independent existence is called the accessory thing and the thing that continues to exist independently is the principal thing. Furthermore, ownership of the composite thing vests in the owner of the principal thing. This means that the owner of the accessory thing loses ownership thereof if attachment is recognised in a given scenario.[98] When assessing whether attachment of movables to

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[96] See section 3 2 2 2 above.

[97] Van der Merwe CG *Sakereg* 2 ed (1989) 229; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 299; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 493; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 164.

[98] *Khan v Minister of Law and Order* 1991 (3) SA 439 (T) 443. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 12-13; Van der Merwe CG *Sakereg* 2 ed (1989) 229-230; Sonnekus

movables encapsulates the characteristic of “by operation of law” it becomes evident that it does. Generally, the test for determining whether attachment of movables to movables took place, concerns the objective determination of which component of the composite thing gives the thing its identity. This test is determined by looking at the components and their characteristics without asking whether it was the intention of the owners of the components that ownership should pass. Consequently, attachment of movables to movables takes place by operation of law. Again, it seems like the issue of impossibility of simultaneous exercise of *corpus* also arises in the context of attachment of movables. This means that the characteristic that limited real rights over movable property terminate at original acquisition of ownership is in any event at odds with the practical reality of what happens when attachment takes place. Therefore, attachment of movables to movables also supports the submission that a limited real right that burdened the property prior to the acquisition thereof by way of attachment, does not terminate as a result of it being acquired in an original manner as opposed to a derivative manner.

If the attacher, who is not the owner of the principal or accessory thing, is the holder of a limited real right over the principal or accessory thing the following principle will apply. Where the attacher is the holder of a limited real right over the accessory thing it can be argued that by attaching the property a new thing is created, namely a composite thing. This means that the thing that the attacher might have had a limited real right over does not exist independently anymore. Therefore, the limited real right will be extinguished not because the new thing was acquired in an original manner, but rather because the property which the limited real right burdened does not exist anymore, since it now forms part of a composite thing.[99] On the basis of this reasoning, the limited real right is not extinguished because the new thing was acquired in an

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JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 299; Van der Merwe CG & Pope A “Property” in Du Bois F (ed) *Wille’s principles of South African law* 9 ed (2007) 405-729 493-494; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 164-165. However, in practice it is not always easy to distinguish between the principal thing and the accessory for purposes of determining where ownership should vest. The court may consider various criteria and tests to help distinguish between the principal and accessory things. For an overview of these tests, see *Khan v Minister of Law and Order* 1991 (3) SA 439 (T) 443.

[99] For overview of the principle that real rights terminate when the property it burdens no longer exists see Van der Merwe CG & De Waal MJ *The law of things and servitudes* (1993) 204; Van der Merwe CG & Pope A “Property” in Du Bois F (ed) *Wille’s principles of South African law* 9 ed (2007) 405-729 555.

original manner, but because the thing does not exist anymore. However, where the attacher is the holder of a limited real right over the part which becomes the principal thing after attachment, the principle that you cannot have a limited real right over your own property will apply. In these circumtances, the limited real right would terminate because of this principle. It is not original acquisition of ownership that terminates the right.

The attachment of movables to immovable property usually concerns the attachment of plants or buildings to land. For these type of attachments, the Roman maxim *superficies solo cedit* (that which is attached to land become permanently attached to the land) finds application.[100] The consequence of this maxim is that the owner of the land owns everything permanently attached to the land. In the context of plants that attach to the land the effect of the maxim is that the landowner on whose land the plant took root acquires ownership over the plant.[101] With regard to the permanent attachment of buildings to land, the owner of the land owns all buildings on the land.[102] Clearly, this form of attachment is regulated by a principle, which when

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[100] Inst 2.1.29. See also Kaser M *Römisches Privatrecht* 6 ed (1960) translated by Dannenbring R *Roman private law* 2 ed (1968) 110-111; Carey Miller DL *The acquisition and protection of ownership* (1986) 22; Van der Merwe CG *Sakereg* 2 ed (1989) 244; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 298; Borkowski A & Du Plessis P *Textbook on Roman law* 3 ed (2005) 193-195; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 496-505; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 167-175; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 166. For a fairly recent comparative analyses of inaedificatio see Knobel IM *Bebouing (*inaedificatio*) in die Suid-Afrikaanse Reg – 'n regsvergelykende studie* (unpublished LLD dissertation University of South Africa 2016).

[101] Carey Miller DL *The acquisition and protection of ownership* (1986) 20-21; Van der Merwe CG *Sakereg* 2 ed (1989) 244-246; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 298; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 496-505; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 167-175; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 164-166.

[102] *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 998. For a detailed discussion of the requirements of attachment of buildings to land, see Carey Miller DL *The acquisition and protection of ownership* (1986) 22-36; Van der Merwe CG *Sakereg* 2 ed (1989) 247-258; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 301, 303; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 496-505; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 167-175. Interestingly, the question whether attachment of a building took place is also difficult to answer in practice. There is uncertainty as to the exact test to apply. In this regard, see Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 300; Muller G, Brits R, Pienaar JM & Boggenpoel Z

complied with, results in ownership vesting in the landowner. Therefore, it plainly encapsulates the characteristic "by operation of law". The same argument regarding the fact that the movable building or plant fails to exist as an independent object made above with regard to attachment of movables to movables, may also be made here, to explain what happens to potential real rights when attachment takes place between movables and immovable property. Therefore, it can also be argued here that it is not the fact of original acquisition of ownership that terminates the limited real right but rather because the object that was burdened by the limited real right no longer exists.

Attachment of immovable things to immovable things can result from acts of nature by way of the common law modes of either alluvion, avulsion or the forming of islands.[103] For these natural processes to occur, the boundary line of the land must be determined by a river (*agri non limitati*). In South Africa, boundary lines are however determined by the cadastral system. Consequently, a small number of erven with *agri non limitati* boundaries do actually exist.[104] The result is that natural attachment would seldom occur in South Africa although in theory it would be possible. If it does, the general rule concerning the increase of land through one of these methods is that the owner of the land to which the addition attaches becomes the owner of the addition.[105]

Silberberg and Schoeman's The law of property 6 ed (2019)166-173. See in general, Sono NL *Development of the law regarding inaedificatio: A constitutional analysis* (unpublished LLM thesis Stellenbosch University 2014).

[103] Carey Miller DL *The acquisition and protection of ownership* (1986) 13; Van der Merwe CG *Sakereg* 2 ed (1989) 232; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 300-301; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 494-495; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 175; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 162-164.

[104] Carey Miller DL *The acquisition and protection of ownership* (1986) 16; Van der Merwe CG *Sakereg* 2 ed (1989) 234; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 301; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 494; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 175; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 162.

[105] For a detailed discussion of this general rule, see Carey Miller DL *The acquisition and protection of ownership* (1986) 13-20; Van der Merwe CG *Sakereg* 2 ed (1989) 232-241; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 300-302; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 494; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 175;

Whether attachment of immovable property to immovable property took place, is regulated by a principle of the common law that dictates who becomes owner of the land. The principle does not consider the will of any party involved. This context makes attachment due to increase of land one that is dictated by law and therefore comes about by operation of law as a key characteristic of original acquisition of ownership. Pienaar correctly states that the probability that limited real rights would be affected by these modes of acquisition is small.[106] I agree with this view. In terms of the gradual increase of land (*alluvio*), the source of the addition to the land is not identifiable. Consequently, it would seem impossible to identify whether there might have been any limited real rights registered over the mud and sand particles that over time formed the addition to the land. A logical assumption would, therefore, be that the addition to the land caused by the gradual increase of land is by its nature free from any burdens (limited real rights).[107]

In terms of the sudden attachment of land to another piece of land (*avulsio*), the owner of the piece of land or holder of any limited real rights over the piece of land has the opportunity to assert their rights before attachment takes place. However, if the real right holders fail to assert their rights before attachment (when the addition becomes affixed to the land) these rights terminate at attachment.[108] Accordingly, one can make an argument that by failing to claim their real rights, the holders of these real

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Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 162.

[106] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480-1481.

[107] For the general principles regulating *alluvio*, see Van der Merwe CG *Sakereg* 2 ed (1989) 232-238; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 300-301; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 494; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 177; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 162-163.

[108] For the general principles regulating *avulsio*, see Van der Merwe CG *Sakereg* 2 ed (1989) 238; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 301; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 494; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 178; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 163.

rights, out of their own accord, terminate their rights. The need to decide whether these limited real rights continue to exist after attachment does not arise.

Finally, where immovable property is acquired by way of the forming of islands (*insula nata in flumine*) it is relatively clear that the island constitutes a new piece of land over which no other rights existed previously. Accordingly, no limited real rights are present at the time of the original acquisition of the island. Therefore, the question of whether limited real rights terminate at the acquisition of ownership over the island does not arise.[109] From these common law modes of original acquisition of ownership, it is clear that it is improbable that there would be any limited real rights over the property acquired. Accordingly, a rule that requires that all limited real rights must terminate at original acquisition of ownership would arguably be redundant in these contexts.

Mingling and mixing are also forms of original acquisition of ownership in South African law. Mixing takes place where solids that belong to different owners are joined in such a way that they become indivisible.[110] Mingling occurs when liquids belonging to different owners are mixed so that subsequently they too become indivisible.[111] The principles of mixing and mingling establishes joint ownership in the mixed or fused thing where the respective owners of the mixed or mingled things consented to the mixing or the mingling.[112] If the owners never gave consent for mixing or mingling, the

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[109] For the general principles regulating *insula nata in flumine*, see Van der Merwe CG *Sakereg* 2 ed (1989) 238; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 301; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 494-495; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 180; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 163.

[110] Voet 6.1.27. See further Van der Merwe CG *Sakereg* 2 ed (1989) 263; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 302-303; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 507; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 189; Muller G, Brits R, Pienaar JM & Boggenpoel ZT *Silberberg and Schoeman's The law of property* 6 ed (2019) 179.

[111] Voet 41.1.23. See further Van der Merwe CG *Sakereg* 2 ed (1989) 263; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 302-303; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 507-508; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 189; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 178.

[112] *Ex parte Terminus Compania Naviera SA and Grinrod Marine (Pty) Ltd: In Re the Aretil L* 1986 (2) SA 446 (C) 425. For a detailed discussion of the principles and requirements of mixing and fusing, see

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following principles apply: With regard to mingling of liquids without the consent of the owners of such liquids and where the liquids are inseparable, the owners of the liquids become joint owners of the mingled liquids. It is therefore by operation of law that ownership converts into joint ownership. Regarding limited real rights that might have burdened the respective liquids, the joint owners would as a consequence of their joint ownership share in the burdens on the property according to their undivided co-ownership share.[113]

Regarding mixed solids, where the owners of the solids never consented to the mixing of such solids, no change in ownership takes place. Each respective owner would be able to claim the return of her portion of the mixed solids through a vindication claim.[114] This means that any limited real rights that could have potentially burdened the solids remain unaffected by the mixing of solids without the consent of the owners. The general conclusion that can be drawn from this is that the mixing of solids displays the characteristic of operating *ex lege*, but does not reflect the characteristic that limited real rights fall away at the original acquisition of ownership that takes place by way of mixing and mingling.

The last common law form of original acquisition recognised in South African law is the acquisition of ownership over fruits. The point of departure is that the owner of the fruit-bearing thing becomes the owner of the fruits produced by the thing, irrespective of the owner's intention. This means that the owner of the fruit-bearing thing acquires the ownership over the fruits by operation of law. However, *bona fide* possessors, *ususfructus*, lessees, pledgees, creditors or mortgagees of the fruit-bearing thing will acquire the ownership over the fruit at the separation or gathering of

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Carey Miller DL *The acquisition and protection of ownership* (1986) 46-48; Van der Merwe CG *Sakereg* 2 ed (1989) 263-265; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 302-303; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 507-508; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 178-179; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 178-179.

[113] For the common law principles regulating joint ownership, see Van der Merwe CG *Sakereg* 2 ed (1989) 384; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 558-560.

[114] *Andrews v Rosenbaum & Co* 1908 EDC 419. See futher a discussion of this principle in Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 159-160.

the fruit from the thing.[115] The law dictates that in these particular circumstances ownership over the fruit will be acquired by persons with these rights, rather than by the owner of the fruit-bearing thing. This affirms that acquisition of fruits sets in by operation of law. Since fruit constitutes independent legal things from the fruit-bearing thing at separation, they constitute completely new legal objects. Such fruit would automatically have no burdens or benefits. As a result, acquisition of fruits also indicates that potential limited real rights do not terminate over property due to original acquisition of ownership, but rather because of the legal object automatically having no burdens or benefits in the first place.

Considering the above, it seems clear that the characteristic "ownership acquisition by operation of law" is fundamental to every common law mode of acquisition analysed. This means that, at least in terms of the common law modes of original acquisition, the characteristic that ownership must be acquired by way of objective compliance with the law (*ex lege*) is central to what constitutes an original method of ownership acquisition. Consequently, the theoretical position regarding original modes having to operate by operation of law is reflected in the manner in which the existing original common law modes operate.

However, it would seem that the characteristic that "all burdens and benefits terminates at original acquisition" is not supported by the manner in which the existing common law original modes of ownership acquisition operate. This is the situation where both movables and immovable property are concerned. Overall, the reasons for why an acquirer of ownership by way of an original mode would acquire *movable property* without any limited real rights are due to the operation of other legal principles or practicalities, and not as an automatic result of original acquisition. Therefore, it can be said that the original modes of ownership acquisition considered above show that it is not the original acquisition that results in limited real rights terminating in these instances. Moreover, the common law modes of original acquisition of ownership that were considered above, revealed that the question of whether limited real rights

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[115] *Morkel v Malan* 1933 CPD 370 375-376; *Peens v Botha-Odendaal* 1980 (2) SA 381 (O) 391. For a detailed discussion see Carey Miller DL *The acquisition and protection of ownership* (1986) 49-61; Van der Merwe CG *Sakereg* 2 ed (1989) 265-268; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 508-509; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 175-176; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 174-175.

terminate at original acquisition of ownership over immovable property may not be relevant, or prove to be problematic, for the current common law modes of original acquisition. The only mode that allows for acquisition of ownership over immovable property is the attachment of land-to-land that from a pragmatic point of view does not reflect the general rule that limited real rights over immovable property terminates at original acquisition of ownership. Since this is the only common law mode of original acquisition that applies to immovable property, the fact that the operation of the so-called rule that burdens terminate at original acquisition of ownership is not reflected in how this mode operates puts the existence of the rule into question.

Yet, it remains necessary to determine what the law is (or should be) for purposes of the recognition of future or new common law modes of original acquisition such as the current consideration of whether estoppel could potentially qualify as an original mode of acquisition of ownership. Therefore, the part below continues with assessing modes of original acquisition of ownership. However, the assessment now turns to statutory modes of original acquisition to determine if the same trends as found above are prevalent in the recognised statutory modes. If so, the idea that burdens and benefits terminate at original acquisition of ownership would constitute a rule that is not reflected and supported in the existing original modes.

3 2 3 2 Statutory modes of original acquisition

Forfeiture and confiscation are recognised statutory modes of acquisition of ownership. Confiscation can take place during a declared state of emergency. When a state of emergency is declared, in terms of section 37(4) of the Constitution, the state is empowered to promulgate legislation and regulations that provides for necessary measures that must be implemented to manage the state of emergency. These measures include confiscation of private property.[116] When the state confiscates property in terms of state of emergency legislation or regulations such confiscation and

[116] Van der Walt AJ & Pienaar GJ *Introduction to the law of property* 7 ed (2016) 129. Section 37(4) of the Constitution sets out the powers granted to the state to promulgate legislation and regulations to enable the state to regulate the emergency. The section also sets out the limits of these powers.

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seizure will result in the state acquiring the property by original means. This means that state of emergency confiscation would take place by operation of law.[117]

Forfeiture may, in turn, take place in terms of authorising legislation that allows the state to become owner of private property in certain circumstances.[118] One can forfeit movable or immovable property to the state where the property was used to commit a crime with or without the owner's consent. Ownership over the property is acquired by the state when the court makes an order that the property has been forfeited in terms of authorising legislation.[119]

Whether limited real rights that burdened the forfeited property before the forfeiture terminate at acquisition by the state is regulated by various statutes, which allow for the forfeiture of property. For instance, both the Criminal Procedure Act 51 of 1977 and the Drugs and Drug Trafficking Act 140 of 1992 provide for parties with rights, including limited real rights, in forfeited property to assert such rights over the property by way of application to the court. After the court has identified the forfeited property and assessed the merits of the case, the court will ensure that the interest of the applicant (the right holder) is protected in terms of the specific provisions of the applicable statute.[120] In this regard, the court will consider all relevant circumstances to ensure that innocent limited real right holders over the property do not suffer extreme hardship due to the forfeiture.[121] In terms of the provisions of the Criminal Procedure

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[117] Van der Walt AJ & Pienaar GJ *Introduction to the law of property* 7 ed (2016) 129.

[118] Statutes that contain forfeiture provisions in favour of the state include the Criminal Procedure Act 51 of 1977; the Films and Publications Act 65 of 1996; the Drugs and Drug Trafficking Act 140 of 1992 and the Prevention of Organised Crime Act 121 of 1995. See further Van der Merwe CG *Sakereg* 2 ed (1989) 296-297; Van der Walt AJ & Pienaar GJ *Introduction to the law of property* 7 ed (2016) 129; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 206. Interestingly, Van der Merwe indicates that in some instances property can be forfeited in favour of private individuals. In this regard, see section 24(1) of the Copyright Act 98 of 1978. See also Van der Merwe CG *Sakereg* 2 ed (1989) 296.

[119] Van der Walt AJ & Pienaar GJ *Introduction to the law of property* 7 ed (2016) 129; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 206.

[120] See sections 35(1)-(4) of the Criminal Procedure Act and sections 26(2)-(3) of the Drugs and Drug Trafficking Act.

[121] *Mazibuko v National Director of Public Prosecution* 2009 (6) SA 479 (SCA) paras 23-26; *Mohunram v National Department of Public Prosecution (Law Review Project as Amicus Curiae)* 2007 (4) SA 222 (CC) para 146; *National Director of Public Prosecutions v Gerber* 2007 (1) SA 512 (W) para 27; See

Act and the Drug Trafficking Act, the court may order that the property be sold in execution and that the proceeds be paid to the holder of the right.[122] In the event that the state alienated the property before any application might have been lodged by a holder of interest over the property, like a limited real right holder, such a person will be compensated the value of her interest.[123] Consequently, it would be more plausible to argue that the limited real rights over property never terminate when property becomes forfeited to the state, instead limited real rights continue to burden the forfeited property even after the ownership of the property vests in the state by way of original means. This is so since the limited real right holders can assert their rights by application to the court and receive the value of their interest, by way of auction proceeds or compensation. The way legislative measures that provide for forfeiture deals with the limited real rights that burden the forfeited, supports the view that limited real rights do not automatically terminate, when the ownership in the property is acquired by the state.

"Statutory passing of ownership" is argued to constitute an original mode of acquisition of ownership that is authorised by legislation. In this regard, the Insolvency Act 24 of 1936 and the Companies Act 71 of 2008 allows interested parties to approach a court for an order declaring persons and companies insolvent.[124] The consequence of a court ordering that a person or a company is insolvent is that an appointed administrator such as a curator or liquidator acquires the ownership over the assets of the sequestrated estate or the liquidated company. Consequently, the previous owner of the assets (private individual or company) loses ownership by virtue of the court order and without consent, although typically for a specified period only.[125] This effect

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also Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 206.

[122] Section 35(4)(a)(ii)(aa) of the Criminal Procedure Act and section 26(2)(b)(ii)(aa) of the Drugs and Drug Trafficking Act.

[123] Section 35(4)(a)(ii)(bb) of the Criminal Procedure Act and section 26(2)(b)(ii)(bb) of the Drugs and Drug Trafficking Act.

[124] Van der Walt and Pienaar categorise section 21(1) of the Insolvency Act and section 80(5) of the Companies Act as modes of original acquisition of ownership. This is significant since traditional textbooks on property law generally does not include these two provisions under either the original or derivative category of ownership acquisition. Van der Walt AJ & Pienaar GJ *Introduction to the law of property* 7 ed (2016) 130.

[125] See *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A) 15-17; *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC) paras 10-12. Regarding the constitutional implications of section 21(1) of the

of the statutory passing of ownership encapsulates the characteristic that ownership is acquired by operation of law and arguably makes it an original mode of acquisition of ownership rather than a derivative mode.[126] Interestingly, all the powers and capacities over the assets vest in the master of the court and then the liquidator or curator, respectively. This nominated liquidator or curator would be responsible for managing the assets, which includes ensuring that limited real rights like long-term leases, servitudes and real security rights that existed over the assets prior to the assets vesting in the liquidator or curator are honoured. This means that limited real rights that existed over the property do not fall away at the original acquisition of ownership in favour of the curator or liquidator, instead such rights survive original acquisition of ownership.[127] Therefore, statutory passing of ownership in terms of the Companies Act and the Insolvency Act allows the estate of the liquidated company or sequestrated person to be acquired with existing limited real rights. As a result, the general trend picked up in the section concerning the common law modes of original acquisition that limited real rights do not fall away due to original acquisition of ownership, are even clearer in terms of statuory methods of acquisition and are in fact codified under these statutes.

Expropriation is another form of statutory original acquisition of ownership.[128] Ownership of expropriated movable or immovable property is acquired by the state on the date of expropriation in terms of authorising legislation.[129] Section 25(2)-(3) of the

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Insolvency Act; Van der Walt AJ *Constitutional property law* 3 ed (2011) 339; Bezuidenhout K *Compensation for excessive but otherwise lawful regulatory state action* (unpublished LLD dissertation Stellenbosch University 2014) 101.

[126] Van der Walt AJ & Pienaar GJ *Introduction to the law of property* 7 ed (2016) 130.

[127] Section 21(1)(a) of the Insolvency Act and section 80(5) of the Companies Act. See also Van der Walt AJ & Pienaar GJ *Introduction to the law of property* 7 ed (2016) 130.

[128] For a discussion of expropriation in general, see Southwood MD The *compulsory acquisition of rights* (2000) 14-15; Gildenhuys A *Onteieningsreg* 2 ed (2001) 8-9; Van der Walt AJ *Constitutional property law* 3 ed (2011) 334; Mostert H & Badenhorst PJ "Property and the bill of rights" in Mokgoro Y & Tlakula P (eds) *Bill of rights compendium* (RS: 34 2014) 3FB-7.2.2; Slade BV "Less invasive means: The relationship between sections 25 and 36 of the Constitution of the Republic of South Africa, 1996" in Hoops B, Marais EJ, Mostert H, Sluysmans JAMA & Verstappen LCA (eds) *Rethinking Expropriation Law Vol I* (2015) 331 331-347; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 194, 647-651.

[129] *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 48. See Van der Walt AJ *Constitutional property law* 3 ed (2011) 337-338. See further in general Du Plessis WJ *Compensation for expropriation under the Constitution* (unpublished LLD dissertation Stellenbosch University 2009);

Constitution sets out the requirements for a valid expropriation[130] and the Expropriation Act 63 of 1975 sets out the principles and procedures for a valid expropriation.[131] In this regard, the authorising legislation provides the state with the power to expropriate private property in specifically defined circumstances in the public interest or for a public purpose, while section 25(2)-(3) and a constitutional interpretation of the Expropriation Act ensures that the expropriation passes constitutional muster.[132] Since

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Slade BV *The justification of expropriation for economic development* (unpublished LLD dissertation Stellenbosch University 2012). A non-exhaustive list of legislative measures that provide the state the capacity to expropriate include the National Environmental Management: Protected Areas Act 57 of 2003; the National Water Act 36 of 1998; the Housing Act 107 of 1997; Restitution of Land Rights Act 22 of 1994; and the Broadcasting Act 73 of 1976.

[130] Section 25(2) of the Constitution only permits expropriations if the expropriation is in terms of a law of general application, is in the public interest or for a public purpose and where the landowner is compensated for the expropriation. For a discussion of the formal requirements of expropriation, see Van der Walt AJ *Constitutional property law* 3 ed (2011) 451-520; Mostert H & Badenhorst PJ "Property and the bill of rights" in Mokgoro Y & Tlakula P (eds) *Bill of rights compendium* (RS: 34 2014) 3FB-7.2.2; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 653-667. Since the court in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46 held that expropriations are a subset of deprivations, the requirements for a valid deprivation will also have to be met to establishing whether the expropriation is valid. In other words, the starting point for all constitutional property disputes is section 25(1) of the Constitution. However, the court has not followed this approach strictly. See *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) para 48. See also Roux T "Property" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-22; Marais EJ "When does state interference with property (now) amount to expropriation? An analysis of the *Agri SA* court's state acquisition requirement (part II)" (2015) 18 *Potchefstroom Electronic Law Journal* 3033 360; Slade BV "The effect of avoiding the *FNB* methodology in section 25 disputes" (2019) 40 *Obiter* 36 44-46.

[131] Since the 1975 Act constitutes a pre-constitutional legislative measure there is a need for a new Act that is drafted within the constitutional framework. At the end of 2018, the Department of Public Works published the Expropriation Bill (draft) in GN 1409 in *GG* 42127 of 21-12-2018 that is meant to replace the 1975 Act. Approval of this bill is however still pending. For an analysis of the bill, see Pienaar JM "Land reform" (2018) 4 *Juta's Quarterly Review* para 1.2; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 306. At the end of 2019, Parliament also put forth a Constitution Eighteenth Amendment Bill (draft) in GN6 52 in *GG* 42902 of 13-12-2019, which aims to amend section 25 of the Constitution to allow for the payment of nil compensation in certain instances. It remains to be seen whether this bill will be passed into law.

[132] *Minister of Public Works v Haffejee* 1996 (3) SA 745 (SCA) 749. For a detailed discussion of the development and current status of expropriation as a mode of original acquisition of ownership, see Carey Miller DL *The acquisition and protection of ownership* (1986) 63-101; Van der Merwe CG *Sakereg* 2 ed (1989) 268-290; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 510-517; Van der Walt AJ *Constitutional property law* 3 ed (2011) 337-338; Mostert H & Badenhorst PJ "Property and the bill of rights" in Mokgoro Y & Tlakula P (eds) *Bill*

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expropriation is an original mode of acquiring ownership, it concerns the taking of property without the consent of the owner but the state is nonetheless required to compensate the owner for the expropriation.[133] Interestingly, when determining what happens with any potential limited real rights after expropriation, where such rights existed over the immovable property before expropriation, section 8(1) of the current Act must be consulted. Section 8(1) regulates the termination of limited real rights over expropriated land. Unsurprisingly, this section also provides that all limited real rights survive expropriation unless such rights were also expropriated with the property. This rule, however, excludes mortgage bonds and other real security rights. These rights are specifically regulated by section 19(1) of the Act. This section provides for the extinction of the principal debt that these rights are based on when the debt is discharged. In other words, provision is made for these rights to extinguish in terms of the principle of accessoriness and not in terms of the expropriation as a form of original acquisition of ownership. As a result, this provision together with section 8(1) supports the view that limited real rights over immovable property do not, as a general rule, terminate at original acquisition.[134]

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of rights compendium (RS: 34 2014) 3FB-7.2.2; Slade BV "Less invasive means: The relationship between sections 25 and 36 of the Constitution of the Republic of South Africa, 1996" in Hoops B, Marais EJ, Mostert H, Sluysmans JAMA & Verstappen LCA (eds) *Rethinking Expropriation Law Vol I* (2015) 331-347 331; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 647-651.

[133] Section 25(2)-(3) of the Constitution. For an explanation of the reasoning behind compensation for expropriation and the calculation of compensation, see *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA) para 37; *Du Toit v Minister of Transport* 2005 (11) BCLR 1053 (CC) paras 39-45*; Msiza v Director-General, Department of Rural Development and Land Reform* 2016 (5) SA (LCC) para 47; *Uys v Msiza* 2018 (3) SA 440 (SCA) para 13. Also see Du Plessis WJ *Compensation for expropriation under the Constitution* (unpublished LLD dissertation Stellenbosch University 2009) 214-234; Van der Walt AJ *Constitutional property law* 3 ed (2011) 503-520; Mostert H & Badenhorst PJ "Property and the bill of rights" in Mokgoro Y & Tlakula P (eds) *Bill of rights compendium* (RS: 34 2014) 3FB-7.2.2; Boggenpoel ZT *Property remedies* (2017) 210-224; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 656-667.

[134] Clause 18 of the Expropriation Bill (draft) in GN 1409 in *GG* 42127 of 21-12-2018 deals with the expropriation of property that is subject to a mortgage or a deed of sale. This clause makes it clear that the compensation amount will first be paid out to the mortgagee to settle the debt owed to the mortgagee, before payment is made to any other party. See further Pienaar JM "Land reform" (2018) 4 *Juta's Quarterly Review* para 1.2. Consequently, clause 18 of the draft bill indeed supports the notion that limited real rights do not terminate at the original acquisition of ownership over the property. In the context of expropriation, the principal debt must first be settled so the limited real right can terminate

The final recognised statutory mode of original acquisition is prescription. Initially, prescription was received into the South African legal system as a common law mode of original acquisition of ownership. However, subsequent to its reception, it has been partially codified in legislation. Today prescription takes place in terms of the provisions of the Prescription Act 68 of 1969 together with the principles of the common law.[135] Both movable and immovable property can be acquired by way of prescription. At the factual fulfilment of the requirements for prescription of ownership, prescription may result in the acquisition of ownership.[136] The requirements for the acquisition of ownership in terms of prescription are (i) the exercise of open and undisturbed control over the property, (ii) as if the owner, (iii) for a period of thirty years.[137] This means that the possessor would become owner of the property when these requirements are fulfilled as soon as the period of prescription has ended. This objective nature of prescription makes it a classic example of acquisition of ownership by operation of law.

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due to the accessoriness principle. The limited real right does not terminate due to the property being acquired originally. Instead, the limited real right terminates because of the established accessoriness principle.

[135] Interestingly, in instances where the prescription period started before the year 1969 when the latest Prescription Act was promulgated, its predecessor, namely the Prescription Act 18 of 1943, steps in to regulate the potential acquisition of ownership through prescription. See Carey Miller DL *The acquisition and protection of ownership* (1986) 64-65; Van der Merwe CG *Sakereg* 2 ed (1989) 271-274; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 308-309; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 510-511; Marais EJ *Acquisitive prescription in view of the property clause* (unpublished LLD dissertation Stellenbosch University 2011) 36-64; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 179-181. See further Van der Walt AJ & Marais EJ "The constitutionality of acquisitive prescription: A section 25 analysis" 2012 *Tydskrif vir die Suid Afrikaanse Reg* 714 714-736.

[136] Section 1 of the Prescription Act. See also *Minnaar v Rautenbach* 1999 (1) All SA 571 (NC) 577; Van der Merwe CG *Sakereg* 2 ed (1989) 288; Marais EJ *Acquisitive prescription in view of the property clause* (unpublished LLD dissertation Stellenbosch University 2011) 40-64; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019)192. See further Van der Walt AJ & Marais EJ "The constitutionality of acquisitive prescription: A section 25 analysis" 2012 *Tydskrif vir die Suid Afrikaanse Reg* 714 714-736.

[137] Section 1 of the Prescription Act. See also *Minnaar v Rautenbach* 1999 (1) All SA 571 574; Carey Miller DL *The acquisition and protection of ownership* (1986) 71; Van der Merwe CG *Sakereg* 2 ed (1989) 281-288; Marais EJ *Acquisitive prescription in view of the property clause* (unpublished LLD dissertation Stellenbosch University 2011) 40-64. See further Van der Walt AJ & Marais EJ "The constitutionality of acquisitive prescription: A section 25 analysis" 2012 *Tydskrif vir die Suid Afrikaanse Reg* 714 714-736. Just title and *bona fides* on the part of the acquirer are not required for ownership to be acquired in terms of prescription in South African law. See *Welgemoed v Coetzer* 1946 TPD 701 702; *Pienaar v Rabie* 1983 (3) SA 126 (A) 136-137.

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When it comes to the question of what happens to limited real rights that might have existed over the property before prescription, the answer is found in the Deeds Registries Act 47 of 1937. At the stage when the period for prescription has expired, the possessor acquires ownership. However, the deed of the property will still reflect the particulars of the previous owner. The new owner will have to file an application for the rectification of the deed in tems of section 33 of the Deeds Registries Act. Pienaar notes that when a prescription application is successful the Registrar of Deeds executes the rectification process in accordance with the procedures set out in the Deeds Registries Act.[138] In terms of this process, the Registrar of Deeds will rectify the deeds records by correcting the particulars on the deed of the property to that of the new owner and stipulating on the deed that the reason for rectification is prescription in terms of a court order. The court order for the rectification does not automatically cancel or extinguish existing limited real rights over the property, contrary to the general assumption that at original acquisition burdens and benefits over the property terminates. Burdens such as limited real rights only terminate if the court specifically ordered the cancellation of those existing limited real rights over the property in the same order for rectification. This will happen only if these limited real rights also prescribed with the property, in other words, if the requirements for prescription can be shown to have been met with regard to the burdens as well. If this does not take place, the burdens will be endorsed against the property acquired by way of prescription.[139] Therefore, it is clear that the prescription of the ownership over the property does not render any limited real rights over the property automatically prescribed. It would seem that prescription is clearly a mode of acquisition by operation of law. However, prescription does not support the assumption that limited real rights terminate over movable or immovable property because of original acquisition of ownership.

The above analysis showed that the statutory modes of original acquisition, like the common law modes of original acquisition, all reflect the by operation of law characteristic that is in theory associated with original modes of acquisition, where the

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[138] Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1494. See section 33(1) of the Deeds Registries Act. See further Carey Miller DL & Pope A *Land title in South Africa* (2000) 196-204.

[139] See 33(8) of the Deeds Registry Act. See also Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 192-193. For a contrary view that all burdens terminate when prescription occurs see Marx FE *Verkrygende verjaring in die Suid Afrikaanse reg* (unpublished LLD dissertation University of Port Elizabeth 1994) 283.

owner's intention is irrelevant for acquisition of ownership. Significantly, the analysis of whether the consequence of these statutory modes was indeed that existing burdens terminate at acquisition of ownership showed that it is more likely that burdens and benefits survive the acquisition. However, where they terminate, the statutory modes of acquisition of ownership expressly set provisions in place to regulate what happens to the burdens that existed over the property subsequent to acquisition. This supports the view that burdens do not automatically terminate at original acquisition of ownership.

3 2 4 Preliminary observations

As shown above, the only true requirement for acquisition to be categorised as an original mode is that the ownership must be acquired *ipso iure* (through operation of law) and not by the cooperation of the predecessor. When this is applied to how estoppel could potentially be developed into a new mode of original acquisition of ownership, the question is whether the estoppel mode of acquisition would resemble the *ex lege* nature of original modes of acquisition? A purchaser, who bought the property under the circumstances that would traditionally give rise to a successful estoppel defence, bought the property without the owner's consent. The requirements that such possessor would have to satisfy are also objectively determined and are not subject to the owner's consent. As a result, estoppel as a mode of acquisition can be said to resemble an original mode of acquisition since the cooperation (consent) of the predecessor in title is not required.

However, some scholars opine that if a new mode of acquisition due to estoppel is recognised as a mode of original acquisition of ownership the burdens over the property such as limited real rights will terminate which may result in the loss of such rights giving rise to constitutional infringements. The supposed inability of the original category of acquisition to provide an acquirer with ownership together with the existing burdens and the resultant constitutional infringements that may arise if estoppel were to be recognised as an original mode of acquisition of ownership has led scholars to conclude that the only viable method for acquisition of ownership by estoppel is the

derivative mode.[140] Arguably, this would only be true if one accepts that burdens necessarily terminate solely because the mode of ownership acquisition is original, rather than derivative. However, the analysis done in the section above proves that limited real rights are not terminated due to the original nature of the acquisition of ownership. It is clear that existing limited real rights over movable property would arguably not terminate if at the time of acquisition limited real rights are still burdening the property. However, the probability of any such rights burdening the property at the time of acquisition is highly unlikely due to the impossibility of simultaneous exercise of *corpus* over the movable property. Moreover, the analysis of the exiting modes also showed that it would rather be due to other legal principles or practicalities that the so-called burdens would terminate. If a new mode of original acquisition in terms of estoppel is recognised, it seems unlikely that any burdens over the movable property would exist at the time of acquisition. It would be improbable that another's limited real right could be affected by the acquisition of ownership of movables by the successful estoppel raiser. This means that, if such rights do not terminate due to original acquisition of movable property, but rather due to other relevant legal principles, a constitutional challenge will most likely not arise.

In the case of immovable property, it seems as though existing limited real rights will not automatically terminate when original acquisition of such property takes place. The analysis of the existing original modes of acquisition showed that the only original modes of acquisition of ownership in terms of which ownership over immovable property can be acquired are attachment of land, forfeiture, prescription, expropriation, insolvency and liquidation. In the very unlikely event that attachment of land occurs in South Africa, it would be improbable that limited real rights would be affected by such acquisition as shown above. In addition, in the context of statutory modes of original acquisition of ownership, it became evident that specific provisions regulate the consequences of existing burdens on immovable property where the property is acquired as result of the operation of the provisions of such statutes. Also, it is evident that burdens will not terminate unless these provisions expressly allow such termination. When this happens, the termination is usually due to an established principle such as, for instance, the accessoriness principle. Accordingly, it cannot be

[140] Van der Merwe CG *Sakereg* 2 ed (1989) 373; Pelser FB "Aspekte van eiendomsverkryging deur estoppel" (2005) 38 *De Jure* 153 159.

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maintained that burdens and benefits automatically terminate over immovable property at original acquisition of such property.

Therefore, the general assumption that burdens terminate over movable and immovable property are not reflected in the way in which the existing original modes of acquisition of ownership operate. When considering developing estoppel into a potential mode of original acquisition and the caution that has been raised specifically due to the assumed consequence of original acquisition of ownership (that burdens terminate and will cause constitutional infringements), it seems unlikely that any prejudice would be suffered by third parties if estoppel results in the estoppel raiser acquiring ownership by original means. This is because the loss of limited real rights that could potentially cause arbitrary deprivation of property in terms of section 25(1) does not arise. Since it is likely that limited real rigths would remain unaffected, the section 25 argument cannot be sustained as a reason to prevent estoppel from being recognised as an original mode of acquiring ownership.

Based on the characteristic that limited real rights are terminated at the original acquisition of ownership, it would seem possible to argue that there remain no valid doctrinal or constitutional objections to recognising ownership acquisition by way of estoppel as an original mode of ownership acquisition.[141] Since objections have also been raised against potentially recognising estoppel as a mode of derivative acquisition of ownership, the section below will consider these objections and determine whether there is any merit to them.

3 3 Estoppel as a mode of derivative acquisition of ownership

3 3 1 Introduction

Traditionally, the derivative category of acquisition consisted of universal acquisition of ownership and particular acquisition of ownership.[142] Universal derivative acquisition

[141] A constitutional analysis of the loss of ownership that would be suffered by the predecessor in title in terms of a newly recognised mode of acquisition in the context of estoppel will be done in chapter 6 below.

[142] Grotius 2.11.1. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 117; Van der Merwe CG *Sakereg* 2 ed (1989) 298; Van der Merwe CG & De Waal MJ *The law of things and servitudes* (1993) 148.

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takes place when an estate in general or part thereof is acquired by one person from another. Examples of universal derivative acquisition are the acquisition of a spouse's estate upon marriage in community of property or the acquisition of an estate by the curator or liquidator upon insolvency or death of the owner. In other words, marriage in community of property, succession and liquidation or sequestration are modes of acquisition traditionally categorised under universal derivative acquisition of ownership.

In Roman-Dutch law, an heir to an estate became the owner of property by way of universal derivative acquisition in terms of the will of the testator.[143] However, universal acquisition in the context of succession has been replaced with executorship in South African law and is now regulated by the Administration of Estates Act 66 of 1965.[144] Furthermore, the transfer of a spouse's estate upon marriage in community of property is regulated by the principles of family law rather than the principles of property law in modern South African law, although it is still regarded as a true mode of derivative acquisition of ownership.[145] Moreover, statutes now regulate acquisition of ownership by the curator or liquidator of an insolvent or liquidated estate in South African law. The provisions in these statutes that deal with the acquisition of the estate by the liquidator or curator are argued to result in original acquisition of ownership rather than derivative acquisition of ownership due to their *ex lege* nature.[146] Particular derivative acquisition is the acquisition of a single thing or a number of particular things.[147] This refers to derivative acquisition known and dealt with in property law in contemporary times, namely acquisition by way of delivery or registration.

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[143] Grotius 2.8.6. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 117; Van der Merwe CG *Sakereg* 2 ed (1989) 299; Van der Merwe CG & De Waal MJ *The law of things and servitudes* (1993) 148. De Waal MJ & Schoeman-Malan MC *Law of succession* 4 ed (2008) 2-3.

[144] *Estate Smith v Estate Follett* 1942 AD 364 383. See also Carey Miller DL *The acquisition and protection of ownership* (1986) 117; Paleker M "Succession" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 666-729 668-670; De Waal MJ & Schoeman-Malan MC *Law of succession* 4 ed (2008) 10.

[145] For an overview of the principles regarding the forming of the joint estate by derivative means, see Halo HR *The South African law of husband and wife* 5 ed (1985) 161-163. Himonga C "Persons and family" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 145-402 265-278.

[146] See section 3 2 3 2 above.

[147] Carey Miller DL *The acquisition and protection of ownership* (1986) 117; Van der Merwe CG *Sakereg* 2 ed (1989) 289; Van der Merwe CG & De Waal MJ *The law of things and servitudes* (1993) 148.

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In Roman-Dutch law and South African law, some of the universal modes of derivative acquisition of ownership allowed transfer of ownership without the owner of the estate willing/intending such transfer to take place. For instance, in the context of universal derivative acquisition of ownership by way of marriage in community of property, Carey Miller identifies that:

> "[E]ach spouse acquires ipso jure an undivided half-share in the joint estate and acquisition, although derivative, *is not dependent upon any act of will or co-operatio*."[148] (Own emphasis added)

In addition, sequestration and liquidation were also regarded as modes of universal derivative acquisition of ownership where the estate of the insolvent person or entity would vest in an appointed curator or liquidator in terms of statutory provisions coupled with a court order irrespective of the will of the owner.[149] This aspect of these two modes of universal derivative acquisition is particularly interesting given what was found earlier regarding the core distinction between the original category of ownership acquisition and the derivative category of ownership acquisition.[150] As found earlier, original acquisition takes place by operation of law independent of the will or cooperation of the predecessor in title, whereas derivative acquisition takes place with the will and cooperation of the predecessor in title. Therefore, it would seem that the above universal derivative modes of acquisition in fact blurs the line between what is in modern times regarded as derivative acquisition on the one hand and original acquisition on the other hand. Although they are categorised as derivative modes, they come about by operation of law and without the will or cooperation of the predecessor in title. What these modes arguably also make apparent is that the requirement of cooperation on the part of the predecessor in title is not always followed strictly in the context of derivative acquisition, in particular under universal derivative acquisition. In other words, ownership over an estate may be transferred from one person or entity to another without the will of the predecessor. However, this phenomena of the relaxation

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[148] Carey Miller DL *The acquisition and protection of ownership* (1986) 117.

[149] Carey Miller DL *The acquisition and protection of ownership* (1986) 117; Van der Merwe CG *Sakereg* 2 ed (1989) 289; Van der Merwe CG & De Waal MJ *The law of things and servitudes* (1993) 148. For an overview of the insolvency principles in this regard, see section 20(1)(d) of the Insolvency Act. See also *Sassoon Confirming & Acceptance Co (Pty) Ltd v Barclays National Bank Ltd* 1974 (1) SA 641 (A) 647. See further De Wet JC & Van Wyk AH *De Wet on Yeats kontraktereg en handelsreg* 4 ed (1978) 436-439.

[150] See section 3 2 2 1 above.

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of the requirement of the will of the predecessor in title seems to be limited to modes of universal derivative acquisition where it is the ownership over an entire estate that is transferred. Relaxation of the requirement of the will of the predecessor in title does not feature in the context of particular derivative acquisition of ownership, which deals with the transfer of a particular or single asset from one estate to another. Since the defence of estoppel is normally raised against a claim to recover a particular thing and not an entire estate, it may be more plausible to reflect on particular derivative acquisition of ownership rather than universal derivative acquisition when assessing whether estoppel could potentially result in transfer of ownership. Consequently, the discussion of derivative acquisition that follows will specifically refer to particular derivative acquisition of ownership and not universal acquisition of ownership.

Particular derivative acquisition of ownership refers to the transfer of ownership or the passing of ownership over a single thing and is characterised by the cooperation of both the current owner (transferor) and the owner to be (transferee) in the process of transfer.[151] Evidently, the cooperation of both parties in the context of particular derivative acquisition of ownership is regarded as an essential characteristic of this mode of acquisition. For purposes of derivative acquisition of ownership this essential characteristic of cooperation is given content to by the general requirements for the valid transfer of ownership over movable and immovable property.[152] These are: (i) that the property must be *res in commercio*, meaning that the property should be susceptible to private ownership;[153] (ii) that the transferor and the transferee must have

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[151] Carey Miller DL *The acquisition and protection of ownership* (1986) 118; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 389; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 519.

[152] These requirements are accepted as the generic requirements for valid transfer of ownership by way of the derivative mode of acquisition. In this regard, see Carey Miller DL *The acquisition and protection of ownership* (1986) 118; Van der Merwe CG *Sakereg* 2 ed (1989) 301-302; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 389; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 520-525; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 209. However, it is trite that the real agreement and the occurrence of *traditio* (delivery or registration), constitute the primary requirements for a valid transfer of ownership. The importance of the requirement of *animus* on the part of both the transferor and transferee in the context of derivative acquisition was reiterated in *Trust Bank van Afrika v Western Bank & Andere* 1978 (4) SA 281 (A) 302.

[153] This means that the nature of the property must be as such that it can be held in private ownership. See Voet 41.1.35: Full citation Voet J *Commentarius ad Pandectas* (1829) translated by Gane P *Commentary on the Pandect* (1955-1958). See also Van der Merwe CG *Sakereg* 2 ed (1989) 301; Van

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the capacity to transfer and acquire ownership respectively;[154] (iii) that the transferee and the transferor must have the intention to transfer ownership (*animus transferendi dominii*) and acquire ownership (*animus accipiendi dominii*) respectively, also known as the real agreement;[155] (iv) a form of conveyancing (delivery or registration);[156] (v) the payment of an agreed-upon purchase price;[157] and, in some instances; (vi) also

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der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 521; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 209.

[154] Voet 41.1.35; Carey Miller DL *The acquisition and protection of ownership* (1986) 119-120; Van der Merwe CG *Sakereg* 2 ed (1989) 302; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 390; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 521; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 209. The capacity to transfer and receive ownership refers to the legal capacity of the transferor and transferee and is therefore an issue regulated by the law of persons. Legal capacity concerns the ability of a person or entity to perform legal acts and is generally not present when dealing with minors and persons regarded as mentally unfit. For more on the question of capacity, see Himonga C "Persons and family" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 145-402 145-146; Cronje DSP & Heaton J *The South African law of persons* 4 ed (2012) 35-37.

[155] Voet 41.1.35; D 44.7.55; Carey Miller DL *The acquisition and protection of ownership* (1986) 120; Van der Merwe CG *Sakereg* 2 ed (1989) 302; Carey Miller DL "Transfer of ownership" in Zimmermann R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 727-758 734-735; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 391-396; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 521; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 209. See further *Commissioner of Customs and Excise v Randles Bros and Hudson Ltd* 1941 AD 369 411; *Trust Bank van Africa Bpk v Western Bank Bpk* 1978 (4) SA 281 (A) 301; *Air-Kel (Edms) Bpk h/a Merkel Motors v Bodenstein* 1980 (3) SA 917 (A) 923-924*; Concor Construction (Cape) (Pty) Ltd v Santambank Ltd* 1993 (3) SA 930 (A) 933-934*; Dreyer and Another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) 555-558.

[156] Carey Miller DL *The acquisition and protection of ownership* (1986) 141; Van der Merwe CG *Sakereg* 2 ed (1989) 305; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 522; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 209.

[157] This also includes the payment of the purchase price in terms of a credit agreement. See *Laing v SA Milling Co Ltd* 1921 AD 387 387; *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton* 1973 (3) SA 685 (A) 694. See also Voet 41.1.15; Carey Miller DL *The acquisition and protection of ownership* (1986) 135; Van der Merwe CG *Sakereg* 2 ed (1989) 304; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 395; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 521; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 209. However, it must be noted that this requirement of payment does not apply to the transfer of immovable property. Carey Miller and Pope explain that where all the formalities regarding transfer of land has been complied with, the Registrar of Deeds will allow transfer regardless of whether payment has been secured, since payment is an issue that the

the existence of an underlying agreement that gives rise to transfer.[158] In addition, the *nemo plus iuris tranfere potest quam ipse habet* precept underlies acquisition of rights in property and by implication ownership. The precept translates that no one can transfer more rights than what such person has.[159] This underlying precept ensures that only the holder of ownership or those that have authority to transfer ownership would be able to transfer this right validly. All these requirements are commonly accepted to constitute the general prerequisites for the valid transfer of ownership.[160] However, the existence of a valid real agreement and the subsequent physical act of transfer (conveyancing in the form of registration or delivery) have been singled out as constituting the primary (or essential) requirements of transfer. This is because these requirements establish and publicise the essential characteristic of derivative acquisition, namely cooperation between the transferor and transferee to transfer ownership.

If a possible new mode of acquisition by way of estoppel is categorised as a derivative mode of acquisition it would need to comply with these general requirements of transfer. In other words, the circumstances that traditionally give rise to a successful estoppel defence, would have to meet the above-mentioned requirements. Generally, the requirements, that the property must qualify as *res in commercio*, that the transferor (the fraudulent seller) and the transferee (the *bona fide* purchaser) have the capacity

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parties must settle between each other. See Carey Miller DL & Pope A *Land title in South Africa* (2000) 52.

[158] *Britz v De Wet* 1965 (2) SA 131 (O) 134; Van der Merwe CG *Sakereg* 2 ed (1989) 303; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 522; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 209. The purists' formulation of the abstract system of transfer of ownership that has been accepted in South African law does not require the validity of an underlying agreement as a requirement for valid transfer of property. See section 3 3 3 below for a discussion of the abstract system of transfer that operates in South African law.

[159] *Glatthaar v Hussan* 1912 TPD 322 322. See further Van der Merwe CG *Sakereg* 2 ed (1989) 301; Sonnekus JC "Bona fide-verkryging vir waarde en estoppel" (1999) 62 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 463 465; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 85.

[160] Carey Miller DL *The acquisition and protection of ownership* (1986) 118; Van der Merwe CG *Sakereg* 2 ed (1989) 301-302; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 390; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 520-525; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 209.

to transfer ownership and acquire ownership, respectively and that an underlying agreement must exist, would not be in issue in the context that would give rise to a successful estoppel defence. This is because these are prerequisites for commercial transactions including the sale of property.

Furthermore, the circumstances that give rise to a successful estoppel defence involves a sale by a non-owner without authority to alienate the property to a *bona fide* purchaser in the situation where the true owner created the negligent impression that the non-owner seller at the least had the authority to dispose of the property. If it is accepted that the non-owner seller is the transferor, the assessment cannot reach the stage of determining whether a valid real agreement was entered into since there would be non-compliance with the principle of *nemo plus iuris tranfere potest quam ipse habet*, which implies that nobody can transfer more rights than they have. Since the non-owner seller had no rights and no authority to dispose of the property – in the circumstances of estoppel – the transfer would be invalid.[161] Interestingly, Van der Merwe does not regard the above as problematic. Van der Merwe's submission of a so-called "realistic approach" to the consequences of a successful plea of estoppel, is the recognition that ownership in fact passes by way of derivative acquisition from the fraudulent seller to the *bona fide* purchaser.[162] In particular, he places the focus on the transaction between the fraudulent seller who factually had no ownership or authority to dispose of the property and the estoppel raiser who *bona fide* purchased the property from the seller. He submits that the recognition of a new mode of derivative acquisition in this context should allow the fraudulent seller with no right of ownership and with no right of disposal to pass ownership in the property to the purchaser. Van der Merwe's submission would mean that the particular circumstances that would give rise to a successful estoppel defence, should create an exception to the *nemo plus iuris* precept. Since the fraudulent seller had no rights, this principle would have the result that the seller cannot transfer ownership. However, due to the exception argued for, in this very limited instance where a purchaser could prove all the requirements of estoppel, the right to alienate is ascribed to the fraudulent seller.

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[161] Sonnekus JC "Eienaars en ander reghebbendes mag ervaar dat swye nie altyd goud werd is nie" 2013 *Tydskrif vir die Suid Afrikaanse Reg* 326 334-335.

[162] Van der Merwe CG *Sakereg* 2 ed (1989) 373; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 259.

This suggestion made by Van der Merwe accords with the statement of estoppel as explained in the previous chapter.[163] The function of estoppel is to prevent the plaintiff from denying the authority of the seller or the ownership of the seller, depending on the specific representation made. To do this, the representation that was made by the plaintiff is accepted as the true state of affairs and any evidence to the contrary is not considered by the court. Consequently, the effect of estoppel is to uphold the fiction that the seller had the authority to dispose, between the plaintiff and the purchaser as to the truth for legal purposes. As a result, it is maintained that the seller had the right of ownership, which means that the seller could transfer the rights to the *bona fide* purchaser. From a theoretical point of view, it seems that the exception to the *nemo plus iuris* rule that Van der Merwe argues for in the form of a new mode of derivative acquisition, which will allow the seller to have the rights to transfer, is in my view supported by the statement of estoppel and its effect. If this approach is tenable the *nemo plus iuris* precept should not hinder recognising that valid transfer of ownership can take place in the context of estoppel between the seller and the purchaser under this new mode, if the essential requirements of transfer, namely the real agreement and conveyancing are also met.

The requirement that a valid real agreement must be concluded constitutes the subjective or mental element of transfer, and the requirement of conveyancing represents the objective or physical element of transfer.[164] Since these are regarded as the core requirements for valid transfer to take place, these will be explored in more detail below. It will also be considered whether, in the circumstances that would give rise to a successful estoppel defence, these elements are present since, without these, the argument cannot be made that estoppel could ever qualify as a mode of derivative acquisition of ownership.

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[163] See chapter 2, section 2 3 2 above.

[164] *Trust Bank van Afrika v Western Bank & Andere* 1978 (4) SA 281 (A) 302; Carey Miller DL *The acquisition and protection of ownership* (1986) 121; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 392; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 525; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 191.

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3 3 2 The real agreement

The requirement that a real agreement must exist at the time of the act of transfer is both theoretical and factual in nature. Theoretically, the real agreement requires a very particular system of transfer to find application in South African property law.[165] Generally, two distinct systems of transfer exist, namely the abstract system and the causal system of transfer.[166] A prerequisite for valid transfer under the causal system is the existence of an *iusta causa* that is valid. An *iusta causa* refers to an underlying agreement that gives rise to the transfer, usually in the form of a valid contract of sale.[167] In this regard, the validity of the transfer is dependent on the validity of the contract. Therefore, an existing and valid *causa* is often referred to as a *sina qua non* of a valid transfer of ownership and constitutes an essential requirement for such transfer.[168] In the event of any contractual requirements or formalities not being complied with (the contract being voidable or void), the contract and the subsequent transfer will be null and void, notwithstanding compliance with the conveyancing requirement.[169] Once the contract has been properly executed to form a valid *causa*

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[165] Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 210.

[166] Carey Miller DL *The acquisition and protection of ownership* (1986) 123; Van der Merwe CG *Sakereg* 2 ed (1989) 305; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 392; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 522; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 210; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 87-89.

[167] Carey Miller DL *The acquisition and protection of ownership* (1986) 124; Van der Merwe CG *Sakereg* 2 ed (1989) 305; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 392-394; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 522; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 210. Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 88.

[168] Carey Miller DL *The acquisition and protection of ownership* (1986) 130; Van der Merwe CG *Sakereg* 2 ed (1989) 305; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 392; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 522; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 210; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 87-89.

[169] *Klerck NO v Van Zyl & Maritz NO and Related Cases* 1989 (4) SA 263 (SE) 273; *Rasi v Madaza* 2001 (1) All SA 498 (TK) 511. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 125; Van der Merwe CG *Sakereg* 2 ed (1989) 305-306; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 392; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of*

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ownership passes to the transferee since the existence of a valid *iusta causa* is sufficient to transfer ownership.[170]

The requirements for a valid transfer in terms of the abstract system of transfer are different from that of the causal system of transfer. The abstract system of transfer differentiates between the *causa* that gives rise to the transfer of ownership and the actual transfer of ownership.[171] Actual transfer in terms of the abstract system requires two legally relevant events to take place for ownership to pass, namely (i) a valid real agreement and (ii) a recognised form of conveyancing.[172] A valid real agreement consists of the actual intention of the transferor to transfer ownership to the transferee and the clear intention of the transferee to accept transfer of ownership from the transferor.[173] This clear intention forming the real agreement must be present at the moment of transfer.[174] In practice, the transferor and the transferee would usually conclude a contract of sale (*iusta causa*) to codify the necessary intention to transfer and receive transfer, similar to the causal system. Yet the general rule, in terms of the abstract system of transfer is that the validity of the contract of sale (*iusta causa*) does not impact on the validity of the real agreement.[175] If the contract is found to be

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South Africa Vol 27 Part 2 2 ed (2014) para 210. For the general principles regarding non-compliance with the formal requirements of a contractual agreement, see Hutchinson D & Du Bois F "Contracts in general" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 733-887 736-789; Hutchison D, Pretorius C & Du Plessis JE *The law of contract in South Africa* (2017) 163-209.

[170] For example in French law the causal system of transfer determines the requirements for valid transfer of ownership. See Hinterregger M & Van Vliet L "Transfer" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 783-909 788-789, 891.

[171] Van der Merwe CG *Sakereg* 2 ed (1989) 305; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 392; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 522; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 210.

[172] Carey Miller DL *The acquisition and protection of ownership* (1986) 124-125; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 392.

[173] Carey Miller DL *The acquisition and protection of ownership* (1986) 130; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 392; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 522; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 212.

[174] *Weeks & Another v Amalgamated Agencies Ltd* 1920 AD 218 218; *Ex parte Smith* 1956 (1) SA 252 (SR) 254. See also Van der Merwe CG *Sakereg* 2 ed (1989) 303.

[175] The existence of a real agreement is a question that is determined on the facts of each case. Whether the parties entered into a valid *causa* for the transfer of ownership usually constitutes one of the factors that the court will consider when determining whether a valid real agreement was reached. Van der

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defective (voidable or void), the real agreement will not be defective as long as both parties had the required intention to transfer and receive ownership, respectively.[176] Therefore, the abstract theory of transfer focusses on the validity of the real agreement rather than the validity of the underlying contractual agreement. Interestingly, the contract together with the circumstances that gave rise to the transfer can in some instances influence the validity of the real agreement, specifically where the reasons for the contract being void relates to the intention to transfer or reasons of public policy.[177] In this regard, the real agreement will be vitiated: (i) in the circumstances where the transferor was induced by undue influence to transfer the property;[178] (ii) where fraudulent representation or mistake vitiates consent on the part of the transferor;[179] and (iii) where the contract was concluded for illegal purposes or the

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Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 212. For the decisive role the real agreement plays in establishing valid transfer, see *Commissioner of Customs and Excise v Randles Bros and Hudson Ltd* 1941 AD 369 369; *Trust Bank van Africa Bpk v Western Bank Bpk* 1978 (4) SA 281 (A) 301-302. See further Van der Merwe CG *Sakereg* 2 ed (1989) 310; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 189; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 211. For earlier cases in which the real agreement was regarded as the requirement for transfer, see *Wolf v Richards* 1884 (3) HCG 102 116; *Luca's Trustee v Ismail and Amod* 1905 TS 239 239.

[176] Carey Miller DL *The acquisition and protection of ownership* (1986) 133; Van der Merwe CG *Sakereg* 2 ed (1989) 306; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 392; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 523; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 210.

[177] *Legator Mckenna Inc v Shea* 2010 (1) SA 35 (SCA) para 22. See also Van der Merwe CG *Sakereg* 2 ed (1989) 312; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 524; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 212; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 93.

[178] *Preller v Jordaan* 1956 (1) SA 483 (A) 496; *Nedbank Ltd v Mendelow* 2013 (6) SA 130 (SCA) para 14. See also Van der Merwe CG *Sakereg* 2 ed (1989) 312; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 524; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 212; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 93.

[179] *Dalrymple, Frank & Feinstein v Friedman & Another* 1954 (4) SA 649 (W) 664; *Nedbank Ltd v Mendelow* 2013 (6) SA 130 (SCA) para 14. See also Van der Merwe CG *Sakereg* 2 ed (1989) 312; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 524; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol

parties failed to comply with applicable statutory requirements.[180] Where any of the above circumstances are present, the real agreement will be defective and ownership will not pass to the transferee, since these circumstances directly affect the intention of the parties or justifies nullifying the transfer due to public policy.

A real agreement will be valid where the intention to pass ownership and to receive ownership can be deduced from the surrounding circumstances. In this way, the existence of a real agreement and therefore subjective intention on the part of both the transferor and the transferee is a question that is determined factually. The intention to transfer and to accept transfer must be the actual intention as inferred by the circumstances of the case.[181] The existence of an underlying agreement would often be considered together with other relevant circumstances to determine whether a valid real agreement came into existence.[182]

Accordingly, ownership will transfer only once a valid real agreement exist together with compliance with the conveyancing requirement, while the validity of the underlying agreement generally has no effect on the validity of the transfer. The importance of the real agreement in the passing of ownership places the will of the parties at the forefront of derivative acquisition, which is to bring about the specific juristic act of transferring and receiving ownership.

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27 Part 2 2 ed (2014) para 212; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 93.

[180] Examples of statutory measures that prescribe additional requirements that must be complied with before transfer can occur are: the Alienation of Land Act 68 of 1981 and the Credit Agreements Act 75 of 1980. See also Carey Miller DL *The acquisition and protection of ownership* (1986) 132; Van der Merwe CG *Sakereg* 2 ed (1989) 313; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 524; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 212; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 92-93. See further *Dalrymple, Frank & Feinstein v Friedman & Another* 1954 (4) SA 649 (W) 664; *McGaili v Menezes* 1971 (2) SA 12 (C) 15; *Nedbank Ltd v Mendelow* 2013 (6) SA 130 (SCA) para 12.

[181] Carey Miller DL *The acquisition and protection of ownership* (1986) 123, 308.

[182] *Bank Windhoek Bpk v Rajie* 1994 (1) SA 115 (A) 141; *Dreyer v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) paras 19, 22, 23. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 123; Van der Merwe CG *Sakereg* 2 ed (1989) 312; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 393; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 524; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 212.

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When considering whether there could potentially be a valid real agreement, for purposes of transfer of ownership in the context of estoppel, the true intention of both the fraudulent seller and the *bona fide* purchaser must be considered. The focus falls on the fraudulent seller's intention and not that of the owner, since it was shown previously that it is the seller and not the owner who is argued to have passed ownership to the purchaser, if it is accepted that the estoppel scenario creates an exception to the *nemo plus iuris* principle. Since the *bona fide* purchaser reasonably believed that the seller had the authority to transfer ownership and relied on this to acquire ownership, as stipulated by the requirements of estoppel, it is highly likely that the purchaser would have the requisite intention.[183] However, whether the *fraudulent seller* truly intended to transfer ownership is questionable, since the seller in the estoppel scenario usually sells the property fraudulently, meaning with the knowledge that she does not have the rights to transfer and with the intention to deceive the purchaser. Consequently, the intention on the part of the fraudulent seller is never to transfer ownership. It is rather to act as if she intends to transfer ownership based on the representation created by the owner. The intention to transfer ownership expressed to the purchaser is merely a façade to hide the true subjective intention of the seller, which is to deceive the purchaser. This raises the question of whether the façade of intention to transfer on the part of the seller that can be established objectively, is sufficient in our law to transfer ownership.

As mentioned above, fraudulent representation not only vitiates an existing underlying agreement such as a contract of sale, it also can potentially vitiates the real agreement. Notably, in *Mvusi v Mvusi*[184] it was held that where the transferor or transferee convey property with the knowledge that they do not have the requisite authority or rights to transfer, the required intention to transfer that makes up the real agreement cannot be said to be present.[185] It cannot be said that the fraudulent seller in the estoppel context has the true intention to transfer ownership since she usually knows that she does not have authority or rights to transfer ownership to the purchaser,

[183] See chapter 2, section 2 3 2 above for a brief overview of the requirements of estoppel by representation.

[184] 1995 (4) SA 994 (T).

[185] *Mvusi v Mvusi* 1995 (4) SA 994 (T) 1006. See further Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 212; Van der Merwe CG & Pienaar JM "The law of property" 1995 *Annual Survey of South African Law* 293-294.

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albeit creating the objective façade that she does. Therefore, there is no real agreement.[186] The reason why the acquisition of ownership as a consequence of estoppel would not be derivative seems to be premised on the absence of a valid real agreement.[187] Whether the requisite intention to establish a real agreement between the fraudulent seller and the *bona fide* purchaser in the context of estoppel could be constructed, meaning be an implied intention rather than actual intention, has been considered by Carey Miller,[188] and recently also by Harms DP in the controversial *Oriental Products* case.[189] Although their respective assessments focus on the owner's intention and not on that of the fraudulent seller, their reasoning regarding the possibility of accepting implied consent for purposes of establishing a real agreement in my view can be applied in the context of Van der Merwe's exception. Where the exception to the *nemo plus juris maxim* as explained earlier allows the focus to fall on the fraudulent seller and his intention, rather than the owner.

Carey Miller argues that in the context of estoppel, the transferor as the owner cannot be said to have had the intention to transfer ownership.[190] He submits that constructive intention, meaning intention that is constructed or created by law, irrespective of the true intention or facts of the case, is not sufficient for ownership to pass. He submits that the intention required for a real agreement is the actual subjective intention and not an intention constructed objectively and ascribed to the transferor.[191] However, it should be noted that objective factors are considered to

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[186] See chapter 2, section 2 3 2 above.

[187] Carey Miller DL *The acquisition and protection of ownership* (1986) 309; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 350-351; Sonnekus JC "Eienaars en ander reghebbendes mag ervaar dat swye nie altyd goud werd is nie" 2013 *Tydskrif vir die Suid Afrikaanse Reg* 326 334.

[188] Carey Miller DL *The acquisition and protection of ownership* (1986) 308-309.

[189] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 31.

[190] Carey Miller DL *The acquisition and protection of ownership* (1986) 308-309.

[191] Although academic commentary on whether actual or real intention is a strict requirement under the derivative category of acquisition of ownership is rather scant, the submission of Carey Miller that "[o]wnership passes on what the real agreement actually is, rather than what it purports to be in outward form", however, supports the notion that a constructive intention is not sufficient. See Carey Miller DL *The acquisition and protection of ownership* (1986) 130. Moreover, the manner in which the law deals with simulated agreements indicates that when real rights are created by way of agreement (derivative acquisition) it is the actual intention of the parties that is determined and given effect to and not the

determine the subjective intention as indicated earlier. On the other hand, the recent dicta of the Supreme Court of Appeal suggest otherwise. In the *Oriental Products* case Harms DP stated that:

> "[The fact that] estoppel may only be used as a defence is part of English law and since the Roman-Dutch roots of the doctrine are said to be found in the *exceptio doli*, a legal defence rather than an action, the same may be said to apply in our law. Whether this formalistic approach can still be justified need not be considered in this case even though the effect of the successful reliance on estoppel has the effect that the appellant may not deny that the first respondent holds the unassailable title in the property or that the deeds registry entry is correct. This means that should the latter wish to dispose of the property the appellant would not be able to interfere. If this means that ownership *passed by* virtue of estoppel so be it. *The better view would be that the underlying act of transfer is deemed to have been validly executed.*"[192] (Own emphasis added)

Harms DP's use of terminology such as "ownership passes by virtue of estoppel" and "the underlying act of transfer" seems to suggest that he is satisfied that the derivative mode of acquisition should apply to the estoppel scenario. Moreover, the court suggested that if the "underlying act of transfer" is "deemed to be validly executed" there should be compliance with the essential requirements of the derivative mode of acquisition, which includes the real agreement.[193] This means that the law would then construct intention to transfer and ascribe it to the seller, because actual intention is not present. In other words, the intention would be ascribed to the seller by operation of law. Whether it is wise to ascribe intention by operation of law under the derivative mode becomes questionable, since such an understanding of particular derivative acquisition would possibly blur the line between original acquisition and derivative acquisition. As shown in the previous section dealing with original acquisition of ownership, the core distinction between the original category and derivative category is that in terms of the original category, ownership vests by operation of law, while in

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façade the parties created. In this regard, see *Zandberg v Van Zyl* 1920 AD 302 309; *Mannesmann Engineering v LTA Construction Ltd* 1972 (3) SA 773 (W) 775.

[192] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 31.

[193] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 31.

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terms of the derivative category of acquisition it vests by cooperation between the parties, specifically referring to the intention to pass and receive ownership.[194]

The above dictum of Harms DP suggesting that in the estoppel scenario the underlying act of transfer is deemed to have been validly executed, in other words in terms of derivative acquisition, seems to not be in line with the principles of property law regarding the acquisition of ownership in South African law. Therefore, the suggestion that an intention should rather be constructed creates the impression that estoppel is an original mode, rather than as a derivative mode of ownership acquisition, since it presumably occurs *ipso iure* in terms of constructive intention.

The above analysis has purportedly indicated that it is unlikely that estoppel would fit the mould of the derivative category since compliance with the real agreement may potentially be problematic, even in terms of the so-called constructive intention. The part below nevertheless explores the conveyancing requirement to determine if it perhaps also supports the above finding that estoppel perhaps cannot be classified as a derivative mode.

3 3 3 The conveyancing requirement

Once a real agreement has been established the court will determine whether there was an act of transfer, also known as a form of conveyancing, which constitutes the objective/physical element of a valid transfer. The objective element is the second essential requirement for derivative acquisition of ownership. When dealing with movable property, delivery (*traditio*) is required and when dealing with immovable property, registration in the name of the transferee is required for there to be compliance with this requirement for transfer of ownership.[195] The rationale underlying the requirement of the objective act of transfer is an important principle underlying property law, in particular the acquisition of rights, namely the publicity principle. The publicity principle in the context of ownership acquisition entails a public act that

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[194] See section 3 2 1 above.

[195] Carey Miller DL *The acquisition and protection of ownership* (1986) 141; Van der Merwe CG *Sakereg* 2 ed (1989) 300; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 389; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 525; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 219.

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indicates the parties' intention to transfer ownership.[196] The necessity for publicity in this context is found in the nature of real rights. Real rights, such as ownership, are enforceable against the entire world.[197] This has the effect that an owner can enforce her rights against third parties irrespective of their good faith.[198] Accordingly, third parties should be able to ascertain the existence and content of such real rights, and the identity of the holder the rights. Publicity allows third parties access to this information, which they would otherwise not have been privy to. In the case of movables, delivery puts the property in the control of the transferee and places the transferee in the position to exercise her ownership entitlements openly for the entire world to see. Physical delivery is known as actual delivery (*transfer vera*).[199] By way of the actual delivery of the movable property, the physical control over the property is given to the transferee and the message that the transferee is now the owner of the

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[196] *Policansky Brothers v Hanau* 1908 (25) SC 670 673. See also Van der Merwe CG *Sakereg* 2 ed (1989) 300; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 395; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 520; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 191; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 208; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 93.

[197] Van der Merwe CG *Sakereg* 2 ed (1989) 60; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 90; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 428; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 60.

[198] Van der Merwe CG *Sakereg* 2 ed (1989) 60; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 90; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 410; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 10. However, the doctrine of notice constitutes an exception to the rule that the owner can enforce her ownership right against third parties with weaker rights in the circumstances where the acquirer of the real right knew of the existence of a potential real right (personal right). In these circumstances, the potential real right (personal right) will trump the acquired real right. For a discussion of the doctrine of notice, see *Reynders v Rand Bank Bp*k 1978 (2) SA 630 (T) 641; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 95-99.

[199] Voet 41 1 34. Carey Miller DL *The acquisition and protection of ownership* (1986) 142; Van der Merwe CG *Sakereg* 2 ed (1989) 314; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 396; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 525; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 198; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 219. See also *Marcus v Stamper & Zoutendijk* 1910 AD 58 58; *Ex parte Smith* 1956 (1) SA 252 (SR) 254.

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property is sent to the world. In certain circumstances, the actual delivery of the movable property may be impossible, impractical or inappropriate.[200] In these circumstances, the transferor and transferee can make use of constructive delivery (*traditio ficta*).[201] Constructive delivery allows for compliance with the requirement of delivery of transfer in the absence of the physical handing over of the movable property as long as the transferee is placed in a position to exercise physical control over the property.[202] Once delivery (*vera* or *ficta*) has taken place, the law attaches to this factual circumstance a rebuttable presumption that the transferee is the owner of the property.

When considering a successful plea of estoppel over movable property, the circumstances indicate that the seller delivered the movable property to the *bona fide* purchaser since the plaintiff as the owner is instituting the *rei vindicatio* against the purchaser as the possessor of the property. However, as indicated above, delivery as a form of conveyancing constitutes the physical expression of the intention to transfer ownership to the purchaser, where such intention is publicised. Considering the argument that it is questionable whether in the context of estoppel there could ever be the intention to transfer ownership on the part of the seller to establish the real agreement, it can be argued here that although physical delivery occurred, such delivery does not, subjectively speaking, constitute a physical expression of the required real agreement. Yet, objectively speaking, it does create the presumption to

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[200] Van der Merwe CG *Sakereg* 2 ed (1989) 315; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 397; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 525; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 198; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 219.

[201] Voet 41 1 34; Carey Miller DL *The acquisition and protection of ownership* (1986) 143; Van der Merwe CG *Sakereg* 2 ed (1989) 314; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 219.

[202] Carey Miller DL *The acquisition and protection of ownership* (1986) 143; Van der Merwe CG *Sakereg* 2 ed (1989) 315. A closed list of acceptable methods of constructive delivery exists in South African law. Accordingly, parties are not at liberty to decide per agreement on a method of delivery outside those accepted by the law. See Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 198. However, a number of scholars are of the opinion that whether new methods of constructive delivery may still be developed in South African law remains an unsettled issue. Accordingly, the possibility still exists. See Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 525; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's TheILaw of property* 6 ed (2019) 181.

the world that the receiver of possession is the owner thereof in accordance with the publicity principle and therefore meets the objective standard of the conveyancing requirement. Notably, the latest authority on the consequences of estoppel, namely *Oriental Products*, further strengthens the presumption of ownership in favour of the successful estoppel raiser, specifically in the context of immovable property.[203]

The objective act of transfer or conveyancing of immovable property is registration.[204] Registration occurs in the Deeds Office of the area within which the land falls as stipulated by the second annexure to the Deeds Registries Act.[205] The registration process involves an appointed Conveyancer, the Registrar of the Deeds Office and her Officials.[206] The process consists of careful examination of the deed and all its notes, the removal of the name of the transferor and the recording of the name of the transferee on the title deed and finally the signing of the deed by the Registrar, upon which the transferee's name forthwith reflects.[207] This process results in registration taking place at the moment when the Registrar affixes her signature on the deed.[208]

The effect of registration is that the real right created by the transfer process now establishes *prima facie* evidence that the holder of the real right as reflected in the deed is the owner of the immovable property, much like delivery establishes

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[203] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA).

[204] Carey Miller DL *The acquisition and protection of ownership* (1986) 164; Van der Merwe CG *Sakereg* 2 ed (1989) 333; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 402; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 534; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 227.

[205] The jurisdiction of the Deeds Office is determined by the second annexure to the Deeds Registries Act. See further Van der Merwe CG *Sakereg* 2 ed (1989) 337.

[206] Van der Merwe CG *Sakereg* 2 ed (1989) 338; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 229.

[207] For a discussion of the process of registration of immovable property see Van der Merwe CG *Sakereg* 2 ed (1989) 337-340; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 535-536.

[208] *Breytenbach v Van Wijk* 1923 AD 541 547; *Standard Bank van SA Bpk v Breitenbach* (1977) (1) SA 151 (T) 155-156; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 536; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 229.

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presumption of ownership in favour of the person receiving delivery.[209] The presumption of ownership over the immovable property created at registration can, however, be rebutted with appropriate evidence. In this regard, the South African registration system is negative and does not guarantee the accuracy of deeds registry entries.[210] This means that when *bona fide* third parties for value rely on an incorrect or outdated entry in a deed the law does not protect these third parties, unless gross negligence can be proven on the part of the state.[211] Scholars argue that the negative system of registration protects the position of the original holders of real rights rather than third parties relying on the entries recorded in the registry.[212] In this regard, the South African deeds registry system is a reformed negative registration system with publicity and certainty as its key objectives.[213] The negative nature of the South African deeds registry system ensures that as a point of departure the accuracy of the information reflected on the deed is not guaranteed by the state. However, due to the active and involved Registry Officers the South African registry system maintains a

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[209] Van der Merwe CG *Sakereg* 2 ed (1989) 340; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 230. *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) 582.

[210] *Knysna Hotel CC v Coetzee* 1998 (2) SA 743 (SCA) 753. See also Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 403; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 537; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 213; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 231.

[211] Van der Merwe CG *Sakereg* 2 ed (1989) 342; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 403; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 213; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 231.

[212] Van der Merwe CG *Sakereg* 2 ed (1989) 341; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 537; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 213; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 231. This is different from the positive registration system where the entries in the deeds registry are guaranteed as accurate. In terms of the positive registration system, when a *bona fide* third party for value relies on an entry in a deed that is inaccurate, the law protects her above the correct owner that should be registered. For an explanation of and examples of positive registration systems see chapter 4, sections 4 2 3 and 4 3 3.

[213] Van der Merwe CG *Sakereg* 2 ed (1989) 342. See also *Barclays Nasionale Bpk v Registrateur van Aktes Transvaal & 'n Ander* 1975 (4) SA 936 (T).

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high degree of accuracy of information.[214] The Supreme Court of Appeal in *Cape Explosive Works* expressed that:

> "We have a negative system of registration where the deeds registry does not necessarily reflect the true state of affairs and third parties cannot place absolute reliance thereon."[215]

Interestingly, it seems that where estoppel is successfully raised as a defence against the recovery of immovable property, an exception to this entitlement to rectify in accordance with the negative registration system exists. *Oriental Products*[216] illustrated that where estoppel is successfully raised against the *rei vindicatio* an order for the "rectification" of the deeds registry will not be made, meaning that the *bona fide* purchaser who successfully raised estoppel will remain registered as the owner of the immovable property. This means that in the limited circumstances in which an estoppel defence succeeds against the *rei vindicatio* concerning immovable property, the message that is portrayed in perpetuity to the world at large when the estoppel raiser remains registered is that the estoppel raiser has ownership over the property. This is identical to the message sent when movables remain in possession of the successful estoppel raiser. In both instances of movable and immovable property, the unsuccessful owner will also not be able to rebut the presumption of ownership created by the publicity principle at a later stage due to the *ne bis in idem* rule, which means that the owner cannot bring the same action on the same facts twice.[217] This has the implication that in terms of the publicity principle, third parties would likely be justified in relying on the physical control exercised by the successful estoppel raiser, where the property is movable and where the property is immovable reliance on the deeds registry entry would also be justified. This would be the case because the law approved of the state of affairs without in some or other way ensuring that third parties are warned about the reason why the estoppel raiser is registered as owner or in possession of the property as if the owner. Van der Merwe explains that it is in fact the publicity principle that justifies the effect of estoppel on the *rei vindicatio*, since it is the

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[214] Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 535-537-538; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 213.

[215] *Cape Explosive Works Ltd v Denel (Pty) Ltd and Others* 2001 (3) SA 569 (SCA) para 16.

[216] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA).

[217] See Van der Merwe CG *Sakereg* 2 ed (1989) 373.

impression created to the world at large that an owner is forced to give effect to when estoppel is successfully raised.[218]

Should both the mental and physical elements of transfer have been complied with together with the general requirements of derivative acquisition, ownership passes from the transferor to the transferee. It is said that the ownership acquired by the transferee under the derivative mode of acquisition is derived from the transferor's ownership.[219] In this regard, it is trite law that the transferee receives from the transferor the same ownership the transferor had, nothing more and nothing less. The ownership received by way of the derivative mode is acquired with all the burdens and benefits that existed over the property while the transferor was the owner.[220] The golden rule of property law being *nemo dat quod non habet* implies that nobody can give what he does not have. This is often employed to justify the inverse that transfer

[218] Van der Merwe CG *Sakereg* 2 ed (1989) 15; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 10.

[219] Van der Merwe CG *Sakereg* 2 ed (1989) 298; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 389; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 519; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 160; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 155.

[220] Van der Merwe CG *Sakereg* 2 ed (1989) 298; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 389. An argument can be made that this consequence only applies to immovable property. In this regard, the *mobilia non habent sequelam* maxim applies to movable property and causes any limited real rights that existed over the movable property to fall away. De Villiers in *Mutual Life Assurance Co v Hudson's Trustee* 1885 (3) SC 264 held:

> "In the absence of any allegation of negligence on the part of the applicants it appears to me clear that the order prayed for must be granted, and that the first mortgage passed in favour of the applicants must be admitted to rank as preferent. It is a claim upon the land itself, which differs in this respect from movables in regard to which the rule is *mobilia non habent sequelam*."

This dictum was later confirmed by the court in *Barclays Nasionale Bank Bpk v Registrateur van Aktes Transvaal en 'n Ander* 1975 (4) SA 936 (T) 941-942. However, it is commonly accepted that limited real rights that existed over the property at derivative acquisition of ownership continue to burden the property after the transfer of the ownership. See Van der Merwe CG *Sakereg* 2 ed (1989) 216; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 488; *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1000; Pienaar GJ "The effect of the original acquisition of ownership of immovable property" (2015) 18 *Potchefstroom Electronic Law Journal* 1480 1480.

of the benefits and burdens with the ownership takes place since the transferor gives what she has to the transferee.[221]

Accordingly, this would mean that if the circumstances that would give rise to a successful estoppel defence were recognised as a mode of derivative acquisition of ownership all burdens and benefits would transfer with ownership to the successful estoppel raiser. Since there seem to be no issue regarding loss of limited real rights, issues with regard to section 25(1) of the Constitution does not arise. It would arguably only be the loss of ownership as a result of transfer that would have resulted in potential section 25(1) issues if estoppel fitted the mould of derivative acquisition.

3 3 4 Preliminary observations

As shown above, it would seem that although the circumstances that would give rise to a successful estoppel defence, complies with the generic requirements for valid transfer as well as one of the essential requirements, namely delivery or registration, it arguably could never be recognised as a mode of derivative acquisition. This is because of the absence of a real agreement between the transferor and the transferee. With the real agreement constituting one of two essential requirements, the question of whether estoppel could result in transfer of ownership will have to be answered in the negative. Also, when considering whether the universal subcategory of derivative acquisition, which in certain circumstances allow for the acquisition of ownership without a real agreement, could constitute a better fit for estoppel as a derivative mode, the fact that estoppel concerns single assets rather than an entire estate makes this a difficult argument to make. Consequently, it is rather more appropriate to submit that estoppel cannot from a doctrinal point of view result in derivative acquisition of ownership.

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[221] *Glatthaar v Hussan* 1912 TPD 322 327. This property law principle is derived from the Roman maxim *nemo plus iuris tranfere potest quam ipse habet* that translates into nobody can transfer more rights than such person has. See further Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 390; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 521; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 160; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 85.

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With the preliminary observations above in mind, it is probably necessary to turn to some of the practical questions that come to mind when thinking about estoppel as a potential mode of original acquisition, rather than derivative acquisition for the reasons mentioned above. The part below will explore these practicalities.

3 4 Acquisition by way of estoppel

It is arguably important to briefly consider if estoppel were to be developed into a mode of original acquisition, how such acquisition would practically ensue. In this regard, the circumstances that would give rise to a successful estoppel defence and the consequent original acquisition of ownership are reflected in the requirements of estoppel. The requirements of estoppel are: that the owner must have made a negligent representation that induced another to reasonably rely on the representation to such person's detriment.[222]

As shown in the previous chapter, estoppel ordinarily operates only as a defence and not as a cause of action.[223] Although the Supreme Court in the *Oriental Products* case created some doubt as to the suitability of this principle, the doubt was removed when the same court handed down *Rossouw v Land and Agricultural Development Bank of South Africa*.[224] In *Rossouw* the court unequivocally held that estoppel is a defence and not a cause of action. This was confirmed when the court dismissed the respondents' claim that they acquired ownership over property by way of deemed transfer of ownership through estoppel. This case confirmed that estoppel as a defence has limitations since it cannot be relied upon as a cause of action. However, as submitted in chapter 2, this case does not exclude the possibility of a successful estoppel *defence* resulting in the acquisition of ownership in view of *Oriental Products*.[225] The implication of the limited function of estoppel as a defence is that the estoppel raiser may not in terms of the current application of estoppel approach the court for an order declaring that the owner is estopped from taking action against her or that she acquired ownership by way of estoppel. Estoppel only becomes available

[222] See chapter 2 above, section 2 3 2.

[223] See chapter 2 above, section 2 3 2, 2 4 6.

[224] 2013 JDR 2038 (SCA). See chapter 2 above, section 2 4 6 for a discussion of the *Rossouw* case.

[225] See chapter 2 above, section 2 4 5.

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to the *bona fide* purchaser when the owner first institutes a vindicatory claim against her. Only then would the *bona fide* purchaser have the opportunity to prove the requirements of estoppel in defence against the owner's *rei vindicatio* – and potentially acquire ownership if the requirements are met according to *Oriental Products*. This means that the purchaser who raises estoppel will only acquire ownership once the court confirms that she satisfies all the strict and onerous requirements of the defence by way of a court order.[226] The implication of this is that only if the owner who made the representation attempts to recover the property from the purchaser, will the purchaser have the opportunity to acquire ownership. In other words, if the owner never institutes court proceedings, the purchaser will arguably never have the opportunity to show that the circumstances of estoppel are present and can never acquire ownership based on estoppel, although the purchaser would be in possession of the property and act as if owner. Consequently, if it is accepted that *Oriental Products* indeed held that ownership results from a successful estoppel defence, acquisition by way of the defence of estoppel would be problematic for the reason mentioned above. The purchaser in the estoppel scenario should arguably have the same legal recourse at her disposal that persons who acquire ownership ordinarily have in terms of the recognised common law and statutory modes of acquisition of ownership. This position arguably highlights the limitation of estoppel, specifically it being limited to a defence, when considering how ownership would be acquired through the estoppel defence. It further raises the question whether estoppel as a defence could ever be apt and appropriate to have ownership acquisition consequences.

Considering the above, the proposal submitted in this regard is that clear development of the law should take place to ensure that the circumstances that would traditionally result in an estoppel succeeding are, instead, recognised as a self-standing original mode of acquisition of ownership. In other words, a new mode of original acquisition of ownership should arguably be recognised based on the requirements of estoppel. The submission is not that estoppel in its form as a defence should automatically result in acquisition of ownership. In other words, a court order confirming a successful estoppel defence would not, in my view, be enough for

[226] Carey Miller specifically highlights that a *bona fide* purchaser that finds herself in a situation which complies with the requirements of estoppel is in no position to approach the court for a declaratory order that she is owner or has a right to hold the property, since estoppel is a defence and not a cause of action. See Carey Miller DL *The acquisition and protection of ownership* (1986) 309.

ownership to be acquired by a successful estoppel raiser. Instead, the submission is that the circumstances that would traditionally have only provided a purchaser with the estoppel defence should now provide the purchaser with a new self-standing mode of acquisition. In other words, estoppel at common law should developed into a new self-standing mode of original acquisition, potentially under the name of *equitable acquisition*.[227] This would entail the current requirements of the estoppel defence

[227] It must be noted that there are other descriptions that have been submitted by scholars to describe the mode of acquisition that should develop in the context of estoppel. For instance, scholars such as Van der Merwe and Pope as well as Louw, respectively proposed the term *bona fide* acquisition. See Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 233-234; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 555. Louw also mentions another term, namely "eiendomsverkryging deur 'n derde wat ter goeie trou is" which can loosely be translated into English to *ownership acquired by a bona fide third party*. See Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 233. This description can be argued to be the same as the description *bona fide* acquisition. As a result, they will be dealt with as representing the same description. The difficulty that I have with this description is the undue emphasis it places on *bona fides* (or good faith) since *bona fides* only forms part of one of the requirements to succeed with a claim for the acquisition of ownership in these circumstances. There are many other requirements that could be argued should then also feature in the description of the new mode of acquisition if *bona fides* were to feature in the name. However, since it would result into a cumbersome description of the mode of acquisition if all the requirements were to be included in the name, it is perhaps more appropriate to avoid using any of the requirements in the description. In this regard, equitable acquisition does not describe a requirement, but rather encompasses the reason for all the requirements. Therefore, equitable acquisition can be argued to be more appropriate than the *bona fide acquisition* description. A further description that was pointed out by Louw in the same article is "eiendomsverkryging vanaf 'n nie-eienaar" which in English can loosely be translated into *acquisition of ownership from a non-owner*. Although this description is accurate in indicating that the purchaser acquires ownership from a non-owner who sold the property, it is arguably not an all together appropriate description in that the emphasis placed on *non-owner* can create the incorrect impression that the mode of acquisition covers all instances of sales of property by non-owners. This impression will be inaccurate since the circumstances when the new mode of acquisition would be available to the purchaser is narrower and more complex than the impression created by the description. Another description submitted by Louw, is "eiedomsverkryging deur estoppel" which can be translated into English as *ownership acquisition by way of estoppel* or *estoppel based ownership acquisition*. This description would have been apt in the event that estoppel as a defence resulted in ownership acquisition. However, the new mode of acquisition argued for in this dissertation consists of a completely new legal construct that, athough it would evolve from estoppel and transplant the estoppel defence's requirements, it is not to be confused with estoppel, especially because of the limitations of the doctrine. By moving away from the term estoppel, there is also a move away from the limitations that ordinarily come with it. It is therefore advisable that the description of the new mode of acquisition is void of any reference to estoppel. The term equitable acquisition is seemigly a more appropriate description, especially because in its broad sense it describes the essence of the mode of acquisition and all together eliminates direct association with the defence of estoppel.

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functioning as the requirements of the newly created original mode of acquisition with the court order confirming the requirements and the acquisition of ownership.

The consequence and benefit of such a clear development would be that a *bona fide* purchaser who can satisfy the court of the requirements of equitable acquisition, will not have to wait for a vindication case to be instituted before she can receive protection from the law. A *cause of action* will exist based on equitable acquisition and will immediately be available to such a party if she can prove the requirements of the new mode of acquisition, which evidently will coincide with the requirements of estoppel under its current application. It is submitted that if this approach is followed and estoppel is expressly and clearly developed into a mode of original acquisition of ownership, the *bona fide* purchaser would find herself in a position akin to that of an acquirer of ownership by way of prescription.[228]

The submission that the circumstances of estoppel should rather be recognised as requirements of a self-standing mode of acquisition under the name of equitable acquisition is arguably supported by the equitable nature of estoppel. Louw submits that equitable doctrines, like estoppel, have the potential to set in motion legal development to achieve equitable outcomes.[229] Accordingly, equitable doctrines, such as the defence of estoppel, have somewhat of a temporary role to play in that they illuminate where more appropriate principles must be developed by the courts or the legislator. Therefore, it might be appropriate to envisage that estoppel as a doctrine of equity by nature can result in the development of a legal rule, principle or mode of acquisition, such as equitable acquisition.[230]

Concerning the question as to the moment when ownership would be acquired by way of equitable acquisition it is submitted that ownership would be acquired *ipso iure* when the purchaser satisfies the requirements of equitable acquisition that would

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[228] For an overview of the principles of prescription see Van der Merwe CG *Sakereg* 2 ed (1989) 268-289; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 308-318; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 510-517; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 179-193.

[229] Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 220. See further chapter 5 above, section 5 3 2 1.

[230] Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 220.

be the same as the requirments of estoppel. In other words, ownership should arguably vest in the purchaser at satisfaction of the requirements, but should only become operative/operational when confirmed by a court order. This proposed approach is already followed when acquisition by way of prescription takes place. In this regard, sections 1 and 2(2) of the Prescription Act stipulate that the moment when the period of prescription expires, the possessor of the property acquires the ownership over the property.[231] This means that an acquirer of movable or immovable property by way of prescription acquires the property the moment when the requirements of prescription as set out in the Prescription Act are met. Therefore, the original owner's ownership is extinguished when ownership vests in the acquirer by way of prescription. However, the acquired ownership only becomes operative subsequent to the court confirming that the presumed acquirer indeed satisfied the requirements of prescription.[232] Persuant to the court being satisfied that the requirements of prescription are indeed complied with, it will make an order instructing the Registrar of Deeds to rectify the registry by removing the particulars of the original owner and replacing such particulars with that of the applicant (the acquirer by way of prescription) in terms of section 33 of the Act. Such order and the rectification by the Registrar of Deeds functions as a confirmation that ownership indeed vested at the time that the requirements of prescription were complied with. After registration is effected in the name of the acquirer by way of prescription, she will be allowed to exercise the full extent of her ownership entitlements. For example, she will be allowed to burden her property with real security rights or transfer ownership over her property to another.[233] It is my submission that equitable estoppel as a self-standing mode of original acquisition should operate in the same manner. This will allow the acquirer by way of equitable acquisition to approach the court and request that the registry be rectified to reflect her as owner, subsequent to showing that she can satisfy the requirements of equitable estoppel. It will also allow the acquirer by way of estoppel to refute a vindicatory action

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[231] See also Van der Merwe CG *Sakereg* 2 ed (1989) 288-289; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 192.

[232] Van der Merwe CG *Sakereg* 2 ed (1989) 288-289; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 192-193. See *Ex parte Glendale Sugar Millers (Pty) Ltd* 1973 (2) SA 653 (N) 658 in which it was held that an action for rectification can be brought either at common law or in terms of the designated section in the Act.

[233] Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019)192-193.

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instituted by the original owner by merely satisfying the court that the original owner lost ownership since she acquired ownership by way of equitable acquisition.

3 5 Concluding remarks

As set out in the introductory part, the aim of this chapter was to determine the most appropriate mode under which the estoppel scenario can be categorised if this scenario results in the acquisition of ownership. Furthermore, the chapter also purported to provide some suggestions as to how estoppel should be developed and when ownership should be held to have vested in the acquirer by way of estoppel. The observations and findings, which emanated from this chapter and which concerns these issues, will be dealt with in three parts.

The first part of the chapter, which dealt with the original category of ownership acquisition, clarified that the main concern scholars have with potentially categorising estoppel as an original mode of acquisition is the supposed effect it would have on any limited real rights that exist over property at the time such property is acquired in an original manner. This effect is believed to be that original acquisition of ownership ordinarily extinguishes all existing burdens (which includes limited real rights) over the property, at the time of acquisition. This idea stems from the fact that traditional property law textbooks ascribe this consequence to original modes of acquisition in their distinction between original and derivative modes of acquisition of ownership. The concern is whether this supposed effect of original modes of acquisition is constitutional in nature. In particular, the concern is that the extinction of existing limited real rights over property acquired by the operation of estoppel as a potential original mode of acquisition of ownership could result in an infringement of section 25(1), which guards against arbitrary deprivations of property.[234]

In an attempt to determine to what extent this consequence and other characteristics ascribed to original modes of acquisition are indeed inflexible characteristics that must be adhered to strictly when a new mode of acquisition, based on the estoppel construct is accepted, part one revealed some interesting findings. Apart from showing that the distinction between derivative and original acquisition of ownership in South Africa is not a correct representation of how the modes of

[234] See section 3 2 1 above.

acquisition were categorised in Roman and even Roman-Dutch law,[235] the chapter also demonstrated that the core characteristic of the original acquisition of ownership is that ownership is acquired by operation of law and by implication without the cooperation of any predecessor in title. It follows that a new mode of original acquisition can be recognised in South African law as long as the acquisition of ownership ensues by operation of law and is not due to an agreement between the predecessor and acquirer. Consequently, this means that if estoppel were to be classified as an original mode of acquisition of ownership it must strictly function *ipso iure*, which means that the original owner's cooperation (in particular her intention) in the matter is not relevant in deciding whether ownership is acquired. In this regard, part one of the chapter showed that estoppel by its very nature operates *ex lege* in that its requirements are objectively determined and completely independent of the original owner's will. Accordingly, it was established that at least based on this core characteristic of original modes of acquisition, it would not be problematic to fit estoppel into the mould of original acquisition of ownership.[236] However, the possibility that estoppel based acquisition as an original mode of acquisition may result in arbitrary deprivation of limited real rights, is still an obstacle to potentially categorising estoppel as an original mode of acquisition.

Interestingly, part one further revealed that the effect of original acquisition of ownership on limited real rights has not been settled in South African law, although it has generally been assumed that all limited real rights are extinguished on original acquisition of ownership. Yet, the analysis of the impact of the original acquisition of ownership on limited real rights over movables seems to indicate that this might not be so. The section on acquisition of ownership over movable property showed that acquisition of ownership over a movable by the operation of estoppel can generally not follow where a limited real right exists over the movable. This is since it is improbable that both the holder of the limited real right and the acquirer would be able to exercise physical control over the movable simultaneously. For the limited real right to continue burdening the property, the holder of the limited real right must not lose physical control over the property, while a potential acquirer of ownership over the same property will need to exercise physical control over the property for the acquisition of ownership by

[235] See section 3 1 above.

[236] See section 3 2 2 1 above.

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estoppel. It would seem that the impossibility of the holder and the acquirer to exercise simultaneous physical control is encapsulated in the maxim *mobilia non habent sequelam*. However, in the unlikely situation of a special notarial bond being registered over the movable property the submission is that the limited real rights continue to exist, since there is no impossibility of simultaneous physical control that would have otherwise caused the termination of the right. Furthermore, like the impossibility of simultaneous control being exercised over movable property, the chapter showed that it is more likely than not that other independent legal rules or principles cause limited real rights to terminate such as that the movable no longer exists since a new product has been created or due to the principle that you cannot have limited real rights in your own property. Accordingly, limited real rights would usually already be terminated before original acquisition over movable property occurs or be terminated after original acquisition due to the application of legal principles. It is therefore not original acquisition that *per se* causes the termination of limited real rights. It was shown that the mere fact of original acquisition of ownership, at least regarding movable things, do not in fact result in the extinction of limited real rights. Consequently, estoppel can be categorised as an original mode of acquisition of ownership. The concern that scholars raised regarding the potential unconstitutionality of loss of limited real rights in the original acquisition of ownership in the estoppel scenario is unfounded since it could arguably not arise or could be explain by the application of other legal rules or principles.[237]

In the case of immovable property, the analysis of arguments for and against the termination of limited real rights over immovable property in this context showed that it is more probable that limited real rights over immovable property are not extinguished on original acquisition of immovable property. Pienaar argues convincingly (contrary to the view expressed in traditional textbooks) that limited real rights in fact do not terminate when ownership over immovable property is acquired by way of original acquisition. His argument is based on the nature of limited real rights.[238] Moreover, an analysis of all the original modes of ownership acquisition at common law and in terms of statutes, which pertains to acquisition of immovable property, revealed support for Pienaar's theoretical and doctrinal observation that when immovable property is

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[237] See section 3 2 2 2 1 above.

[238] See section 3 2 2 2 2 above.

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acquired by way of an original mode, limited real rights do not automatically fall away. Furthermore, this analysis brought to light some remarkable points. In the first place, it became apparent that the only original modes of acquisition of ownership in terms of which ownership over immovable property can be acquired are attachment of land to land, forfeiture, prescription, expropriation, insolvency and liquidation. In the very unlikely event that attachment of land to land occurs in South Africa, it would be improbable that limited real rights would be affected by such acquisition, since property borders are not necessarily determined by rivers but rather with the cadastral system. As a result, the chances of common law original acquisition of ownership taking place remains negligible. However, where the attachment of land to land takes place, the chapter showed that it would be highly unlikely that the piece of land that attaches to another piece of land would have had any limited real rights burdening it to start with.[239]

In the second place, in the context of statutory modes of original acquisition of ownership, the chapter showed that specific provisions ordinarily regulate the consequences of existing burdens on immovable property where the property is acquired as a result of the operation of the provisions of such statutes. Furthermore, these provisions tend to acknowledge the continued existence of limited real rights that burdened the property before the original acquisition of ownership over the property. Moreover, the chapter showed that such rights will be extinguished only where the statutory provisions expressly provide for the extinction with appropriate compensation or relief. Accordingly, it cannot be maintained that burdens and benefits automatically terminate over immovable property at original acquisition of such property.[240]

As a result, part one concluded that the consequences of recognising a successful estoppel defence as an original mode of acquisition would certainly not cause limited real right holders to lose their rights where both movable and immovable property are concerned. The constitutional concerns, pertaining to section 25(1) of the Constitution that were raised by scholars in fact do not arise and is arguably no obstacle to categorising estoppel as a mode of original acquisition of ownership.

The second part of the chapter, which explored whether it would be more fitting to categorise estoppel as a mode of derivative acquisition, explained that two distinct subcategories of derivative acquisition exist, namely universal and particular derivative

[239] See section 3 2 3 1 above.

[240] See section 3 2 3 2 above.

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acquisition. The chapter demonstrated that since universal derivative acquisition deals with the transfer of entire estates and particular derivative acquisition deals with the transfer of specific assets, it would be more appropriate to deal with estoppel under particular derivative acquisition as the circumstances of estoppel ordinarily do not deal with entire estates.[241] Furthermore, the chapter confirmed the general and essential requirements of particular derivative acquisition known as transfer of ownership by way of delivery when dealing with movables and registration when dealing with immovables. It became apparent that the general requirements of transfer are satisfied by the circumstances that would give rise to a successful estoppel defence if Van der Merwe's submission about estoppel creating an exception to the *nemo plus iuris* principle is accepted. Also, one of the essential requirements namely conveyancing (delivery in the case of movables and registration in the case of immovable) is also shown to be complied with and does therefore not hinder the possibility of estoppel being categorised as a derivative mode of acquisition.[242] Notably, however, the analysis of the conveyancing requirement revealed that legal certainty is compromised by the traditional consequence of estoppel which contradicts the publicity principle.

Interestingly, part two further showed that the essential requirement of transfer, namely intention to transfer could arguably never be satisfied in the estoppel context. This observation confirmed the objection scholars have for years raised against recognising estoppel as a derivative mode of acquisition of ownership, albeit for somewhat different reasons than what has traditionally been submitted in this regard. The way estoppel operates namely by upholding the fiction of the representation as the truth, in other words that the unauthorised seller was the owner or had the authority to disposeof the property, allows for an exception to the *nemo plus iuris* maxim. Since the authority created by the representation would be accepted as the true state of affairs for legal purposes in the proceedings, the effect is that the seller was the owner or at least had authority to dispose of the property, placing the focus on the seller, and not the owner, from this point on. Consequently, the chapter demonstrated that it is the *seller's* and not the owner's intention that needs to be scrutinised to determine if valid transfer occurred. This is the Achilles heel of categorising estoppel as a mode of derivative acquisition. The intention to transfer ownership expressed to the purchaser

[241] See section 3 3 1 above.

[242] See section 3 3 above.

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by the seller merely constitutes a façade to hide the true subjective intention of the seller, which is to deceive the purchaser, since the seller knew she was not the owner and incapable of transferring ownership. Yet, the chapter demonstrates that a façade of intention to transfer on the part of the seller would arguably not be enough to constitute the intention required for a valid real agreement to be established, even though the recent case of *Oriental Products* may suggest otherwise. The submission that a façade of intention constructed by law should be enough to establish the intention to transfer ownership on the part of the seller is rejected by Carey Miller who argues that a real agreement cannot be constructed. Also, the chapter observed that accepting a façade of intention constructed by law would not be in line with the core distinction between original and derivative modes of acquisition. This distinction is that original acquisition ensues by operation of law without the cooperation of any predecessor in title and particular derivative acquisition ensues when there is cooperation by the predecessor in title in the form of a clear intention to transfer ownership over property. Accepting that a constructed intention equals a true intention to transfer on the part of the seller would blur the lines between derivative and original acquisition since it is under original acquisition that the law objectively creates acquisition of ownership in favour of an acquirer. To allow such construction in the case of derivative acquisition would not be advisable.[243]

Accordingly, the chapter showed that the scope and consequences of the category of original acquisition of ownership in South African law are more suitable to accommodate acquisition of ownership by way of a successful estoppel defence. The absence of a real agreement makes it impossible for ownership acquired in terms of estoppel to qualify as a derivative mode of acquisition of ownership.

The third and final part of chapter 3 dealt with the question of how estoppel should be developed to constitute a mode of acquisition of ownership and when ownership could be said to have vested in the acquirer. Regarding the questions of how estoppel as a defence could potentially result in acquisition of ownership and the exact moment of vesting of ownership in the acquirer, the third part of the chapter showed that the estoppel construct should be developed into a self-standing mode of acquisition, possibly under the name of equitable acquisition. The current requirements of estoppel as a defence should arguably function as the requirements for the new mode of

[243] See section 3 3 2 above.

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acquisition of ownership. Simply allowing estoppel as a defence to result in ownership acquisition will not be enough to transform estoppel into a true mode of acquisition of ownership that can function as a cause of action. It was illustrated that a clear development of a new mode of original acquisition, namely equitable acquisition, which complies with the traditional requirements for invoking estoppel, would be in line with what estoppel as a flexible equitable doctrine can accomplish and would provide for a true mode of acquisition that can operate as a cause of action. Moreover, this part of the chapter revealed that if the above development occurs, ownership should vest when the objective requirements of equitable acquisition are met, similar to acquisition by way of prescription. This will allow the *bona fide* acquirer to enjoy adequate protection of the law from the moment that her ownership vests.[244]

[244] See section 3 4 above.

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Chapter 4: Comparative analysis

4 1 Introduction

In vindication proceedings, estoppel by representation essentially operates as a defence against the *rei vindicatio* (a civil law restitution action) to protect *bona fide* purchasers in certain circumstances in South African law. In particular, estoppel prevents the owner from relying on the true state of affairs to the detriment of a *bona fide* purchaser in circumstances where the conduct of the owner culpably led the purchaser to believe, to her detriment that the disposer of the property was legally entitled to dispose of it. If estoppel is successfully relied upon, the vindicatory action would be denied leaving the successful estoppel raiser in possession of the property.[1] It was shown in chapter 2 that the effect or consequences of this outcome is unresolved in South African law, although chapter 3 indicated that the recognition of a self-standing mode of acquisition of ownership as a mode of original acquisition of ownership based on estoppel might be doctrinally plausible.[2]

While this seems like an attractive route to follow, it is not altogether clear whether the recognition of a successful estoppel defence as an original mode of acquisition of ownership is advisable although it seems as though it can potentially be fitted into the mould of original acquisition of ownership without much difficulty. It is for this reason that this chapter turns to identify how the conflicting interests between owners and *bona fide* purchasers are dealt with in other jurisdictions with "estoppel-like" constructs. This will provide insight into how foreign jurisdictions with estoppel-like constructs have dealt with the consequences or effects of these comparable constructs.

From a comparative perspective, South Africa is the only jurisdiction where a *bona fide* purchaser can raise estoppel by representation as a defence against an owner's vindicatory claim with regard to both movable and immovable property.[3] This

[1] See chapter 2, section 2 3 2 above.

[2] See chapter 3, section 3 4 above.

[3] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 19 confirmed that the doctrine of estoppel as a defence against an owner's *rei vindicatio* can be raised when dealing with both movable and immovable property.

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is the result of the unique mixed nature of the South African legal system that allows a *bona fide* possessor to refute the civil law action of the *rei vindicatio* by relying in specific circumstances on the common law equitable defence of estoppel. This implies that the doctrinal issues that result from the interplay between the *rei vindicatio* and the defence of estoppel are unique to South African law.

However, a review of literature in some foreign jurisdictions shows that the Sale of Goods Act 1979 (the SGA) that has operational effect in both Scotland and England contains section 21(1) that seems to be similar to the South African doctrine of estoppel in that it aims to regulate the same conflict of interest that estoppel aims to regulate in the South African context. This is the conflict between the interest of an owner to have the right to reclaim her property and the interest of purchasers in possession who in good faith purchased property for value as a result of the owner's culpable conduct.[4] Interestingly, the SGA in both these jurisdictions applies to movable property (goods) only. Therefore, one must also determine in this chapter whether other mechanisms (besides the SGA) exist in these jurisdictions in the context of immovable property, especially because estoppel operates with regard to both movable *and* immovable property in South Africa.[5] Accordingly, this chapter describes the ambit of an owner's right to vindicate in both Scottish and English law, the limitations on an owner's right to vindicate in the context of immovable property, the ambit of section 21(1) of the SGA in both Scottish and English law as a defence against an owner's right to restitution pertaining to movable property and, very importantly for present purposes, the proprietary consequences ascribed to these constructs in these particular jurisdictions.

The specific issues of comparative significance are whether, upon a closer analysis, the constructs in Scotland and England are comparable to estoppel in South African law and what the consequences of these constructs are in the foreign jurisdictions. This is done to determine whether these jurisdictions can provide South

[4] Reid EC & Blackie JWG *Personal bar* (2006) 189; Reid K & Van der Merwe CG "Property law: Some themes and some variations" in Zimmermann R, Visser D & Reid K (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2014) 637-670 662; Smith TB *Property problems in sale (Tagore law lectures)* (1978) 161-162; Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 375; Bridge M *Benjamin's sale of goods* 9 ed (2014) 355.

[5] See *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 19.

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Africa with comparable solutions for the current uncertain position regarding the consequences of a successful estoppel defence

With this purpose in mind, the first part of the chapter deals with the comparative constructs found in Scottish law and the second part provides an overview of the English law estoppel-like constructs. Both sections describe, firstly, the ambit of an owner's right to vindicate property and secondly how the owner's right to vindicate is impacted in the context of movable property by the operation of section 21(1) of the SGA. The third part of the respective sections explores the position in terms of immovable property to determine whether there are mechanisms in these jurisdictions that resemble estoppel as far as it pertains to immovable property and what the proprietary consequences of these mechanisms are. Throughout the chapter, the South African doctrine of estoppel is compared to its counterparts in Scotland and England to determine the viability of implementing similar consequences in the South African context.

4 2 Scottish law

4 2 1 The right to vindicate in Scotland

Erksine describes ownership in Scottish law as:

> "The right of using and disposing of a subject as our own, except in so far as we are restrained by law or paction (*sic*)".[6]

The above quote refers to ownership as the relationship between owners and their property.[7] It also emphasises the extensive powers over property that is inherent to ownership, but at the same time, indicates the limited nature of the right of ownership. Furthermore, it indicates that the Scottish legal system follows the civil law tradition and not the English common law tradition when it comes to the concepts of possession and ownership since a clear distinction is maintained between possession and

[6] Erskine J *An institute of the law of Scotland* 8 ed (1871) 2 1 1.

[7] Gordon WM *Scottish land law* (1989) 387-394; Miller K & Robson P *Greens concise Scots law: Property* (1991) 72.

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ownership in Scottish law.[8] In this regard, ownership is viewed as the sum total of the entitlements it gives rise to.[9] One of these entitlements is the right to exclusive possession of property. Accordingly, owners have the natural right to possession of their property and therefore, by implication, the strongest right to possess.[10] It is this right that gives rise to the owner's right to restoration of possession. The right to restoration of possession, also referred to as restitution in Scottish law, flows directly from ownership and is binary in nature in that it consists of the *rei vindicatio* and a compensation claim. The *rei vindicatio* enables the owner to claim the return of specific property while the compensation claim entitles the owner to claim damages that have ensued due to loss of possession.[11] The focus in this section is on the owner's right to vindicate by way of the *rei vindicatio* and not on the entitlement to claim damages since it is the impact of limiting and denying the right to recover that is considered throughout this dissertation.

The *rei vindicatio* allows the owner to reclaim her property from whoever is in unlawful occupation thereof.[12] Similar to South African law,[13] two main requirements must be complied with to be successful with the *rei vindicatio* in Scottish law. To succeed, the owner has to prove her right of ownership and that the property is in the natural possession of the defendant.[14] Whether the property still exists at the time of

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[8] Carey Miller DL "Transfer of ownership" in Reid K & Zimmermann R (eds) *A History of private law in Scotland* (2000) 269-304 269; Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 223-234. For a discussion of the English legal system see section 4 3 below.

[9] Gordon WM *Scottish land law* (1989) 389; McAllister A & Guthrie TG *Scottish property law: An introduction* (1992) 34; Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 11.

[10] Gordon WM *Scottish land law* (1989) 389; McAllister A & Guthrie TG *Scottish property law: An introduction* (1992) 34-35; Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 11-12.

[11] *Scot v Low* (1704) Mor 9123. See also Gordon WM *Scottish land law* (1989) 235; Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 238-239.

[12] *Scot v Low* (1704) Mor 9123; Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 235-236.

[13] See chapter 2, section 2 2 2 above for a discussion of the owner's right to recover with the *rei vindicatio* in South African law.

[14] *Scot v Low* (1704) Mor 9123; Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 235-236.The term natural possession refers to the situation where a legal subject exercises control over the property while the property is in such legal subjects physical custody. The term *natural possession* is usually contrasted with the term *civil possession* that refers to the situation where the legal subject ceases exercising physical control over the property without the intention to abandon possession of the property. In this regard, see Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 25-27.

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the claim for restoration of possession by way of the *rei vindicatio* is considered under the second requirement of natural possession. In the event that the property no longer exists, it will be impossible for the defendant to return it to the owner since the defendant will no longer be in natural possession of the property.[15] Furthermore, under the natural possession requirement, the owner must show that the possessor is in unlawful possession. Generally, there is a presumption of ownership in favour of the defendant in possession of the property.[16] Accordingly, the defendant is not required to prove that she is the owner or lawful possessor or how she became owner or lawful possessor. The burden to rebut the presumption of ownership of the defendant, in order to show unlawful possession, rests on the plaintiff.[17] The plaintiff is not merely required to prove her ownership but should also prove that possession of the property by the defendant is not based on ownership or any other right to possession. This is usually shown by proving the absence of intention to transfer on the part of the owner and absence of consent for the defendant's possession.[18]

The general rule is that an owner can claim back her property from both *bona fide* and *mala fide* possessors.[19] A *bona fide* possessor in this context refers to a possessor

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[15] *Faulds v Townsend* (1861) 23 D 437; Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 236.

[16] Reid K & Van der Merwe CG "Property law: Some themes and some variations" in Zimmermann R, Visser D & Reid K (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2014) 637-670 662.

[17] *Russel v Campbell* (1699) 4 BS 468 469. See further Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 236.

[18] *Forsyth v Kilpatrick* (1680) Mor 9120; *Chief Constable of Strathclyde Police v Sharp* 2002 SLT (Sh Ct) 95 paras 12-13. See further Reid K & Van der Merwe CG "Property law: Some themes and some variations" in Zimmermann R, Visser D & Reid K (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2014) 637-670 662; Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 237. This is different from the burden of proof that rests on the vindicator in South African law. The vindicator must only prove ownership after which the burden of proof shifts onto the possessor to prove lawful possession. Accordingly, the burden on the vindicator in South African law is lighter than that of the vindicator in Scottish law. See further Reid K & Van der Merwe CG "Property law: Some themes and some variations" in Zimmermann R, Visser D & Reid K (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2014) 637-670 662-663.

[19] The availability of the *rei vindicatio* is based on the obligation of the possessor to make restitution rather than the right of the owner to recover lost possession. See Reid K & Van der Merwe CG "Property law: Some themes and some variations" in Zimmermann R, Visser D & Reid K (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2014) 637-670 660.

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that in good faith genuinely beliefs that she acquired the right to possess or the right of ownership over the property. A *mala fide* possessor refers to someone who is in possession of the property knowing that she is not the rightful possessor or the rightful owner of the property. As a result, an owner's right to vindicate is an extensive right in Scottish law. Interestingly, in the case of of immovable property, the law only distinguishes between a *bona fide* and *mala fide* possessor for purposes of the *bona fide* possessor's claim for restitution of improvements made to the property and not by the turpitude of the possessor.[20] This means that the owner can vindicate her immovable property from an unlawful possessor irrespective of whether the unlawful possessor was *bona fide* or *mala fide* in obtaining possession. However, the analysis in this section will specifically inquire whether this is also true in the circumstances where the *bona fide* purchaser, purchased the immovable property from an unauthorised non-owner. When dealing with movable property, however, it is clear that a *bona fide* possessor in certain circumstances can refute an owner's vindicatory claim. The owner's position in terms of *mala fide* possessors of movable property is the same as that of a *mala fide* possessor of immovable property.

Similarly, in South African law, the owner's right to recover lost possession with the *rei vindicatio* is as a general rule also not affected by the mere *bona fides* or *mala fides* of the possessor.[21] In this regard, the *bona fides* or *mala fides* of the possessor is also only taken into account to determine whether the possessor can claim for improvements made to the property and when the possessor is entitled to keep the fruits of the property.[22] However, in South African law the *bona fides* of the possessor of both movable and immovable property can by way of a successful estoppel defence

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[20] McAllister A & Guthrie TG *Scottish property law: An introduction* (1992) 38.

[21] *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 605-607. See also *Mngadino NO v Ntuli and Others* 1981 (3) SA 478 (D) 485. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 265; Van der Merwe CG *Sakereg* 2 ed (1989) 351; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 467; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 235; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 269.

[22] *Lechoana v Cloete & Others* 1925 AD 536 547. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 268-273; Van der Merwe CG *Sakereg* 2 ed (1989) 156-157; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 235.

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limit the owner's right to vindicate, given that the other requirements of estoppel are complied with.[23]

The part below explores the scope of the owner's right to vindicate from *bona fide* purchasers of movable and of immovable property, respectively, with a specific focus on sales by unauthorised non-owners, which constitutes similar circumstances that give rise to estoppel in South African law. This focus is in line with the broader purpose of this dissertation to determine what the consequences of a successful estoppel defence could be in the South African context. As already illustrated in chapter 2, estoppel is a defence that can be raised against an owner's *rei vindicatio* by a *bona fide* purchaser usually where the *bona fide* purchaser purchased movable or immovable property from a non-owner in certain circumstances. Therefore, an explanation of the scope of an owner's right to vindicate in Scottish law in the context of sales by non-owners to *bona fide* purchasers will be of comparative value, especially considering the ostensible similarities between the Scottish and the South African legal system in this regard.[24]

4 2 2 The sale of movable property by unauthorised sellers

Concerning movable property, Scottish law in general allows owners to recover their property from unlawful possessors. However, in certain circumstances such as where an unlawful possessor was virtuous (in good faith), and the owner was at fault, the owner would usually not succeed with her *rei vindicatio*.[25] The owner's right to vindicate and the limitation on the owner's right to vindicate in these circumstances is contained in section 21(1) of the Sale of Goods Act that reads as follows:

> "[W]here goods are *sold by a person who is not their owner*, and who does not sell them under the authority or with the consent of the owner, the *buyer acquires no*

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[23] See chapter 2, section 2 3 2 above.

[24] For a general comparison of the Scottish legal system and the South African legal system, see Reid K & Van der Merwe CG "Property law: Some themes and some variations" in Zimmermann R, Visser D & Reid K (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2014) 637-670 637-670.

[25] The fact that the possessor was virtuous and the owner at fault can have the consequence that the virtuous possessor acquires ownership. See Reid K & Van der Merwe CG "Property law: Some themes and some variations" in Zimmermann R, Visser D & Reid K (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2014) 637-670 662.

> *better title to the goods than the seller* had, *unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell*."[26] (Own emphasis added)

The first part of the provision codifies the *nemo dat quod non habet* maxim that holds that a person who is not the owner cannot transfer ownership of the movable property to another because one cannot transfer what one does not have.[27] This rule typically has the effect that a non-owner, in the absence of authority to dispose, will not be able to transfer ownership to others. The law of Scotland, by way of the *nemo dat quod non habet* maxim, protects the person with the strongest right over the movable property who would usually be the owner of the movable property. Therefore, the buyer of the movable property, irrespective of whether she was *bona fide* or *mala fide*, does not become owner of the movable property and the moment the buyer takes possession of such property, the owner can recover it.[28] In this regard, the general rule of Scottish law is similar to the point of departure in South Africa. As shown in chapter 3, the *nemo dat quod non habet* maxim is a precept of South African property law. In the South African context, it also precludes a person, who is not the owner or who sells movable or immovable property without authority to do so, from transferring any rights to a buyer irrespective of the buyer's *bona fides* or *mala fides*.[29] In these circumstances, the owner typically has the *rei vindicatio* at her disposal to claim recovery of her property.[30] Therefore, the general rule in Scottish and South African law with regard to vindicating movables seems to be the same.

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[26] Section 21(1) of the SGA.

[27] For interpretation of the *nemo dat quod non habet* maxim in English law, see Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 372-373. For an interpretation of the *nemo dat quod non habet* maxim in Scottish law, see Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 263; Reid EC & Blackie JWG *Personal bar* (2006) 189.

[28] The owner will be able to claim back exclusive possession. See Reid K & Van der Merwe CG "Property law: Some themes and some variations" in Zimmermann R, Visser D & Reid K (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2014) 637-670 660.

[29] See chapter 3, section 3 3 above.

[30] Van der Merwe CG *Sakereg* 2 ed (1989) 347; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 539; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 233; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 269.

The second part of section 21(1) of the SGA provides for an exception to the *nemo dat quod non habet* maxim in the circumstances "where the owner by her own conduct is precluded from denying the disposer's authority to sell the property".[31] What is meant with this exception is uncertain in Scottish law because of the failure of the provision to specify the type of conduct that will trigger this prohibition. As a result, of this failure, the argument has been made that this exception embodies the doctrine of personal bar.[32] The doctrine of personal bar is a unitary doctrine that can be linked to the civil law maxim *nemo contra factum suum venire potest*, which holds that no one can go against his own act.[33] Personal bar has been defined in modern terms as: "[a] term for that body of rules by which a person who acts inconsistently and unfairly may be prevented from exercising a right".[34]

Therefore, the doctrine of personal bar covers vast factual circumstances over an array of legal fields in terms of which a person would be penalised for inconsistent conduct if the result of upholding such inconsistency would be unfair.[35] One of these factual scenarios that would give rise to a defence of personal bar is where unauthorised sales by non-owners to *bona fide* purchaser's takes place where the owner acted inconsistent with her ownership and thereby created the impression that the seller had the authority to transfer ownership over the property. It is this specific scenario in which the personal bar doctrine would be available to the purchaser that has arguably been codified in section 21(1) of the SGA. This means that for this exception to be activated (a) the owner had to have acted inconsistently with her ownership rights by for instance representing to the purchaser that the seller was the owner and (b) that it would therefore be unfair to enforce the owner's rights.[36] In this

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[31] Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 263; Reid EC & Blackie JWG *Personal bar* (2006) 189.

[32] Reid K & Van der Merwe CG "Property law: Some themes and some variations" in Zimmermann R, Visser D & Reid K (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2014) 637-670 662; Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 263; Reid EC & Blackie JWG *Personal bar* (2006) 189.

[33] The doctrine of personal bar has its roots in this Roman maxim but its link to the maxim has not been articulated and confirmed in modern times. See further Reid EC & Blackie JWG *Personal bar* (2006) 5.

[34] Reid EC & Blackie JWG *Personal bar* (2006) 3.

[35] Reid EC & Blackie JWG *Personal bar* (2006) 30.

[36] The owner can make such false impression by failing to correct a misleading impression or by expressly making such a representation. See Reid K & Van der Merwe CG "Property law: Some themes

regard, the first requirement of inconsistency is proven in a number of instances. The first instance is where the right holder institutes proceedings to exercise a right, while the purchaser argues that the right holder is barred from exercising such right. The second instance is where the right holder made a representation by way of words, actions or inactions, which contradicts the right she now wants to exercise. The third scenario that shows inconsistency is where the right holder knew of her right when she made the representation towards the buyer and finally in the circumstances where the enforcement of the right will have a prejudicial effect on the buyer.[37]

The second requirement that the buyer will have to satisfy concerns the idea that the enforcement of the owner's right will be unfair towards the purchaser. Unfairness is established on the facts of each case. In this regard, several factors are taken into account to determine whether the enforcement would be unfair. These are: (i) that the right holder acted in a blameworthy manner; (ii) that the buyer reasonably believed that the right holder will not exercise her right; (iii) that the buyer had reacted in a proportionate manner; or (iv) that the buyer would suffer detriment as a result of the inconsistent conduct of the right holder. The circumstances of each case will determine the extent to which these indicators might influence a court to find that the enforcement may be unfair.[38]

Reading section 21(1) of the SGA as encompassing the personal bar defence makes it comparable with the South African doctrine of estoppel by representation for several reasons. In the first place, the estoppel-like construct of personal bar requires that the owner by her own conduct must have created a representation.[39] A representation would be present in South African law where the owner created the impression (by way of conduct, writing or silence) that the seller of the property was the owner of the property or that the seller had the right to dispose of the property. Section 21(1) states that the conduct of the owner is what precludes her from denying

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and some variations" in Zimmermann R, Visser D & Reid K (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2014) 637-670 662; Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 263-264; Reid EC & Blackie JWG *Personal bar* (2006) 30.

[37] Reid EC & Blackie JWG *Personal bar* (2006) 30.

[38] Reid EC & Blackie JWG *Personal bar* (2006) 30.

[39] See chapter 2, section 2 3 2 above for an overview of the representation requirement of estoppel by representation in South African law.

that the seller was authorised to alienate the property. In this sense, it refers to a representation made by the owner by way of her "conduct" towards the *bona fide* purchaser that creates the exception to the owner's general right to vindicate movables. The reference to "conduct" in the section, when understood through the prism of personal bar, refers to the *inconsistent behaviour of the right holder*. This behaviour can manifest through physical conduct, writing or silence.[40] In this sense, "conduct" under section 21(1) refers to the representation a right holder makes that is subsequently inconsistent with the enforcement of her right, be it by actions, words or silence.

The exception in section 21(1) of the SGA is also comparable with estoppel when considering the requirement that the estoppel raiser must have reasonably relied on the impression/representation created by the owner in South African law.[41] In the context of estoppel, "[the estoppel raiser] must act upon the representation believing it to be true" [42] and a reasonable person in her position from an objective point of view should have believed the representation to be true.[43] If the estoppel raiser acted *mala fide* (in other words, she knew or should have known that the seller was not the owner or that the seller had no authority to dispose of the property) her reliance on the representation would be unreasonable in South African law.[44] It is in this sense, that *bona fides* of the estoppel raiser plays a role in determining reasonable reliance. Although section 21(1) of the SGA does not expressly require reasonable reliance or *bona fides* on the part of the buyer, the doctrine of personal bar does require something similar to estoppel's reasonable reliance requirement. The doctrine of personal bar specifically requires that the buyer must prove that the enforcement of the right holder's right would be unfair. Consequently, the fact that the buyer reasonably believed in the representation, and acted proportionately according to that belief, is considered to

[40] Reid EC & Blackie JWG *Personal bar* (2006) 31.

[41] See chapter 2, section 2 3 2 above.

[42] *Hauptfleish v Caledon Division Council* 1963 (4) SA 53 (C) 57.

[43] Interestingly, when dealing with a representation by word, the estoppel raiser's precise and unambiguous representation will be indicative of reasonable reliance. Van der Merwe CG *Sakereg* 2 ed (1989) 370.

[44] See *Van Rooyen v Minister van Openbare Werke en Gemeenskapsbou* 1987 (2) SA 835 (A) 849; *Apostoliese Geloofsending van Suid-Afrika (Maitland Gemeente) v Capes* 1978 (4) SA 48 (C) 56.

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indicate unfairness for purposes of the personal bar defence.[45] However, the weight given to these considerations depends on the facts of each case and can be influenced by the presence of other factors.[46] Accordingly, these are not conclusive factors for the determination of unfairness and therefore not strict requirements for a successful personal bar defence.

In the same way, the requirement of culpability on the part of the right holder is also not a strict requirement for a successful personal bar defence in the Scottish context.[47] Interestingly in South African law, *culpa* is a strict prerequisite for a successful estoppel defence and requires that the owner must have acted negligently, at the very least, when she made the representation.[48] In this regard, negligence would be present when a reasonably prudent person in the owner's position would have foreseen that another person could be prejudiced because of her conduct and would have taken steps to prevent the harm from occurring.[49] In Scottish law, section 21(1) of the SGA does not explicitly require culpability on the part of the owner. Yet, personal bar does seem to take into account blameworthiness of the owner (or rather, the right holder) in determining whether the enforcement of the inconsistent conduct would be unfair. The weight ascribed to the presence of blameworthiness depends on the type of relationship that exists between the buyer and right holder. If there is a relationship of trust, blameworthiness will be easily determined, and it would weigh heavier in the assessment of whether the inconsistent conduct of the owner was unfair. However, if there is no existing relationship of trust, it will be difficult to ascribe culpability to the right holder.[50] This is similar in some respects to the difference between estoppel in factor and agent cases and the availability of estoppel in non-factor and non-agent

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[45] Reid EC & Blackie JWG *Personal bar* (2006) 189-192; Reid K & Van der Merwe CG "Property law: Some themes and some variations" in Zimmermann R, Visser D & Reid K (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2014) 637-670 662.

[46] Reid EC & Blackie JWG *Personal bar* (2006) 43.

[47] Reid EC & Blackie JWG *Personal bar* (2006) 38.

[48] See chapter 2, section 2 3 2 above. Culpability, also known as the fault requirement of estoppel in South African law, concerns the negligent creation of the impression/representation that the party who disposed of the property was the owner or that the disposer at the very least had the authority to alienate the property. See Van der Merwe CG *Sakereg* 2 ed (1989) 371.

[49] See chapter 2, section 2 3 2 above.

[50] Reid EC & Blackie JWG *Personal bar* (2006) 38-39.

cases where a trust relationship exists in the former and not in the latter.[51] However, it should be noted that although blameworthiness is a strong indicator of unfairness, it is not a prerequisite for the successful reliance on the doctrine of personal bar in Scottish law. This is because other circumstantial factors may also indicate unfairness in the absence of blameworthiness.[52] Accordingly, the role blameworthiness would play in the determination of fairness depends on the circumstances of each case.[53]

The fourth requirement of estoppel by representation in the South African context is that the reliance on the owner's representation must have resulted in the estoppel raiser exercising physical control over the property with the *animus domini* to her own detriment.[54] This prerequisite for a successful estoppel defence requires detriment on the part of the estoppel raiser and that the detriment should be the direct consequence of the owner's culpable representation.[55] Interestingly, whether the buyer will suffer detriment is also another indicator of unfairness for a successful reliance on the personal bar defence.[56] However, the context of each case will determine whether detriment is required and to what extent it will induce unfairness.[57] Under the personal bar doctrine, detriment refers to the potential harm or loss that the buyer would suffer if the right holder is allowed to enforce her right and recover her movable property.[58]

It is clear from the above discussion that the doctrine of personal bar includes numerous factors and requirements that are prerequisites for a successful estoppel defence in the South African context. However, a few factors are not strictly required for the successful reliance on the personal bar doctrine, although these factors will have a bearing on the outcome of the case if they are present. There are also several factors that although not valid considerations for a successful estoppel defence, may

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[51] See chapter 2, section 2 3 2 above.

[52] For the importance of unfairness as a prerequisite for a successful personal bar defence, see Reid EC & Blackie JWG *Personal bar* (2006) 30, 43-44.

[53] Reid EC & Blackie JWG *Personal bar* (2006) 43.

[54] See chapter 2, section 2 3 2 above. More specifically, see *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) 459.

[55] *Baumann v Thomas* 1920 AD 428 436; *Poort Sugar Planters (Pty) Ltd v Minister of Lands* 1963 (3) SA 352 (A) 363.

[56] Reid EC & Blackie JWG *Personal bar* (2006) 48.

[57] Reid EC & Blackie JWG *Personal bar* (2006) 48.

[58] Reid EC & Blackie JWG *Personal bar* (2006) 49.

feature in personal bar cases. Nonetheless, the similarities that were pointed out ensures that the scenarios that potentially could give rise to a successful plea of estoppel could be compared with that which falls under the doctrine of personal bar. Therefore, where a possessor would ordinarily be entitled to use estoppel against an owner's right to vindicate in South Africa, a possessor in the same situation in Scottish law would no doubt be able to successfully rely on the personal bar defence in terms of the exception found in section 21(1) of the SGA.

The proprietary consequences of the successful reliance on this exception are uncertain in Scottish law. There is academic debate concerning what the proprietary consequences of this exception are for a purchaser who successfully proves the requirements of the doctrine of personal bar and thereby succeeds with section 21(1) against an owner's vindicatory claim over movable property.[59] This debate has two dimensions. The first being the proprietary consequences of personal bar as a private law doctrine and the second being the proprietary consequences of section 21(1) of the SGA as a statutory measure.

There seems to be no uniformity or agreement regarding what the proprietary effect of a successful personal bar defence is. Some authors argue strongly that personal bar has no real effect and can therefore not extinguish or confer ownership on a purchaser who successfully relies on the personal bar doctrine.[60] Rather, if it is successfully raised as a defence against an owner's right to recover her property, the bar would only prevent the owner from recovering the property due to the owner's inconsistent and unfair conduct. Accordingly, it can only prevent enforcement of rights and does not necessarily confer rights on the purchaser who successfully relies on the defence.[61]

Smith, in his commentary on the Sale of Goods Act of 1893, which precedes the current SGA, argues that personal bar does not have a real effect.[62] His argument is

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[59] Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 263; Reid EC & Blackie JWG *Personal bar* (2006) 192-193.

[60] Smith TB *Property problems in sale (Tagore law lectures)* (1978) 162; Reid EC & Blackie JWG *Personal bar* (2006) 192.

[61] Reid EC & Blackie JWG *Personal bar* (2006) 192.

[62] Smith TB *Property problems in sale (Tagore law lectures)* (1978) 162. It seems appropriate to evaluate Smith's argument, which refers to the previous version of the Sale of Goods Act 1979, since the wording of section 21(1) in the new legislation is essentially the same as it was in the 1893 statute.

based on the personal nature of the doctrine of personal bar. He indicates that personal bar is a "personal exception barring only a particular party and those claiming through him".[63] In other words, the bar would only be against the specific owner in her personal capacity and would not affect subsequent owners of the movable property.[64] The successors to whom the predecessor transferred ownership would be able to claim the property from the party who raised the defence of personal bar because the bar was merely preventing the previous owner in his personal capacity from claiming the property back. There is however a practical difficulty with Smith's argument. Given that the bar is usually raised against the recovery of movable property and that it results in the party who succeeds with personal bar remaining in possession of the movable property, it is difficult to envisage a situation where the owner who unsuccessfully instituted the recovery claim can be in a position to transfer ownership to subsequent purchasers. This difficulty may be ascribed to the fact that an essential requirement for valid transfer of ownership over movable property in Scottish law is physical delivery of the movable property to the purchaser who would become the subsequent owner.[65] As a result, it may be submitted that although Smith's argument may be sound from a theoretical point of view given the so-called personal nature of the personal bar doctrine, it fails to provide a solid reason for why personal bar cannot have ownership acquisition as consequence on the part of the purchaser who succeeds with personal bar. In other words, the personal nature of the personal bar doctrine has little to no effect on the question of whether the purchaser acquires ownership by way of the personal bar doctrine, since upholding the personal nature of the personal bar is not practically feasible in terms of what ordinarily happens when ownership of movables is transferred as described above.

Smith's argument is somewhat identical to the argument made by some academic authors in South African law concerning the proprietary consequences of a successful estoppel defence. These scholars argue that a successful estoppel defence

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[63] Smith TB *Property problems in sale (Tagore law lectures)* (1978) 162.

[64] Reid EC & Blackie JWG *Personal bar* (2006) 192. For an elaboration of the personal nature of personal bar, see further Reid EC & Blackie JWG *Personal bar* (2006) 20-21.

[65] Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 151-154. However, this may be possible in instances of inheritance and in very limited circumstances where the requirements for any recognised mode of constructive delivery is complied with. Consequently, movable property could in theory be transferred without delivery of such movable property to the subsequent owner, albeit in limited circumstances. See Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 161-168.

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suspends an owner's *rei vindicatio* to the effect that the successful estoppel raiser may merely remain in possession of the property and that the estoppel raiser does not acquire ownership over property.[66] Interestingly, South African scholars are silent on the effect of a successful estoppel defence on subsequent owners (successors in title), specifically whether such owners would be able to recover the property from the successful estoppel raiser. The personal nature of estoppel is ordinarily not relied on by scholars to argue against acquisition of ownership in this regard. Yet, similarity does exist between the argument made in the Scottish context that the defence of personal bar is only applicable between the owner (or right holder) and the buyer, and the submission made in South African law that estoppel only operates between the owner and the estoppel raiser in the sense that estoppel provides the latter with hedged possession against the vindicatory claim of the owner. It is not clear in South African law whether any subsequent possessor may also enjoy this hedged possession. This might be because scholars and the courts realise how difficult (if not impossible) it is to transfer ownership of movable property, which is not in your possession. The same difficulty, however, does not arise in the context of the transfer of immovable property, since transfer of ownership over immovable property is possible without the transferor having possession over the property at transfer.[67] This will receive further attention in the section below where the focus shifts to the position concerning immovable property.

Interestingly, Carey Miller and Irvine suggest that the consequence of the successful reliance on personal bar as a private law doctrine is to confirm ownership on the part of the purchaser who raises the personal bar defence. Their argument is based on the effect of the failure of the plaintiff to rebut the presumption of ownership that operates in favour of the possessor of movable property (the defendant) during the recovery proceedings.[68] As mentioned above, there is a presumption of ownership in Scottish law in favour of the possessor of the movable property.[69] Therefore, the onus rests on the plaintiff demanding recovery of the movable property to rebut this presumption by proving that she is the rightful owner of the property and that the

[66] See chapter 2, section 2 3 2 above.

[67] See chapter 3, section 3 3 3 below in which the requirements for the transfer of immovable property are outlined.

[68] Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 263.

[69] See section 4 2 1 above.

possessor has no right to be in possession of the property. The focus of the plaintiff's argument must be on the lack of intention to transfer the property to the possessor as the defendant, if the possessor contends that she acquired ownership when she purchased the movable property. Only after the plaintiff has been awarded the opportunity to rebut the presumption, the possessor will have the chance to raise personal bar as a defence against the plaintiff's assertions. A successful defence of personal bar would preclude the plaintiff's rebuttal that there was no intention to transfer ownership.[70] Thus, the effect would be failure on the part of the plaintiff to rebut the presumption of ownership in favour of the possessor. As a result, the effect is that the possessor would still be regarded as the legal owner of the movable property, since the presumption will still exist. In other words, it is the successful personal bar defence that keeps the presumption of ownership in place.[71] It is this presumption that is then further perpetuated when the plaintiff is precluded from instituting recovery proceedings at a later stage again because of the *ne bis in idem* principle, which precludes a person from instituting the same proceedings again. Therefore, Carey Miller and Irvine opine that since the presumption remains intact after court proceedings involving the question of ownership, the logical conclusion is that the party who succeeds with the personal bar defence is the owner of the property.

In South African law, the same presumption applies, namely that the possessor of movable property is presumed to be the owner of such property.[72] Therefore, a an owner demanding the return of movable property by reliance on the *rei vindicatio* has to rebut the presumption by proving the three requirements of the *rei vindicatio*, which includes proving that she is the owner of the movable property.[73] In this regard, the plaintiff is not required to allege and prove that the possessor is not the owner or has no right to possess the movable property. Rather, she is only required to allege and prove her ownership on a balance of probabilities, thereby rebutting the presumption of ownership in favour of the possessor. Once the plaintiff proved her ownership over the movable property, as well as the other requirements of the *rei vindicatio*, the burden

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[70] Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 261.

[71] Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 263.

[72] See chapter 2, section 2 2 2 above. See *Ebrahim v Deputy Sheriff, Durban* 1961 (4) SA 244 (D) 267. See also Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 233.

[73] See chapter 2, section 2 2 2 above.

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of proof shifts onto the defendant to show that she has a legal right to possess the property or that she is indeed the owner. In this regard, she needs to show she is the owner since the presumption of ownership in her favour would be rebutted unless she shows otherwise.[74] The defendant would refute the recovery claim if she proves that the owner afforded her a legal right, or that she acquired such a right, to be in possession of the property. Accordingly, once the plaintiff satisfies the first requirement of the *rei vindicatio* the presumption of ownership in favour of the defendant would be rebutted successfully and the defendant will only be able to prove some other right to be in possession of the property to refute the plaintiff's *rei vindicatio*. However, when estoppel is raised, the defendant does not set out to prove a right to be in possession of the property. Rather, the defendant raises the defence of estoppel to stop the plaintiff from denying that the fraudulent seller was the owner or that such seller had the authority to dispose of the property, in effect attacking and excluding the plaintiff's proof of ownership. This implies that the result of a successful estoppel defence is identical to that of the personal bar defence, since it is the owner's proof of ownership that is excluded from consideration by way of the defence. This means that the presumption of ownership in favour of the estoppel raiser is kept in place, after estoppel has been raised successfully. Yet, although the presumption of ownership in favour of the estoppel raiser remains after the unsuccessful recovery proceedings, it remains difficult to justify acquisition of ownership since there is most likely a difference between a presumption of ownership in favour of someone and ownership actually being acquired by someone.

The uncertainty that exists concerning the proprietary consequences of personal bar as a private law doctrine is also visible in the discussion around the proprietary consequences of section 21(1) of the SGA in Scottish law.[75] Apart from Smith, Blackie and Reid indicating that the proprietary consequences of section 21(1) have not been settled in Scottish law, there does not seem to be much resistance against the idea

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[74] However, if the plaintiff goes beyond the burden of proof that rests on her as plaintiff by alleging that the possessor is not the owner or legal possessor, she will have to prove that assertion as well. See *Chetty v Naidoo* 1974 (3) SA 13 (A) 309.

[75] Reid and Blackie indicate that the wording of section 21(1) makes it particularly difficult to construe and give meaning to the section. See Reid EC & Blackie JWG *Personal bar* (2006) 192. However, a contrary argument is made that the particular wording does not inhibit the interpretation of the section, but rather opens it up to include the doctrine of personal bar. In this regard, see Bridge M *Benjamin's sale of goods* 9 ed (2014) 361.

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that if the exception to section 21(1) is raised successfully, the defendant would be held to have acquired ownership over the movable property.[76] The only point of dispute that exists is on what basis ownership is acquired. This point of dispute goes back to the uncertainty around the proprietary consequences of personal bar and has significance for the identification of the specific mode of acquisition by which ownership is arguably acquired. In this regard, Reid argues that the exception contained in section 21 does have as a consequence ownership acquisition in favour of the successful raiser of the exception. However, he interprets the exception as encompassing a statutory exception that confers ownership on the party who successfully relies on the exception in terms of statutory authority.[77] The implication of this is that the successful exception raiser acquires ownership by operation of law and not through cooperation on the part of the owner. This would suggest that the category of acquisition would be original rather than derivative acquisition of ownership. In contrast, Carey Miller and Irvine suggest that the successful reliance on the exception contained in section 21(1) of the SGA does result in ownership acquisition in favour of the asserter of the exception due to personal bar confirming the presumption of ownership in favour of the exception raiser. As a result, it is accepted that the plaintiff intended to transfer ownership to the exception raiser, which means that ownership was acquired in terms of the derivative mode of acquisition.[78]

In light of the above two different views, it is not clear whether ownership is transferred by way of the derivative mode of acquisition or whether the purchaser obtains new ownership by way of the original mode of ownership acquisition through the exception in section 21(1). If it is agreed that personal bar cures the lack of intention

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[76] Some of the concerns the authors raise are that the consequences of section 21(1) of the SGA remain uncertain since no court has ruled on (i) whether personal bar should be read into section 21(1) of the SGA and (ii) what the proprietary consequences are of the successful reliance on this exception encapsulated in the statutory provision. See Reid K *The law of property in Scotland* (1996) 680; Smith TB *Property problems in sale (Tagore law lectures)* (1978) 163; Reid EC & Blackie JWG *Personal bar* (2006) 192-193. For arguments in favour of ownership acquisition as a consequence of the successful reliance on the exception, see Reid K & Van der Merwe CG "Property law: Some themes and some variations" in Zimmermann R, Visser D & Reid K (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2014) 637-670 662; Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 263.

[77] Reid K *The law of property in Scotland* (1996) 680. See also Reid EC & Blackie JWG *Personal bar* (2006) 192-193.

[78] Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 264-265.

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on the part of the plaintiff to transfer ownership, the argument can certainly be made that ownership is transferred to the buyer who successfully raised the exception. However, if it is agreed that the SGA developed the personal bar consequences to confer title by way of statutory power on the successful exception raiser, the mode of acquisition would be an original mode of acquisition and the acquirer would consequently receive an original title. This uncertainty as to the exact mode of acquisition of ownership that exists in Scottish law is comparable to the uncertainty that currently exists in South African law as illustrated in chapter 3.[79] Although the argument made in favour of statutory original acquisition in Scottish law cannot be made in South African law for obvious reasons, the argument that is made in favour of derivative acquisition in the Scottish context is similar to the argument in favour of derivative acquisition in South African law. South African scholars also argue that the lack of intention can be cured precisely because estoppel precludes the plaintiff from denying that the seller had no authority to sell the property. However, this argument differs from the argument made by the Scottish scholars because the focus is not on the confirmation of the presumption in that the owner failed to rebut the presumption. Instead, the focus falls on the independent effect of estoppel that after the owner rebuts the presumption; estoppel steps in and constructs an intention to transfer ownership to the defendant.[80]

Considering the above, it is clear that there are some unresolved issues pertaining to the interpretation of section 21(1) of the SGA in Scottish law. Moreover, the absence of case law on these issues causes uncertainty regarding the consequences of the statutory provision to persist. It is for this reason that Scottish authors have looked to the English courts for some guidance. This is warranted because section 21(1) of the SGA applies in both these foreign jurisdictions. The concerns raised and the solutions suggested by Scottish academic authors can on a superficial level be equated to the unresolved issues raised in South African law pertaining to the consequences of estoppel. However, upon closer analysis, the solutions suggested in the Scottish legal system seem to be incompatible with the South African legal system. Accordingly, although we face the same challenges in our respective approaches the solutions will have to look different at least when dealing

[79] See chapter 3 1 above.

[80] See chapter 3, section 3 3 2 above.

with movable property as shown above. The part below looks at the legal mechanisms in place in Scottish law where it is immovable property that is sold by an unauthorised seller, since in South African law it is not only the sale of movable property that can give rise to a successful estoppel defence, but also the sale of immovable property.

4 2 3 The sale of immovable property by unauthorised sellers

Before turning to explore how section 21(1) of the SGA is dealt with in the English context, this part sets out the legal principles and rules pertaining to the sale of *immovable property* by a non-owner to a *bona fide* purchaser in the circumstances that would ordinarily give rise to a successful estoppel defence in the South African context. As mentioned before, this is important because estoppel can be raised against owners trying to recover both movable and immovable property in South Africa. As section 21(1) of the SGA of Scotland only deals with movables, it is necessary to look at the way the conflict of interest between the owner and *bona fide* purchaser is regulated in the Scottish context where immovable property is concerned. Moreover, what needs to be considered is how the Scottish approach in this regard can potentially assist with the articulation of the consequences of a successful estoppel defence in South African law where estoppel is raised against the vindication of immovable property.

The traditional Scottish law approach to acquisition of ownership of immovable property in the context of sales by non-owners is that non-owners without authority cannot confer title because of the *nemo dat quod non habet* maxim underlying Scottish law.[81] The *nemo dat quod non habet* maxim holds that no one can transfer more rights than she has. Accordingly, a non-owner cannot transfer ownership over immovable property that does not belong to her because she is not the owner.

[81] Carey Miller DL "Transfer of ownership" in Reid K & Zimmermann R (eds) *A History of private law in Scotland* I (2000) 269-304 300; Thomson J *Scots private law* (2006) 33-35; Reid K & Van der Merwe CG "Property law: Some themes and some variations" in Zimmermann R, Visser D & Reid K (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2014) 637-670 662.

In addition, Scotland makes provision for the formal transfer of land by way of recording the transfer of land in a land registry.[82] The registration process includes a preliminary conveyancing procedure in terms of which the seller (which would, in this case, be a non-owner) has to demonstrate her right to transfer the property before the formal transfer takes place. In this regard, the seller must submit a prescriptive progress of title deeds and deeds of real conditions to the solicitor of the purchaser. The purchaser's solicitor is then obliged to check and confirm whether the seller has actual ownership by examining the validity of the submitted deeds.[83] If the solicitor finds that the seller of the immovable property is not the actual owner or lacks the authority to transfer the property, the transfer process will not continue. It follows that when a non-owner attempts to sell land to a *bona* or *mala fide* purchaser, the solicitor will not confirm ownership and transfer of the land into the *bona* or *mala fide* purchaser's name will not take place. In this way, the preliminary conveyancing process ensures compliance with the *nemo dat quod non habet* maxim.

The only formal manner in which ownership can be acquired over land in Scottish law is by way of the formal transfer process that consists of the intention to transfer and registration of the title deed.[84] Traditionally, the system of registration in Scotland was one of registration of deeds. This registration system is regulated by the Register of Sasines (Scotland) Act 1987 and is known as the general register of sasines. The effect of registration in the register of sasines is merely registration or recording of the deed rather than the registration of ownership. Therefore, the registration of deeds in the register of sasines records and guarantees the publication of the details in the deed, instead of guaranteeing the transfer of ownership in the name of the purchaser, which makes it a negative registration system.[85] This system is characterised as negative since it does not guarantee ownership at registration like the South African

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[82] See the Register of Sasines (Scotland) Act 1987 and the more recent Land Registration (Scotland) Act 1979. See further Gordon WM *Scottish land law* (1989) 342; McAllister A & Guthrie TG *Scottish property law: An introduction* (1992) 174; Thomson J *Scots private law* (2006) 29.

[83] McAllister A & Guthrie TG *Scottish property law: An introduction* (1992) 179.

[84] McAllister A & Guthrie TG *Scottish property law: An introduction* (1992) 54; Thomson J *Scots private law* (2006) 29. It seems relatively clear that the common law doctrine of personal bar will not likely be available to a *bona fide* acquirer of land under a misrepresentation made by the owner of the property. In this regard, see Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 264.

[85] Gordon WM *Scottish land law* (1989) 342; McAllister A & Guthrie TG *Scottish property law: An introduction* (1992) 173-174.

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negative registration system discussed in the previous chapter, as opposed to a positive registration system that guarantees ownership in favour of the registered party at the moment of transfer.[86]

The negative nature of the register of sasines was viewed as a shortcoming and this resulted in the creation of a new positive registration system with the promulgation of the Land Registration (Scotland) Act 1979 (the LRSA). The Scottish land registration system is now said to be primarily, meaning not completely, positive since the Register of Sasines (Scotland) Act still has operational effect and remains relevant for those owners who have not yet converted their registered deed into registered ownership through the process provided for in the LRSA. As a result, two transfer systems currently operate in Scottish law with two different consequences, namely, the register of sasines being a negative system of transfer in terms of which the deed is merely documented, and the LRSA with its positive registration system that guarantees ownership at registration.[87] As a result, Thomas refers to the Scottish registration system as "bijural".[88] Sections 3(1)(a) and 12(1)(b) of the LRSA introduced a positive system of land registration that guarantees the accuracy of the information in the register,[89] although it does allow for rectification in certain circumstances.[90]

In terms of the LRSA, where a *bona fide* purchaser's solicitor (conveyancer) by mistake confirms the validity of the seller's ownership in terms of the compulsory preliminary conveyancing process, which should have prevented transfers by non-owners in line with the *nemo dat quod non habet* maxim,[91] and in the absence of any

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[86] See chapter 3, section 3 3 3 above for an explanation of th negative system of registration in South African law.

[87] See section 3 of the LRSA. See further Gordon WM *Scottish land law* (1989) 344. See also section 2 of the LRSA.

[88] Thomson J *Scots private law* (2006) 30.

[89] Section 3(1)(a) of the LRSA. See further Gordon WM *Scottish land law* (1989) 344; Reid K "Property law: Sources and doctrine" in Reid K & Zimmermann R (eds) *A History of private law in Scotland* (2000) 185-219 215; Reid K & Van der Merwe CG "Property law: Some themes and some variations" in Zimmermann R, Visser D & Reid K (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2014) 637-670 662.

[90] Section 9(1) of the LRSA. See further Gordon WM *Scottish land law* (1989) 344.

[91] Reid K & Van der Merwe CG "Property law: Some themes and some variations" in Zimmermann R, Visser D & Reid K (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2014) 637-670 662.

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objection from the original owner, the Registrar will register the *bona fide* purchaser as owner of the land. In what follows, the original owner loses her ownership due to the operation of the positive registration system when the *bona fide* purchaser is registered as owner during the formal transfer process. In the event of this rare occurrence, there is a possibility of compensation being afforded to the original owner for her loss of ownership in terms of the indemnity provisions provided for in the LRSA.[92] However, the original owner is not without recourse. She may in terms of section 9 of the LRSA seek rectification of the register on the basis that the wrong person is registered as owner in the registry.[93] Where the purchaser of the land subsequent to registration is in occupation (possession) of the land the register may only be rectified where the mistaken registration can be ascribed to the *carelessness or fraud of the purchaser*.[94] In the circumstances, that would give rise to a successful estoppel defence in South African law it would hardly be possible to argue that the purchaser was careless or fraudulent because the purchaser is ordinarily required to show that she was *bona fide* and that her reliance was reasonable to succeed with estoppel. Therefore, if the same situation were to arise in the Scottish context it would seem unlikely that the original owner would be able to show fraud or carelessness on the part of the purchaser registered as owner. Accordingly, rectification would probably be refused in these circumstances. Yet, the previous owner would not be without remedy since the indemnity provision, section 12(1)(b) provides for compensation in the event of refusal of rectification.[95] In the context of estoppel the focus falls on the carelessness or rather negligence of the owner rather than that of the purchaser, while the carelessness or negligence of the owner does not seem to be relevant in the Scottish context. This finding highlights the differences between the jurisdictions, since it is clear that the owner is not required to have acted negligently in Scottish law.

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[92] See section 12(1) of the LRSA. See also Gordon WM *Scottish land law* (1989) 342; Thomson J *Scots private law* (2006) 29; Reid K & Van der Merwe CG "Property law: Some themes and some variations" in Zimmermann R, Visser D & Reid K (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2014) 637-670 662.

[93] Section 9(1) of the LRSA. See further Thomson J *Scots private law* (2006) 29.

[94] Section 9(3)(iii) of the LRSA. See further Thomson J *Scots private law* (2006) 29.

[95] Section 12(1)(b) of the LRSA. See further Gordon WM *Scottish land law* (1989) 342; Thomson J *Scots private law* (2006) 29; Reid K & Van der Merwe CG "Property law: Some themes and some variations" in Zimmermann R, Visser D & Reid K (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2014) 637-670 662.

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In light of the above, the consequence of the positive system is that a *bona fide* purchaser would likely acquire ownership in these circumstances; however, the acquisition of ownership will not be the result of the acquirer's *bona fides*. Rather, the acquisition would be the result of the positive registration system of Scotland, which guarantees title at registration. This is different from the South African registration system, which is purely negative in nature, in the sense that ownership is not guaranteed at the moment of registration but instead, registration only creates a presumption of ownership that is rebuttable at the instance of evidence to the contrary.[96] South Africa follows a negative registration system, which means that it does not guarantee the accuracy of the entries in the deeds registry.[97] Therefore, when a *bona fide* third party for value relies on an incorrect or outdated entry in the registry or is registered mistakenly as a real right holder, the law does not protect the third party relying on this mistake, which a positive system of registration would do.[98] The negative system of registration protects the position of the original holders of real rights rather than third parties relying on the entries in the land registry, where the person applying for rectification can prove her ownership.[99] When the true owner institutes the *rei vindicatio* and applies for rectification of the registry, as was the case in *Oriental*

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[96] See chapter 3, section 3 3 3 above. See also Carey Miller DL *The acquisition and protection of ownership* (1986) 170-171; Van der Merwe CG *Sakereg* 2 ed (1989) 342; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 213.

[97] See chapter 3, section 3 3 2 3 above. See *Knysna Hotel CC v Coetzee* 1998 (2) SA 743 (SCA) 753. See also Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 403; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 537. Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 213; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 231.

[98] In this regard, the *bona fide* third party for value will only be entitled to compensation where gross negligence can be proven on the part of the state. See Van der Merwe CG *Sakereg* 2 ed (1989) 342; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 403; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 213; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 231.

[99] See chapter 3, section 3 3 3 above. See Van der Merwe CG *Sakereg* 2 ed (1989) 341; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 537; Mostert H, Pope A, Badenhorst P, Freedman W, Pienaar J & Van Wyk J *The principles of the law of property in South Africa* (2010) 213; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 231.

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Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others,[100] the third party for value would be able to step in and raise estoppel as a defence against the owner's vindication claim. If the estoppel defence is raised successfully against the owner's vindication claim, rectification will not occur as was shown in the *Oriental Products* case. This illuminates why it is important to better articulate the consequences of estoppel since the practical consequence of rectification being denied as was the case in *Oriental Products* is that the successful estoppel raiser remains registered as owner. This registration publicises to the world at large an incorrect message if we fail to recognise that a successful estoppel defence results in acquisition of ownership.

This issue does not come up in the Scottish context due to the positive registration system and its consequences. In Scottish law, the positive registration system protects the *bona fide* purchasers for value, while in South African law it is not the registration system but rather the estoppel defence that protects the *bona fide* purchaser. Therefore, the construct of estoppel in South African law and the effect of the positive registration system in Scottish law that both in one way or another protect the *bona fide* purchasers for value are inherently different in that they protect *bona fide* purchasers at different stages and for different reasons. The registration system of Scotland provides a registered real right holder with indefeasible ownership for reasons of certainty and efficiency of commercial transactions. In contrast, estoppel in South African law as it currently stands prevents the owner from asserting her right where she has made a negligent representation to the contrary in order to provide an equitable outcome to a situation that would have otherwise been inequitable.[101] Whether the consequences ascribed to estoppel indeed can be described as equitable is questionable and will be considered in the next chapter. What this section showed is that comparative analysis is sometimes helpful to display all the differences between the jurisdictions, which would make wholesale transplant of principles and doctrines inappropriate without careful consideration of these differences.

In the above, section 21(1) of the SGA of Scotland was explored to explain the rules and principles that would apply in Scottish law to the situation that gives rise to estoppel in the South African context where movable property is concerned. Furthermore, the LRSA was central to the discussion of the rules and principles

[100] 2011 (2) SA 508 (SCA).

[101] A discussion of the equitable nature of estoppel can be found at chapter 5, section 5 3 2 1 below.

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applicable to the sale of immovable property in the circumstances that give rise to a successful estoppel defence in South Africa. Interestingly, both these legislative measures have similar, if not identical, equivalents in English law that will be considered in the section below.

4 3 English law

4 3 1 The right to recover in English law

This section sets out the constructs that exist in English law that are equivalent or like the estoppel doctrine that operates in South African law. Comparing similar constructs in English law with estoppel in South African law will purportedly be useful since the estoppel defence that was received into South African law originated from English law.[102] In particular, the English approach to the situation that gives rise to a successful estoppel defence in South African law, may perhaps assist with the uncertainties that currently exist in the South African context regarding the consequences of a successful estoppel defence. Consequently, this section sets out the scope of the right to reclaim movable and immovable property and its correlative remedy in English law, the limitations on this right to reclaim movable property in the English context and the possible limitations on recovering immovable property in English law. Throughout this section, the English law recovery remedy and the relevant limitations to this remedy, that are akin to the estoppel defence in South African law, are compared to the *rei vindicatio* and estoppel that operates in South African law.

However, before these legal constructs are considered, mention needs to be made of the differences between the English legal system and the legal system that operates in South Africa. English law is a common law legal system, which is different from the civil law legal system that predominantly makes up the South African law in many respects.[103] Unlike South African law, which at least in the area of property law

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[102] See chapter 2, section 2 3 1 2 above where the reception of estoppel by representation is discussed.

[103] Civil law systems are based on Roman law while common law systems are not. For a discussion of the general distinctive characteristics of the civil and common legal traditions, see Tetley W "Mixed jurisdictions: Common law v civil law (codified and uncodified)" (2000) 60 *Louisiana Law Review* 679-738; Pejovic C "Civil law and common law: Two different paths leading to the same goal" (2002) 32 *Victoria University of Wellington Law Review* 817-841; Hinteregger M "The protection of property rights" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 97-209 206-209.

consists primarily of legal principles of the civilian legal tradition, English law as a whole forms part of the common law legal tradition, which developed separately from the civilian legal tradition.[104] In the context of property law, there are several differences between these legal systems that need to be drawn attention to before the discussion concerning the right to recover property, in situations that could give rise to a successful estoppel plea in the South African context, can be explored in English law.

In terms of the first point of distinction, at common law, the English legal system knows no unitary concept of ownership that can be acquired over movable or immovable property,[105] while both South African and Scottish law recognises such a unitary concept.[106] Instead, English common law recognises that *title* can be acquired over goods (English equivalent of movable property) and land (English equivalent of immovable property).[107] In this regard, title confers on an acquirer legal rights or

[104] South African law has a mixed legal system. This means that both the civil and common law legal traditions make up the body of the South African legal system, although the former is the main legal tradition in the area of property law. See Hahlo HR & Khan E *The South African legal system and its background* (1968) 178; Zimmermann R "Good faith and equity" in Zimmermann R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 217-260 217; Tetley W "Mixed jurisdictions: Common law v civil law (codified and uncodified)" (2000) 60 *Louisiana Law Review* 679-738.

[105] Gray K & Gray S "Possession and title" in Padfield N (ed) *Landlaw* (2009) 72-104 73; Smith RJ *Property law* 6 ed (2009) 92; Hinteregger M "The protection of property rights" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 97-209 206. However, with the introduction of the land registration system in terms of the Land Registration Act 2002, a statutory concept of title emerged that is more comparable with the civilian legal concept of ownership. See Gray K & Gray S "Possession and title" in Padfield N (ed) *Landlaw* (2009) 72-104 73.

[106] Reid K & Van der Merwe CG "Property law: Some themes and some variations" in Zimmermann R, Visser D & Reid K (eds) *Mixed legal systems in comparative perspective: Property and obligations in Scotland and South Africa* (2014) 637-670 658-660. For the concept of ownership in Scottish law, see Gordon WM *Scottish land law* (1989) 389; McAllister A & Guthrie TG *Scottish property law: An introduction* (1992) 34. For the concept of ownership in South African law, see Carey Miller DL *The acquisition and protection of ownership* (1986) 256; Van der Merwe CG *Sakereg* 2 ed (1989) 347; Milton JRL "Ownership" in Zimmermann R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 686; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 103.

[107] Smith RJ *Property law* 6 ed (2009) 45. For a general discussion of title, see Gray K & Gray S *Elements of land law* 5 ed (2009) 180-202; Gray K & Gray S "Possession and title" in Padfield N (ed) *Landlaw* (2009) 72-104 84-85; Megarry R & Wade W *The law of real property* 7 ed (2008) 85-93.

entitlements in goods or land.[108] However, title is relative in nature.[109] This is because title has its roots in possession. Therefore, any party that has possession is presumed to have the title to the goods or the land.[110] However, multiple persons can have title over the same goods or land simultaneously but the party that can prove "better title" will be recognised in law as the holder of the entitlements. "Better title" is usually proven by showing first possession.[111] It is this "better title" that can be equated to the concept of ownership, although not in complete terms.[112] Therefore, the remedies available to recover lost possession will depend on whether the title held by the plaintiff is the best title, which entitles the plaintiff to the possession of the goods or the land.

As a second point of distinction, English law also knows no unitary right to recover lost possession. Instead, various remedies available to dispossessed titleholders are found in tort law.[113] This stands in stark contrast to the general right to claim for the return of both movable and immovable property that is available to owners in civilian legal systems by way of the *rei vindicatio*.[114] As indicated in chapter 2 (and again in this current chapter), the *rei vindicatio* is an action that can be instituted only by the owner of the property to recover lost possession and to assert and confirm her

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[108] Gray K & Gray S *Elements of land law* 5 ed (2009) 180; Gray K & Gray S "Possession and title" in Padfield N (ed) *Landlaw* (2009) 72-104 87.

[109] Megarry R & Wade W *The law of real property* 7 ed (2008) 90-92; Gray K & Gray S "Possession and title" in Padfield N (ed) *Landlaw* (2009) 72-104 84; Smith RJ *Property law* 6 ed (2009) 45.

[110] Megarry R & Wade W *The law of real property* 7 ed (2008) 89; Gray K & Gray S *Elements of land law* 5 ed (2009) 180; Gray K & Gray S "Possession and title" in Padfield N (ed) *Landlaw* (2009) 72-104 81; Smith RJ *Property law* 6 ed (2009) 45.

[111] Megarry R & Wade W *The law of real property* 7 ed (2008) 89; Gray K & Gray S "Possession and title" in Padfield N (ed) *Landlaw* (2009) 72-104 81; Smith RJ *Property law* 6 ed (2009) 88.

[112] Smith RJ *Property law* 6 ed (2009) 92-93. This is due to the relative nature of title. See Megarry R & Wade W *The law of real property* 7 ed (2008) 90-92; Gray K & Gray S "Possession and title" in Padfield N (ed) *Landlaw* (2009) 72-104 84; Smith RJ *Property law* 6 ed (2009) 45. Interestingly, it is sometimes also said that a freehold estate to land can be equated to ownership. For more on the legal concept of a freehold estate, see Gray K & Gray S "Possession and title" in Padfield N (ed) *Landlaw* (2009) 72-104 105-148; Smith RJ *Property law* 6 ed (2009) 33-41.

[113] Megarry R & Wade W *The law of real property* 7 ed (2008) 98; Gray K & Gray S "Privacy, trespass and exclusion" in Padfield N (eds) *Landlaw* (2009) 508 509; Hinteregger M "The protection of property rights" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 97-209 161.

[114] Hinteregger M "The protection of property rights" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 97-209 161.

ownership.[115] However, in English law what needs to be proven by the titleholder to assert her better title and to recover lost possession depends on whether the object constitutes goods (chattels) or registered or unregistered land. In terms of the former, the titleholder is required to prove that she has the strongest right to possess and therefore the "better title".[116] In terms of the latter, the titleholder must prove her title, not by proving possession, but rather by showing that she is registered as titleholder in the land registry in terms of the Land Registration Act 2002.

The question relevant for this section is which remedies are available to titleholders for the recovery of goods, registered land and unregistered land in the English context. The question is specifically raised in the context where a third party acquired title and therefore possession of the property *bona fide* and for value because of the titleholder's negligent representation that the seller was the titleholder. The subsections below explore the remedies available to titleholders to recover possession over goods and land, as well as the limitations imposed on these remedies in English law in the circumstances that would give rise to a successful estoppel defence in the South African context. Therefore, the aim is to look at the sale of goods and land by unauthorised sellers ultimately to determine if the constructs used in this jurisdiction is comparable to the doctrine of estoppel by representation in South African law. If this is the case, it is furthermore necessary to determine whether the way in which the consequences of these constructs are managed in English law can be useful for the way we think about the consequences of a successful estoppel defence in South African law.

4 3 2 The sale of goods (chattels) by unauthorised sellers

Recovery of possession of goods where the titleholder, entitled to possession, lost possession thereof without consent is primarily regulated by English tort law.[117] The

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[115] See chapter 2, section 2 2 2 above.

[116] Megarry R & Wade W *The law of real property* 7 ed (2008) 90-92; Gray K & Gray S "Possession and title" in Padfield N (ed) *Landlaw* (2009) 72-104 84; Smith RJ *Property law* 6 ed (2009) 45.

[117] Hawes C "Recaption of chattels: The use of force against the person" (2006) 12 *Canterbury Law Review* 253-272 254-255; Hinteregger M "The protection of property rights" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 97-209 193; Bridge M *Benjamin's sale of goods* 9 ed (2014) 356. Importantly, this section in the chapter does not purport to elaborate on the right to recover lost possession where possession was lost due to theft. This type of loss of possession falls

common law tort remedies available to a titleholder when goods are interfered with are, in the first place, self-help by way of recaption of the goods, and in the second place, court proceedings in terms of the tort remedies codified in the Torts (Interference with Goods) Act 1977 (the Torts Act).[118] Recaption is a limited right to self-help that allows the titleholder to retake possession of the goods interfered with. It is said to be limited in nature due to self-help being undesirable where it involves force and disturbance of peace.[119] Where force is used to retake possession of goods interfered with, the titleholder is encouraged to rather institute court proceedings to recover possession. In this regard, section 1 of the Torts Act explains that (i) conversion and (ii) trespass to goods give rise to interference with goods that provides the titleholder that is ordinarily entitled to possession, with the relief contained in the Torts Act.[120] A person claiming interference with goods based on conversion is required to show that the defendant is guilty of a conversion. In *Hollins and Others v Fowler and Other*[121] the court explained what a conversion encompasses:

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outside the scope of this dissertation. For a discussion of the remedies available in the context of theft, see Smith TB *Property problems in sale (Tagore law lectures)* (1978) 154; Bridge M *Benjamin's sale of goods* 9 ed (2014) 359-360.

[118] Bridge M *Benjamin's sale of goods* 9 ed (2014) 356. See also Hawes C "Recaption of chattels: The use of force against the person" (2006) 12 *Canterbury Law Review* 253-272 253-254. Moreover, tort law also entitles holders of the right to possession because of interference with their possession to claim injunctive relief that could be prohibitory or mandatory in nature. In terms of mandatory injunctions, the court may decide based on its discretion to order that the property be delivered to the holder of the right to possession over the property. Such a delivery order constitutes equitable relief. See Hinteregger M "The protection of property rights" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 97-209 161-162. In terms of a prohibitory injunction

[119] See also Hawes C "Recaption of chattels: The use of force against the person" (2006) 12 *Canterbury Law Review* 253-272 253.

[120] Section 1 of the Torts Act. See also Hinteregger M "The protection of property rights" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 97-209 193; Bridge M *Benjamin's sale of goods* 9 ed (2014) 356. This discussion will not elaborate on negligence that causes damage to goods because this type of interference with goods requires a breach of a duty of care and is therefore unlikely to be instituted against a *bona fide* acquirer for value of the goods who reasonably relied on a representation created by the titleholder. For a discussion of negligence as provided for in section 1 of the Torts Act, see Deakin S, Johnston A & Markesinis B *Markenesinis and Deakin's Tort law* 6 ed (2008) 492; Hinteregger M "The protection of property rights" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 97-209 193; Jones MA "Negligence" in Jones MA & Dugdale AM (eds) *Clerk & Lindsell on torts* 21 ed (2014) 439-607 439-442.

[121] [1874-1880] All ER Rep 757.

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> "Any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of those goods for his own benefit, or for that of another person, is guilty of conversion".[122]

Accordingly, to prove a conversion it must be shown that (i) the defendant obtained possession of the goods as a result of (ii) the unlawful deprivation of the goods from the plaintiff and subsequently (iii) disposed of the goods for a benefit. Here the focus is on the disposition of the goods adverse to the right of the titleholder.[123]

On the other hand, for interference with goods to be established based on trespass, a plaintiff merely must show direct interference with the goods. In this regard, use or possession without consent makes one guilty of trespass.[124] Accordingly, trespass can be described as a lesser infringement than conversion because conversion requires disposal of the goods in addition to requiring infringement of possession of the titleholder.[125] Interestingly, whether the defendant in a claim for interference with goods acted in good faith is not relevant for whether the court finds the defendant guilty of a conversion or trespass. The good faith of the defendant instead only ensures that the defendant can recover an amount equal to the increase in the value of the goods, in the situation where the defendant who acted in good faith made improvements to the goods.[126]

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[122] *Hollins and Others v Fowler and Other* [1874-1880] All ER Rep 757-757. For a discussion of this case, see Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 97-209 199.

[123] Deakin S, Johnston A & Markesinis B *Markenesinis and Deakin's Tort law* 6 ed (2008) 486-492; Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 97-209 200; Tettenborn A "Wrongful interference with goods" in Jones MA & Dugdale AM (eds) *Clerk & Lindsell on torts* 21 ed (2014) 1225-1309 1229.

[124] Deakin S, Johnston A & Markesinis B *Markenesinis and Deakin's Tort law* 6 ed (2008) 483-484; *Penfold Wines v Elliott* [1946] 74 CLR 204 HCA 215. See further Hinteregger M "The protection of property rights" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 97-209 198; Tettenborn A "Wrongful interference with goods" in Jones MA & Dugdale AM (eds) *Clerk & Lindsell on torts* 21 ed (2014) 1225-1309 1297-1304.

[125] Deakin S, Johnston A & Markesinis B *Markenesinis and Deakin's Tort law* 6 ed (2008) 483-484; Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 97-209 200; Tettenborn A "Wrongful interference with goods" in Jones MA & Dugdale AM (eds) *Clerk & Lindsell on torts* 21 ed (2014) 1225-1309 1297-1298.

[126] Section 6(1) of the Torts Act. This section in the Torts Act restates the common law position. See *Reid v Fairbanks* (1853) 13 CB 692 797. See further Bridge M *Benjamin's sale of goods* 9 ed (2014) 358.

Section 3(2) of the Torts Act provides the court with a discretion to order one of three remedies where either conversion or trespass has successfully been established, namely: (i) the delivery of the goods to the holder of the best title and the payment of consequential damage; (ii) the option of either delivery of the goods or payment of damages equal to the value of the goods plus compensation for consequential damages; or (iii) only the payment of damages equal to the value of the goods.[127] Evidently, the courts have a discretion to award damages or the delivery of the property. This means that the court might not always order delivery as relief to a plaintiff, especially in light of damages traditionally constituting the default remedy for interferences in terms of tort law.[128]

The above remedies are available to those entitled to the possession of the goods who have subsequently been dispossessed and the purpose of these remedies is to provide them with relief for the interference with their goods.[129] In this regard, it is not only the titleholder that would be able to rely on the Torts Act against interference with possession. It would be the holder of the strongest right to possess that would be entitled to relief. This is different from the civilian action of the *rei vindiciatio* that can only be instituted by the owner of the property and not a mere possessor of the property.[130]

Furthermore, these remedies are instituted against the interferer specifically.[131] This means that claims based on interferences caused by conversion that specifically

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[127] Section 3(2) of the Torts Act. See further Hawes C "Recaption of chattels: The use of force against the person" (2006) 12 *Canterbury Law Review* 253-272 253; Hinteregger M "The protection of property rights" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 97-209 193-198; Bridge M *Benjamin's sale of goods* 9 ed (2014) 356.

[128] The court would only order delivery of the goods to the right holder in the event that it decides to exercise its discretion to do so. See Hawes C "Recaption of chattels: The use of force against the person" (2006) 12 *Canterbury Law Review* 253-272 254; Hinteregger M "The protection of property rights" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 97-209 161.

[129] Hawes C "Recaption of chattels: The use of force against the person" (2006) 12 *Canterbury Law Review* 253-272 254; Hinteregger M "The protection of property rights" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 97-209 161; Bridge M *Benjamin's sale of goods* 9 ed (2014) 356.

[130] See chapter 2, section 2 2 2 above.

[131] *Hollins and Others v Fowler and Other* [1874-1880] All ER Rep 757 760. See further Hinteregger M "The protection of property rights" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 97-209 199-203; Bridge M *Benjamin's sale of goods* 9 ed (2014) 356.

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requires disposal of the goods will generally be instituted against a person, not in possession of the goods. For this reason, conversion might not be helpful as a comparable construct in the circumstances that would ordinarily give rise to an estoppel defence in the South African context. The holder of the right to possess would need to institute a claim for conversion against the disposer and not the current *bona fide* possessor for value. In contrast, the civilian action of the *rei vindicatio* is instituted against the person in possession of the property, rather than the interferer or disposer.[132] Therefore, the situation that could give rise to a successful estoppel defence would more likely in English law be triggered by the titleholder instituting a recovery claim in terms of the Torts Act based on trespass. Trespass is a more suitable action in this context because it is instituted against the possessor of the goods that is holding the goods in conflict with the rights of the titleholder. If the titleholder is successful with her trespass claim, the court may exercise its discretion and grant an order for the delivery of the goods.

However, the defendant in a trespass claim who acquired the goods in good faith and for value (under circumstances that would most likely give rise to a successful estoppel defence in South African law) can raise a defence found in section 21(1) of the Sale of Goods Act 1977 against the plaintiff's claim.[133] Section 21(1) of the SGA in the first place confirms the plaintiff's entitlement to the goods by reiterating the maxim *nemo dat quod non habet,* meaning that a person with no rights cannot transfer rights to a purchaser.[134] The interpretation of the first part of the provision is the same as the interpretation attached to the provision in Scottish law, namely that the general rule is that no rights are transferred where the seller had no authority to sell the goods irrespective of the good faith or bad faith of the purchaser. As mentioned above in relation to the Scottish legal position, this general rule of *no transfer* is identical to the

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[132] See chapter 2, section 2 2 2 above.

[133] Section 21(1) of the Sale of Goods Act. See further Smith TB *Property problems in sale (Tagore law lectures)* (1978) 161; Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 375; Bridge M *Benjamin's sale of goods* 9 ed (2014) 361.

[134] Smith TB *Property problems in sale (Tagore law lectures)* (1978) 161-162; Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 375; Bridge M *Benjamin's sale of goods* 9 ed (2014) 355. For a discussion of the operation of the *nemo dat quod non habet sequelam* maxim in English law, see *Whistler v Foster* (1863) 14 CB (NS) 248 257.

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South African position in this regard.[135] Therefore, the claim for recovery of the goods will remain good in these circumstances.

Yet, much like the interpretation ascribed to the second part of section 21(1) in the Scottish context, the provision in English law is interpreted to contain an exception to the "no transfer" maxim. A defendant in a trespass claim "where the owner by her own conduct is precluded from denying the disposer's authority to sell the property" can rely upon this exception.[136] It has been argued, and subsequently confirmed in case law that the second part of section 21(1) of the SGA in English law embodies the English common law doctrine of estoppel.[137] It was first submitted that the exception to section 21(1) of the SGA encompassed the broad principle as articulated in *Lickbarrow v Mason*.[138] This principle entails that "wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it".[139] However, it is trite law that the *Lickbarrow* principle is too vague to ascribe to section 21(1) and that estoppel doctrine might be better suited to encapsulate the exception envisaged in section 21(1) since it is a much narrower legal construct.[140]

Estoppel operating as the accepted exception to section 21(1) precludes the titleholder from asserting her stronger right to possess in two distinct situations. The purchaser can rely on the second part of section 21(1) by satisfying the requirements of *estoppel by representation* or *estoppel by negligence*. On the one hand, estoppel by

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[135] See section 4 2 2 above.

[136] Section 21(1) of the Sale of Goods Act of 1979.

[137] See *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600 607; *Mercantile Credit Co Ltd V Hamblin* [1965] 2 QB 242 275*; Stoneleigh Finance Ltd v Goldring* [1965] 2 QB 537 578; *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890 918. See further Smith TB *Property problems in sale (Tagore law lectures)* (1978) 162; Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 375; Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 263; Reid EC & Blackie JWG *Personal bar* (2006) 189; Bridge M *Benjamin's sale of goods* 9 ed (2014) 361. For a contrasting position, see *Shaw v Commissioner of Met Police* [1987] 1 WLR 1332.

[138] (1787) 2 TR 63.

[139] *Lickbarrow v Mason* (1787) 2 TR 63 70.

[140] See Bridge M *Benjamin's sale of goods* 9 ed (2014) 361. See further *Farquharson Bros & Co v King & Co* [1902] AC 325 335. Also see chapter 2, section 2 3 1 above in which the history of the doctrine of estoppel in English law is briefly outlined. Also the Lickbarrow principle is discussed further in chapter 5, section 5 3 2 2.

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representation will be the most appropriate in the circumstances where the titleholder made an active representation to the acquirer of the property that the seller indeed is the right holder or has the authority to sell the property.[141] Estoppel by representation can be divided into two broad categories, namely estoppel by word and estoppel by conduct.[142] The basic requirements for these subcategories of estoppel by representation are in the first place a *representation* by word or deed.[143] In this regard, it is not sufficient to show that the owner merely parted with the possession of the goods to find a representation.[144] The representation must be misleading in clear and unequivocal terms.[145] Furthermore, the owner must make the representation to the purchaser.[146]

The second requirement for a successful defence of estoppel by representation is that the purchaser must show that she *reasonably relied* upon the representation.[147] It is in terms of this requirement that the court considers the good faith of the purchaser.[148] Thirdly, the purchaser must show that due to her reliance on the

[141] Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 375; Bridge M *Benjamin's sale of goods* 9 ed (2014) 361.

[142] Estoppel by conduct includes both positive conduct and omissions. See *Greenwood v Martin's Bank Ltd* [1933] AC 51 57. See further Cooke E *The modern law of estoppel* (2000) 76-77; Handley KR *Estoppel by conduct and election* 2 ed (2016) para 2-001.

[143] *Pickhard v Sears* (1837) 6 A & E 469 474. See further Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 376; Bridge M *Benjamin's sale of goods* 9 ed (2014) 362; Cooke E *The modern law of estoppel* (2000) 70-71; Handley KR *Estoppel by conduct and election* 2 ed (2016) para 2-001.

[144] *Farquharson Bros & Co v King & Co* [1902] AC 325 332-333. See further Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 378; Bridge M *Benjamin's sale of goods* 9 ed (2014) 362.

[145] Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 378; Bridge M *Benjamin's sale of goods* 9 ed (2014) 362; Cooke E *The modern law of estoppel* (2000) 72-73; Handley KR *Estoppel by conduct and election* 2 ed (2016) para 2-010.

[146] Cooke E *The modern law of estoppel* (2000) 70-71; Bridge M *Benjamin's sale of goods* 9 ed (2014) 363; Handley KR *Estoppel by conduct and election* 2 ed (2016) para 2-002.

[147] *Farquharson Bros & Co v King & Co* [1902] AC 325 341. See further Cooke E *The modern law of estoppel* (2000) 80-83; Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 375; Reid EC & Blackie JWG *Personal bar* (2006) 192; Bridge M *Benjamin's sale of goods* 9 ed (2014) 363; Handley KR *Estoppel by conduct and election* 2 ed (2016) para 5-008.

[148] *Lloyds & Scottish Finance Ltd v Williamson* [1965] 1 WLR 404 411. See further Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 379; Bridge M *Benjamin's sale of goods* 9 ed (2014) 363.

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representation she would suffer prejudice or detriment if the plaintiff succeeds.[149] In this regard, the prejudice must be material.[150] Once these requirements for estoppel by representation has been satisfied the titleholder will be precluded from recovering her goods in terms of section 21(1).[151] These requirements and their subsequent provisos are almost identical to the requirements of estoppel in the South African context given the fact that the South African estoppel by representation was received from English law.[152] However, estoppel by representation in the South African context developed a further requirement, namely, that the representation must have been made because of the owner's negligent conduct.[153] The fact that negligence is not an additional requirement of estoppel by representation in English law ensures that it is easier to succeed with a defence of estoppel by representation in English law. Negligence as a requirement makes the burden of proof heavier on an estoppel raiser in South African law. Another distinguishing factor is that the requirement of a representation under estoppel by representation in South African law includes representations created by way of omissions whereas the English law version of estoppel by representation does not.[154] Omissions in Engish law is regulated by a separate type of estoppel, namely estoppel by negligence.

Notably, the second part of section 21(1) can possibly embody *estoppel by negligence* to the extent that the titleholder created a representation by way of an omission (neglecting to speak up or act) where a legal duty to speak up or act existed (in the circumstances where a reasonable person would have acted).[155] Evidently, estoppel by negligence represents what is known in South African law as estoppel by

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[149] *Pickard v Sears* (1837) 6 A & E 469 474. Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 377; Reid EC & Blackie JWG *Personal bar* (2006) 191-192; Bridge M *Benjamin's sale of goods* 9 ed (2014) 362; Handley KR *Estoppel by conduct and election* 2 ed (2016) para 5-017.

[150] Handley KR *Estoppel by conduct and election* 2 ed (2016) paras 5-016 - 5-017.

[151] See Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 375; Reid EC & Blackie JWG *Personal bar* (2006) 191-192; Bridge M *Benjamin's sale of goods* 9 ed (2014) 361.

[152] See chapter 2, section 2 3 1 2 above.

[153] See chapter 2, section 2 3 2 above.

[154] See chapter 2, section 2 3 2 above.

[155] *Mercantile Credit Co Ltd v Hamblin* [1965] 2 QB 242 245. See further Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 375, 380-383; Reid EC & Blackie JWG *Personal bar* (2006) 190; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 269; Bridge M *Benjamin's sale of goods* 9 ed (2014) 366.

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representation where the representation is in the form of an omission.[156] This means that what is regarded as estoppel by representation in in South African law is regarded as two distinct estoppels in English law, although it has been conceded in English law that both estoppel by representation and estoppel by negligence rests on a representation of some kind.[157]

Unsurprisingly, the requirements for estoppel by negligence are for the most part similar to that of estoppel by representation. However, there are some differences. The representation requirement under estoppel by negligence looks slightly different from the representation requirement under estoppel by representation. Additionally, the negligence requirement that forms part of estoppel by representation in South African law does not feature in estoppel by negligence. To establish a representation under estoppel by negligence, it needs to be shown that the titleholder failed to act or speak up. In other words, a representation under estoppel by representation can only be established in the form of an omission. The required omission having to concern the situation where the titleholder neglected to act or speak up, in the specific circumstances where the titleholder had a duty to act or speak up. In this regard, the party who raises the defence of estoppel by negligence will have to show that: (i) the titleholder owed the estoppel raiser a duty of care; (ii) that there was a breach of this duty of care; and (iii) that it is this breach of the duty that moved the purchaser to alter her position.[158] This requirement of breach of a duty to care is however not required in the context of estoppel by representation in English law. The English law version of estoppel by representation solely entails representations that are created by positive actions such as by word, in writing and by positive conduct as explained above. Accordingly, the existence of a duty of care is uniquely part of estoppel by negligence in English law and holds a titleholder liable for her omission. The court is likely to find that such a duty existed if there was a "sufficient relationship of proximity between [the

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[156] *Garlick Ltd v Phillips* 1949 (1) SA 121 (A) 132. See further Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 169.

[157] *Saunders v Anglia Buildings Society* [1971] AC 1004. See further Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 376.

[158] *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890 903. See further Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 375-376; Bridge M *Benjamin's sale of goods* 9 ed (2014) 366.

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parties]".[159] Once the buyer satisfies the requirements of estoppel by negligence, the titleholder will be precluded from asserting her right in terms of section 21(1) of the SGA.[160]

As was briefly mentioned above, what is known in English law as a separate type of estoppel next to estoppel by representation is known in South African law as one of the recognised manifestations of a representation under estoppel. In South African law, the English estoppel by negligence is merely estoppel by representation in the context of an omission. Estoppel by representation in the form of an omission also concerns establishing a representation where the owner failed to act or failed to speak up in the circumstances where she had a duty to do so.[161] In this regard, showing the existence of a duty of care is essential to succeeding with estoppel by representation by way of an omission. Consequently, the requirements of estoppel by negligence in English law are in fact the same as that of estoppel by representation in South African law, except for South African estoppel requiring a further and separate element of negligence to be present where estoppel by negligence in English law does not even though it is called estoppel by negligence. Also, estoppel in South African law allows for representations in the form of both positive actions and ommisions.

These English law constructs of estoppel by representation and estoppel by negligence seem to be almost identical to the South African doctrine of estoppel by representation. They require a representation made by the owner, reliance on such representation by a *bona fide* acquirer, to the detriment of the acquirer of the property. However, estoppel in South African law also requires negligence on the part of the owner.[162] Both English law estoppels do not specifically have this requirement. Accordingly, it seems as though the English law estoppels as they are implied in section 21(1) are not completely comparable to the South African estoppel by representation. It would seem that it is much more difficult to succeed with estoppel in South African law than in English law due to the negligence requirement.

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[159] Bridge M *Benjamin's sale of goods* 9 ed (2014) 367.

[160] See Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 375; Bridge M *Benjamin's sale of goods* 9 ed (2014) 361.

[161] Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 169-171.

[162] See chapter 2, section 2 3 2 above.

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Once the above-mentioned requirements of estoppel by representation or estoppel by negligence have been met, it is traditionally said in English law that the titleholder is estopped from denying that the seller was the owner or had the authority to dispose of the goods to the purchaser.[163] This stems from the traditional view of estoppel being merely a rule of evidence that precludes the person being estopped from bringing evidence of certain facts to court. In other words, precluding a titleholder from asserting her title against the estoppel raiser.[164] In this regard, the English court in *Low v Bouverie*[165] held that:

> "Estoppel is not a cause of action – it is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself".[166]

As a result, English law ordinarily accepts that the successful reliance on estoppel by representation and negligence does not affect the legal position or rights of the parties.[167] This means that the estoppel denier remains the titleholder because the estoppel asserter does not acquire better title by virtue of estoppel. This line of argument is similar to the arguments made by South African scholars pertaining to the consequences of estoppel in the South African context. It is argued that estoppel operates as a defence purely to provide protection to *bona fide* parties in certain circumstances.[168] It prevents the owner from relying on the true state of affairs to the detriment of a *bona fide* purchaser in circumstances where the conduct of the owner culpably led a *bona fide* purchaser to believe that the disposer of the property was legally entitled to dispose of such property.[169] Therefore, after the requirements of the doctrine of estoppel have been met, the court will find in favour of the estoppel raiser. As a rule of evidence, estoppel operates only as a procedural protective mechanism.

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[163] See Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 383; Handley KR *Estoppel by conduct and election* 2 ed (2016) para 1-010.

[164] *Seton Laing & Co v Lafone* (1887) 19 QB 68 70; *Low v Bouverie* [1891] 3 Ch 82 101. See further Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 383; Handley KR *Estoppel by conduct and election* 2 ed (2016) para 1-009.

[165] [1891] 3 Ch 82.

[166] *Low v Bouverie* [1891] 3 Ch 82 101.

[167] See also Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 383; Handley KR *Estoppel by conduct and election* 2 ed (2016) para 1-010.

[168] See chapter 2, section 2 3 2 above.

[169] See chapter 2, section 2 3 2 above.

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This limitation on the function of estoppel has been enunciated by various courts in the statement that estoppel can only be used as a shield (or defence) and not as a sword (or independent cause of action).[170]

In English law, another view exists to the effect that estoppel is a rule of the substantive law because it forms part of the law of misrepresentation.[171] This view of estoppel as a rule of substantive law implies that estoppel not only precludes the titleholder from asserting her right contrary to the representation she made but that it also has a bearing on the legal position of the parties involved. This may mean that after estoppel is raised successfully, certain entitlements of the owner are obtained by the estoppel raiser. A third view, which constitutes an intermediary approach to the traditional consequences of a successful estoppel defence, also exists. In terms of this view, estoppel is an evidentiary rule, but it also affects the legal rights of the parties involved. In other words, estoppel as an evidentiary rule can have substantive effect.[172] The court in *Paal Wilson and Co v Partenreederei Hannah Blumenthal*[173] explained that:

> "[E]stoppel in the strict sense . . . is an exclusionary rule of evidence, though it may operate . . . to affect substantive legal rights inter partes."[174]

This approach to the consequences of a successful estoppel defence is similar to the approach advanced by Carey Miller and supported by Sonnekus in the South African context based on the *West v Pollak & Freemantle*[175] case. As mentioned in chapter 2, these authors argue that the court in *Pollak* held that one can use estoppel in an indirect manner to supplement a cause of action so that the combined effect is the

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[170] See chapter 2, section 2 3 2, 2 4 6 above. See *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 31.

[171] Handley KR *Estoppel by conduct and election* 2 ed (2016) para 1-010. See also *Foster v The Tyne Pontoon & Dry Docks Co* (1893) 63 LJQB 50 55 where the court held that when estoppel by representation is established by a party, such party is placed in the position as if the representation constituted the truth.

[172] See *Lloyd's Bank Ltd v Cooke* [1907] 1 KB 795 804. See further Handley KR *Estoppel by conduct and election* 2 ed (2016) paras 1-011 – 1-012.

[173] [1983] 1 AC 854.

[174] *Paal Wilson and Co v Partenreederei Hannah Blumenthal* [1983] 1 AC 854 916.

[175] 1937 TPD 64.

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establishment of ownership on the part of the defendant.[176] The combined effect of estoppel and the assertion of ownership by way of a cause of action based on agency would allow the defendant to establish ownership.[177] However, in the absence of a valid cause of action for establishing ownership, estoppel will only function as a defence against the *rei vindicatio*.[178]

Accordingly, it seems as though the same uncertainty that exists in South African law and Scottish law concerning what exactly the proprietary consequences are of the successful reliance on the traditional common law constructs of estoppel and personal bar, respectively, also exists in the English law context. In English law, the same uncertainty was initially also evident regarding the exact consequences of successful reliance on the exception to the "no transfer" maxim encapsulated in section 21(1). However, the successful reliance on either of the above examples of estoppel as encompassed in the exception to the "no transfer" maxim in section 21(1) of the SGA has been argued to not only estop the titleholder but to also have proprietary effect. In this regard, diverging opinions exist as to the proprietary consequences of reliance on the second part of section 21(1) of the SGA. Subsequent to the decision of *Eastern Distributors Ltd v Goldring*,[179] it seems as though the dominant view is that the successful estoppel raiser under the exception to section 21(1) of the SGA of England acquires *good title*, in the sense that she is recognised as the new titleholder, over the property that she purchased.[180] The court in *Eastern Distributors* held that:

> "This section expresses the old principle that apparent authority to sell is an exception to the maxim *nemo dat quod non habet*; and it is plain from the wording

[176] Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 355.

[177] Carey Miller DL *The acquisition and protection of ownership* (1986) 324; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 355. See *West v Pollak & Freemantle* 1937 TPD 64 68.

[178] Carey Miller DL *The acquisition and protection of ownership* (1986) 324; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 355. See *West v Pollak & Freemantle* 1937 TPD 64 68.

[179] [1957] 2 QB 600.

[180] See Smith TB *Property problems in sale (Tagore law lectures)* (1978) 163-164; Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 383; Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 266; Bridge M *Benjamin's sale of goods* 9 ed (2014) 361.

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> that if the owner of the goods is precluded from denying authority, the buyer will in fact acquire a better title than the seller."[181]

Although this is the dominant view, there are nonetheless still concerns about: (i) the fact that such a finding goes against the rules of statutory interpretation and judicial precedent;[182] and (ii) that such a position allows subsequent bad faith purchasers to also acquire good title.[183]

Interestingly, Handley and Atiyah, respectively support the idea that the successful estoppel raiser, however, acquires good title in qualified terms. The qualification is based on the fact that the English common law tradition knows no unitary concept of ownership and considers the strongest right to possess as proof of title in a given dispute, albeit the actual titleholder could be a third party not part of the proceedings.[184] It is based on this inherent characteristic of the English legal system that Handley emphasises the personal nature of estoppel by representation as between the parties and their privies. His argument follows that good title will not be established against the world, unless it was the true titleholder against whom estoppel was successfully raised.[185] Accordingly, where the party against whom estoppel was successfully raised is not the true titleholder, such party and all parties claiming under her will only be estopped in their personal capacity. However, the true titleholder would not be estopped and would therefore subsequently be able to recover the goods from the estoppel raiser. If the party against whom estoppel succeeded was indeed the true titleholder the purchaser would acquire good title.[186] However, a contrasting argument is made in this regard, namely that section 21(1) constitutes a statutory estoppel that in terms of statutory authority passes good title to the successful estoppel raiser. This

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[181] *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600 607. See also a subsequent case that supports this interpretation of section 21(1) of the Sale of Goods Act 1979 in England, namely *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890 918.

[182] Smith TB *Property problems in sale (Tagore law lectures)* (1978) 165-166.

[183] Smith TB *Property problems in sale (Tagore law lectures)* (1978) 166.

[184] See section 4 3 1 above.

[185] Handley KR *Estoppel by conduct and election* 2 ed (2016) para 1-025. See also Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 383 that make this argument in the context of section 21(1) of the Sale of Goods Act 1979 of England.

[186] Atiyah PS, Adams JN & Macqueen H *The sale of goods* 11 ed (2005) 383; Handley KR *Estoppel by conduct and election* 2 ed (2016) para 1-025.

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means that the effect of the statutory estoppel is unusual because the successful purchaser acquires title that is good against all and not a "metaphorical title".[187] Therefore, the traditionally limited consequences of a successful estoppel defence at English common law are not ascribed to the statutory estoppel. I agree with this interpretation of the consequences of section 21(1) of the SGA. The SGA implies estoppel and requires specific consequences to be attached to it, namely title to be acquired by the purchaser when the exception is successfully raised. If this is accepted the statutory estoppel and its consequences are by nature different from the common law estoppel by representation applied in the South African context. Absent legislation that regulates the sale of movables like those that the SGA in England does, the argument made above to recognise the acquisition of title in favour of the purchaser cannot as easily be made in the South African context.

4 3 3 The sale of land by unauthorised sellers

In South African law, estoppel can also be raised in the context of immovable property (land) that is being vindicated. An example of such a situation is found in the *Oriental Products* case. In terms of the peculiar facts of the case, a non-owner, unauthorised to sell the land, sold the land to a *bona fide* purchaser for value who was induced to purchase the land due to the negligence of the owner of the land.[188] In this case, the facts were as such that the rightful owner was deregistered when the first purchaser bought the property and it was subsequently registered as owner in the register. The owner of the land was held to have made a negligent representation since the owner failed to rectify the register immediately after finding out that it was no longer registered as owner. This means that on similar facts, where deregistration of the true owner took place, South African law would allow the owner to institute proceedings to claim back the land with the *rei vindicatio* and rectify the registry to reflect her as the owner.[189] If the owner is successful with the *rei vindicatio*, the court would likely make an order for

[187] Smith TB *Property problems in sale (Tagore law lectures)* (1978) 163-164; Carey Miller DL & Irvine D *Corporeal movables in Scots law* (2005) 266; Bridge M *Benjamin's sale of goods* 9 ed (2014) 361; See also *Moorgate Mercantile Co Ltd v Twitchings* [1977] AC 890 918.

[188] See *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 10.

[189] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 10.

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the ejectment of the purchaser and will order that the registry be amended to reflect the rightful owner. Yet, where the *bona fide* purchaser succesfully refutes the owner's *rei vindicatio* by raising estoppel as a defence, the outcome will be different.[190] In light of the *Oriental Products* case, the result would be that the owner will not be able to rectify the registry and the purchaser will remain registered as owner of the immovable property and remain in possession thereof in perpetuity. However, in cases with different facts, specifically where the misrepresentation does not pertain to the failure of the true owner to rectify the deeds registry timeously and where deregistration of the true owner never took place, the outcome would look slightly different. In this regard, the purchaser who succeeds with estoppel will still have indefinite hedged possession over the immovable property. However, the deeds registry will continue to reflect the rightful owner as the owner of the immovable property.[191]

In English law what must be proven by the titleholder to assert her better title and to recover lost possession of land in the above situation depends on whether the *object* of her title constitutes unregistered or registered land. Traditionally, English law had no system of compulsory registration for the transfer of title over an estate in land.[192] The transfer of title generally occurred by way of the *transfer of the deed* from the seller to the purchaser without registration.[193] However, with the promulgation of the Land Registration Act 2002 (the LRA) and the Land Registration Rules 2003 the system of

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[190] See chapter 2, section 2 3 above.

[191] For a discussion of the consequences of the defence of estoppel where immovable property is concerned see chapter 5, section 5.2.2.1.

[192] However, the predecessors of the Land Registration Act 2002, namely the Land Registry Act 1862 and the Land Registration Act 1925 introduced a system of registration of title before the new Land Registration Act 2002 was promulgated. This system was, however, completely optional. As a result, the common law method of transfer of deeds was still predominantly utilised. See Gray K & Gray S *Elements of land law* 5 ed (2009) 187-188; McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 228; Hinteregger M & Van Vliet L "Transfer" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 783-909 878.

[193] The duty rested on the purchaser of the land to investigate whether the seller had authority to sell or had good title to the land in order to determine whether she is purchasing the land free from encumbrances. In this regard, see Gray K & Gray S *Elements of land law* 5 ed (2009) 1144; McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 225; Hinteregger M & Van Vliet L "Transfer" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 783-909 871.

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registration of title was introduced.[194] The LRA provides for the continuation of the unregistered system of transfer until all unregistered titles in land are registered in the registry.[195] Accordingly, the English system contains both registered and unregistered title to land. Interestingly, the assertion of title and recovery of possession is different depending on whether the title to the land is registered or unregistered. This is because unregistered title is governed by the common law principles of relative title found in possession,[196] while title in terms of registered land is created and governed by the process of registration.[197]

4 3 3 1 Unauthorised sale of unregistered land

In the event of the unauthorised sale of unregistered title over a freehold estate in land, in the situation that would ordinarily give rise to an estoppel defence in the South African context, section 4 of the LRA compels the buyer to register the title to the land in the land registry.[198] The process of registering unregistered land is referred to as *first registration* and it involves a thorough investigation into whether the seller had title to transfer to the purchaser.[199] This investigation accords with the maxim *nemo dat*

[194] Hinteregger M & Van Vliet L "Transfer" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 783-909 878. It must be noted that the Land Registration Act created a system of registration of title and not just registration of land meaning a record of land holdings. See McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 225.

[195] *City of London Building Society v Flegg* [1988] AC 54 84. The Land Registration Act does not require immediate registration of all unregistered title. Rather, it makes provision for voluntary registration and compulsory registration in specifically defined instances to materialize progressively the goal of a conclusive register of all land title in England. See Gray K & Gray S *Elements of land law* 5 ed (2009) 191; McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 226; Hinteregger M & Van Vliet L "Transfer" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 783-909 872.

[196] Gray K & Gray S "Possession and title" in Padfield N (eds) *Landlaw* (2009) 72-104 81.

[197] Gray K & Gray S "Possession and title" in Padfield N (eds) *Landlaw* (2009) 72-104 83; Hinteregger M & Van Vliet L "Transfer" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 783-909 891. The title that is created after registration can either be absolute or qualified. Qualified title refers to title obtained by registration where there is a possibility of a defect in the purchaser's acquired title. See McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 230.

[198] Section 4 of the Land Registration Act. See also Gray K & Gray S *Elements of land law* 5 ed (2009) 193; McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 230.

[199] Gray K & Gray S *Elements of land law* 5 ed (2009) 189-199.

quod non habet that no one can transfer what he does not have.[200] If it is found that there is a defect in the seller's authority to transfer the title, or if it is found that there is a defect in title of the seller to transfer, it is likely that the Registrar would not register the title as an *absolute indefeasible title*, instead the title may be registered as a *qualified title*.[201] The registered qualified title will be subject to prior rights in the estate in the land as well as other overriding interests contained in section 11 of the LRA. In the circumstances that give rise to an estoppel defence in South African law, the purchaser in English law would at some stage take possession of the land before the owner objects to the purchaser's registration in the registry and to the purchaser's subsequent possession of the property by way of a vindication claim. In these circumstances in English law, the "true titleholder" will be able to in the first place register her better title to the land in terms of section 3 of the LRA that provides for voluntary registration of title obtaining through this registration indefensible title, meaning the best title.[202] Subsequent to such registration, the registered holder of the indefeasible title to the estate in the land may institute a possessory claim to recover possession of the land. It is to counter this possessory claim that the purchaser in possession would possibly be able to rely on proprietary estoppel.

Traditionally, recovery of possession of land takes the form of ejectment since the holder of the right to possess is entitled to object to trespass.[203] This right to object provides the holder of the right with remedies for specific recovery when trespass occurs.[204] The manner in which the holder of the right can remove the trespasser and

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[200] For a general discussion of the *nemo dat quod non habet sequelam* maxim in English law, see *Whistler v Foster* (1863) 14 CB (NS) 248 257.

[201] McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 230 explains that where the investigation into the title acquired shows that there are documents missing or that there is a defect in the purchaser's title, the Registrar will register a qualified title rather than an absolute title.

[202] See section 3 of the Land Registration Act. See also Gray K & Gray S *Elements of land law* 5 ed (2009) 193; McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 229.

[203] Gray K & Gray S "Privacy, trespass and exclusion" in Padfield N (eds) *Landlaw* (2009) 508 509.

[204] Specific recovery of land can take place by way of self-help or a court order depending on whether the holder of the right to possess retains possession at the time of trespass. In the instance where the trespasser takes up possession of the property, the holder of the right can remedy the situation by making use of self-help to eject the trespasser. However, this self-help ejectment must be done as peacefully as possible and only where force is necessary may the holder of the right use reasonable force to eject the trespasser. In the event where the trespasser took up possession of the property, the

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recover possession of the property is by way of a possession claim in terms of the Civil Procedure Rules of 1998.[205] Rule 3 of the Civil Procedure Rules requires that the titleholder must (i) show her interest in the land (in other words, show that she is the holder of the best title) and (ii) show the circumstances in which she unlawfully lost possession of the land for the order to be granted in her favour.[206]

The purchaser in occupation can refute a possessory claim by establishing a valid right or interest to possess the land. A valid right or interest to possess is shown by proving a valid right to the possession or at least a right to an equitable remedy. An entitlement to possess in terms of an equitable remedy can be recognised by way of a claim based on proprietary estoppel.[207] English law allows a good faith acquirer of land to rely on proprietary estoppel, although in limited circumstances.[208] If the possessor can prove the elements of proprietary estoppel the possessor successfully refutes the

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holder of the right is not permitted to use self-help. See Gray K & Gray S "Privacy, trespass and exclusion" in Padfield N (eds) *Landlaw* (2009) 508 510.

[205] The possessory claims contained in the Civil Procedure Rules constitute a codification of the common law tort remedies for the recovery of land. Furthermore, the person entitled to possession can also institute proceedings in terms of the Civil Procedure Rules for an interim possession order. Interim possession orders are much more expedient than summary proceedings. See further Hinteregger M "The protection of property rights" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 97-209 97; Gray K & Gray S "Possession and title" in Padfield N (eds) *Landlaw* (2009) 72-104 83.

[206] See further Hinteregger M "The protection of property rights" in Van Erp S & Akkermans B (eds) *Cases, materials and text on property law* (2012) 97-209 162-164.

[207] Megarry R & Wade W *The law of real property* 7 ed (2008) 698; McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 309; Burn EH & Cartwright J *Cheshire and Burn's Modern law of real property* 8 ed (2011) 906.

[208] Megarry R & Wade W *The law of real property* 7 ed (2008) 697; Burn EH & Cartwright J *Cheshire and Burn's Modern law of real property* 8 ed (2011) 909. Proprietary estoppel developed from estoppel by encouragement and estoppel by acquiescence. See *Taylor Fashion Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 151. See further Megarry R & Wade W *The law of real property* 7 ed (2008) 697; Burn EH & Cartwright J *Cheshire and Burn's Modern law of real property* 8 ed (2011) 908; Handley KR *Estoppel by conduct and election* 2 ed (2016) para 11-001. It is important to note at the outset that proprietary estoppel is different from the various common law estoppels, which include estoppel by representation and estoppel by negligence as discussed above. Proprietary estoppel is different in that it remained a pure equitable estoppel while estoppel by representation and negligence was adopted from equity into the common law body of law. As a result, proprietary estoppel is a much more flexible estoppel. This is evident in that proprietary estoppel can be used as a cause of action and as a defence. Furthermore, as will be seen in this discussion it can result in the acquisition of an interest in land. See Megarry R & Wade W *The law of real property* 7 ed (2008) 699-700; Handley KR *Estoppel by conduct and election* 2 ed (2016) para 11-006.

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plaintiff's possessory claim. In this regard, the elements of proprietary estoppel in English law entails first that the right holder should have made an assurance to the possessor.[209] The assurance may refer to an existing interest in the land or some interest in the land that will be acquired in future.[210] More specifically, the requirement of an assurance entails that the titleholder had to have made a representation by word, conduct or omission and it is accordingly not limited to representations made explicitly.[211] Secondly, the possessor must show that her reliance on the assurance made by the titleholder was reasonable.[212] Finally, the possessor must also satisfy the court that if the titleholder is allowed to assert her right in the land that the possessor will be prejudiced die to her reasonable reliance on the assurance made by the titleholder.[213] A wide interpretation is ascribed to "detriment" in this context to the extent that detriment is only required to be substantial.[214] The result of these above elements must be that it would objectively be unconscionable to allow the titleholder to assert her right in the land in these circumstances.[215]

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[209] Megarry R & Wade W *The law of real property* 7 ed (2008) 698; McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 304; Burn EH & Cartwright J *Cheshire and Burn's Modern law of real property* 8 ed (2011) 911. Interestingly, the assurance does not have to be clear. Rather, the court can take into account the assurance as well as events that occurred after the assurance was given to determine if the assurance can be considered for purposes of proprietary estoppel. *Thorner v Major* [2009] UKHL 18 29-30. See further McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 304.

[210] Burn EH & Cartwright J *Cheshire and Burn's Modern law of real property* 8 ed (2011) 911.

[211] *Thorner v Major* [2009] UKHL 18 29-30. See further Megarry R & Wade W *The law of real property* 7 ed (2008) 709; McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 312-313; Burn EH & Cartwright J *Cheshire and Burn's Modern law of real property* 8 ed (2011) 914. For an explanation of the requirement of an intentional representation, see *Greasley v Cooke* [1980] 1 WLR 1036 1036.

[212] *Thorner v Major* [2009] UKHL 18 29-30. See further Megarry R & Wade W *The law of real property* 7 ed (2008) 712-713; McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 304; Burn EH & Cartwright J *Cheshire and Burn's Modern law of real property* 8 ed (2011) 914-916.

[213] *Thorner v Major* [2009] UKHL 18 29-30. See also *Willmott v Barber* (1880) 15 Ch D 96 105-106. See further Megarry R & Wade W *The law of real property* 7 ed (2008)711-713; McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 304; Burn EH & Cartwright J *Cheshire and Burn's Modern law of real property* 8 ed (2011) 914-916.

[214] Burn EH & Cartwright J *Cheshire and Burn's Modern law of real property* 8 ed (2011) 916.

[215] Megarry R & Wade W *The law of real property* 7 ed (2008) 713-715; McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 304; Burn EH & Cartwright J *Cheshire and Burn's*

Proprietary estoppel in English law provides the court with a discretion upon the estoppel raiser's compliance with the requirements of the equitable doctrine.[216] In terms of this discretion, the court can decide based on the circumstances of the case to order (i) compensation in favour of the successful estoppel raiser as equitable relief,[217] or (ii) to order that the estoppel raiser receive the equitable property right that was the subject of the representation.[218] Should the court exercises its discretion in favour of recognising the proprietary estoppel raiser's proved equitable interest, such equity qualifies as an overriding interest that can be registered in the registry. This ensures that all successors in title will be subject to the overriding interest of the purchaser. In other words, the purchaser's possession of the land will be protected.

However, if the Registrar does not pick up the defect in authority of the seller in terms of the first registration investigation, indefeasible title to the land will be registered in the name of the purchaser. In other words, the purchaser will be regarded as holding the best title.[219] Because of the registration of the indefeasible title, the purchaser receives an affirmative warranty of title only to be subject to registered burdens or overriding interests. This affirmative warranty is supported by an indemnity for potential rectification due to fraud.[220] Cooke argues that what the LRA does is to afford

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Modern law of real property 8 ed (2011) 909. See further Dixon M "Proprietary estoppel and formalities in land law and the Land Registration Act 2002: A theory of unconscionability" in Cooke E (ed) *Modern studies in property law* II (2003) 165-182 175-179.

[216] Megarry R & Wade W *The law of real property* 7 ed (2008) 698-699; Burn EH & Cartwright J *Cheshire and Burn's Modern law of real property* 8 ed (2011) 916-917.

[217] *Gillett v Holt* [2001] CH 210 225. See further Burn EH & Cartwright J *Cheshire and Burn's Modern law of real property* 8 ed (2011) 916.

[218] *Jennings v Rice* [2003] 1 FCR 501 para 43. The award of the interest in the land can be either personal or proprietary in nature depending on the circumstances of the case. This means that the court has the discretion to either award the purchaser with a personal interest in the land that is only enforceable *inter partes* meaning between the purchaser and the titleholder; or the court can award a proprietary interest to the purchaser. A proprietary interest is an interest that is enforceable against the whole world and not just *inter partes*. See Burn EH & Cartwright J *Cheshire and Burn's Modern law of real property* 8 ed (2011) 916-917.

[219] Gray K & Gray S *Elements of land law* 5 ed (2009) 189; McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 235.

[220] See McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 235. Overriding interests are dealt with in section 11(3)-11(4) range looks incorrect of the Land Registration Act 2002.

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immediate indefeasibility of title that protects the purchaser's title at registration, rather than deferred indefeasibility of title that favours the former titleholder's title.[221]

Therefore, the effect of registration of title in terms of the LRA is to confer on the registered titleholder an absolute indefeasible title.[222] However, the indefeasibility of the title is subject to an exception as contained in the circumstances that would give rise to a successful rectification or alteration of the register.[223] It is generally accepted that alterations refer to all types of changes made to the registry, while rectifications refer specifically to those corrections that have a prejudicial effect on the registered titleholder.[224] It is only in the case of rectification that indemnity is provided. Interestingly, McFarlane argues that in instances of fraud (this would include cases where a third party fraudulently sold the titleholder's land to a *bona fide* purchaser for value, where the title to the land is subsequently registered in the registry without any objection by the Registrar), the original titleholder would not be able to apply for rectification, but rather for the alteration of the register to bring it up to date. He explains that fraud, unlike forgery, causes the transaction to be voidable and not *ab initio* void. Accordingly, at registration no mistake was made, because the contract was voidable and not void. It is only after the original titleholder succeeds in declaring the voidable transaction void that she can apply for alteration of the registry to bring the register up to date rather than to rectify the register. In these circumstances, a claim for indemnity would not arise in favour of the purchaser because the amendment did not constitute

[221] Cooke E *The new law of land registration* (2003) 101. See also O'Connor P "Registration of title in England and Australia: A theoretical and comparative analysis" in Cooke E (ed) *Modern studies in property law* II (2003) 81-99 86; McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 235.

[222] The Land Registration Act 2002 shifts the focus away from the relative title that traditionally has been asserted by proving the strongest entitlement to possession to an absolute indefeasible title being established by the process of registration in the land registry. See Gray K & Gray S *Elements of land law* 5 ed (2009) 182-183; Gray K & Gray S "Possession and title" in Padfield N (eds) *Landlaw* (2009) 72-104 86-87.

[223] Schedule 4 of the Land Registration Act 2002. See further Gray K & Gray S *Elements of land law* 5 ed (2009) 204-209; McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 239.

[224] Gray K & Gray S *Elements of land law* 5 ed (2009) 206; Gray K & Gray S "Possession and title" in Padfield N (eds) *Landlaw* (2009) 72-104 101-103; McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 238.

a rectification.[225] Those contesting the registered title of others, and the entitlement to possess that flows from such title, will have to accordingly bring an application for the amendment of the registry. Once this application has been successful, the new registered titleholder can institute a possessory claim in terms of Rule 3 of the Civil Procedure Rules to recover possession of the land from the purchaser. However, the purchaser in these circumstances will also be able to raise proprietary estoppel against the registered titleholder to assert an equitable interest in the land in order to remain in possession thereof as explained above.

If the applicant fails in her rectification application, the result is that the purchaser with the registered title will remain the holder of absolute title in the land.[226] In these circumstances, the purchaser acquires a good title due to the positive effect of the registration system and not because of an estoppel-like doctrine that is based on the existence of specifically defined circumstances.[227]

4 3 3 2 Unauthorised sale of registered land

In the event of the sale of registered title over a freehold estate, such sale constitutes a registerable disposition in terms of section 27 of the LRA. Registerable dispositions refer to the transfer of registered title and require that the transferred title must be registered subsequent to the disposition.[228] If such a sale takes place under the circumstances that would give rise to an estoppel defence in the South African context, English law provides that the registered titleholder must be notified and can prevent registration of title in the name of the purchaser. If this happens, the purchaser will not be registered as the titleholder. However, where the registered titleholder fails to act and therefore fails to prevent the registration, she creates the impression that the seller had authority to sell the property to the purchaser. The consequence of this is that the purchaser will be registered as titleholder of the land. The effect of such registration

[225] See McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 240.

[226] McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 240.

[227] McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 235.

[228] Section 27 of the Land Registration Act 2002. See further McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 231.

guarantees the purchaser's absolute indefeasible title.[229] In this situation, the former registered titleholder could approach the court to obtain an order to declare the transfer void and subsequently apply for the alteration of the register to reflect her as the registered titleholder. However, as already indicated above, if the former registered titleholder is unsuccessful with this application, the purchaser will remain the absolute titleholder of the land. Yet, if the alteration application is successful, the registered titleholder will be able to institute a possessory claim against the purchaser after alteration. To counter the possessory claim the purchaser would be able to successfully rely on proprietary estoppel and secure an *equitable interest* against the registered titleholder. As already explained, an equitable interest would constitute an overriding interest in terms of the LRA and can be registered as such.

In view of the above discussion of the remedies available to titleholders in the context of both registered and unregistered land, it is clear that the remedies in place to protect the interest of the original titleholder and third party purchasers arise from legislation (the LRA) and equity (proprietary estoppel). In the circumstances where the original titleholder fails to alter the registry or is unsuccessful with an alteration application, the positive nature of the registration system protects the purchaser's title, since it is the purchaser's name that reflects in the register. This is not comparable to the regulation of similar situations in South African law. The South African registration system is a negative registration system and does not guarantee ownership. Therefore, it can be amended for various reasons as long as the applicant applying for amendment can prove that she is the owner. It is at this stage where the original owner applies for rectification and institutes the *rei vindicatio* that the purchaser would be able to raise estoppel by representation as a defence against the owner's vindicatory claim.

With regard to those instances in the English context where the original titleholder succeeds with amending the register, or registers absolute title, and in the process extinguishes the qualified title of the purchaser, the original owner can subsequently institute a possessory claim to recover possession. However, the purchaser would be able to institute proprietary estoppel against the original titleholder to secure an equitable interest in the property worthy of registration. From a comparative perspective, proprietary estoppel is different from estoppel by representation that can be instituted in the South African context. Unlike estoppel by representation,

[229] McFarlane B, Hopkins N & Nield S *Land law: Text, cases and materials* 2 ed (2009) 235.

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proprietary estoppel is both a cause of action and a defence. Therefore, it is a much more flexible construct than estoppel by representation, which is currently only confined to operating as a defence. Furthermore, an analysis of the requirements of proprietary estoppel *vis-à-vis* the requirements of estoppel by representation indicates that the requirements are comparable in that both constructs require a representation, reliance on such representation and detriment on the part of the purchaser if the owner is allowed to assert her rights. However, negligence that constitutes a requirement in the South African context is not specifically required in terms of proprietary estoppel. Furthermore, the broad all-encompassing requirement of unconscionability that must be satisfied in the context of proprietary estoppel is not required for estoppel by representation.

The major difference between English and South African estoppel in the context of immovable property is arguably found in the consequences attached to the successful reliance on estoppel. Therefore, although the doctrine of estoppel in English and South African law seem almost identical in terms of the requirements for the respective doctrines, the relief provided for in terms of English law is much more substantive than the traditional consequence of hedged possession seemingly ascribed to a successful estoppel defence in the South African context. The fact that a successful proprietary estoppel defence results in the recognition of an equitable interest in the property in favour of the purchaser that is registerable as an overriding interest, secures the interest of the purchaser against subsequent registered owners. In this way, the protection afforded to purchasers of land in the English context is certain. The nature thereof can be described as a secured right to possession. Similarly, estoppel by representation in South African law seems to provide the purchaser with hedged possession. However, the hedged possession is not registerable as a result of a successful estoppel defence. It is more likely that registration of ownership in the name of the good faith purchaser will rather take place prior to the vindicatory proceedings, in cases similar to *Oriental Products*. This case showed that besides the entry in the deed's registry that was unsuccessfully contested by the original owner due to estoppel, no change is made to the register, where the register reflects the name of the successful estoppel raiser. More specifically, the successful estoppel raiser's name is not removed as owner. Therefore, a special possessory right as an explanation for the name that is registered is definitely not noted in the registry as the case may be in English law with the equitable interest being

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registered in favour of a successful proprietary estoppel raiser. Also, in cases where the proceedings that involve estoppel does not include a claim for the rectification of the deeds registry, since the sale of the property did not change the registry as of yet, the law also does not provide for the successful estoppel raiser's factual indefinite hedged possession to be explained in the register by way of a special entry.

4 4 Concluding remarks

This comparative chapter aimed to determine how the situation that gives rise to a successful estoppel defence in the South African context is regulated in Scottish and English law, specifically because a cursory investigation indicated that similar constructs exist in these jurisdictions. Accordingly, the chapter looked at the scope of the owner's right to vindicate movable and immovable property and the limitations posed on an owner's rights by constructs similar to the South African estoppel by representation, with specific focus on the consequences of these constructs. The purpose of this investigation was to establish whether these constructs constitute comparable mechanisms that can be relied on to prevent an owner from relying on the true state of affairs where such owner created a contradictory impression earlier on. The investigation further purported to determine whether the reasoning and arguments advanced for the consequences ascribed to these comparable constructs in these foreign jurisdictions might be useful to resolve the uncertainties that currently exist in South African law pertaining to the proprietary consequences of a successful estoppel defence.

The first part of the chapter focused on the Scottish legal system and showed that the owner's right to vindicate in Scotland is almost identical to the right to vindicate that an owner has in South African law. Both jurisdictions make use of the *rei vindicatio,* although there are differences in the burden of proof. The general rule as to sales by non-owners of movables in both South African and Scottish law is that one cannot transfer more rights than one has in the property.[230] However, the protection afforded to *bona fide* purchasers for value creates an exception to the general rule in Scottish law, albeit in specifically defined circumstances. This exception is regulated by statute in Scottish law by way of section 21(1) of the SGA, which essentially codifies the

[230] See section 4 2 1, 4 3 2 above.

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personal bar doctrine. In South African law an exception to the general rule for the protection of *bona fide* purchasers does not seem to exist. However, the common law provides for a limitation on the right to vindicate by way of the doctrine of estoppel by representation. Although these constructs are not identical in source and in how they are approached, the analysis of their respective requirements showed that the estoppel-like scenarios would adequately be dealt with under the doctrine of personal bar and, if proven, would result in a successful personal bar defence in terms of the exception found in section 21(1) of the SGA. As a result, the chapter demonstrated that at least in the context of movables, it might be suitable to look at the consequences ascribed to the successful reliance on personal bar to determine if the same arguments can be made to provide more certainty for the consequences of a successful estoppel defence in the South African context.

The chapter revealed that uncertainty exists regarding the consequences of the traditional common law personal bar doctrine and as a result the nature of the consequences of the codified personal bar doctrine as found in section 21(1) of the SGA of Scotland is also disputed. Interestingly, the arguments made against the acquisition of ownership at the instance of a successful personal bar defence are similar to the arguments made against recognising ownership acquisition at the instance of successful estoppel by representation defence in the South African context. However, the Scottish scholars seem to agree that the consequences of personal bar as codified in section 21(1) is to ensure that the purchaser acquires ownership over the movable property. The uncertainty regarding the consequences of section 21(1) is limited to whether the purchaser acquires original or derivative ownership, but the fact that ownership is acquired is not disputed. These arguments cannot be made in the South African context because estoppel is not a statutory measure but a common law defence that does not seem to entail the same direct authority for the acquisition of ownership, except for the rather confusing remarks that were made by the court in the case of *Oriental Products*.

Therefore, it would seem that at least with regard to movable property Scottish law is more advanced as to the consequences attached to the successful reliance on section 21(1) than South African law. This is because it is settled in Scottish law that section 21(1) provides purchasers with ownership. In South African law it is not clear whether the traditional consequences ascribed to a successful estoppel defence has been developed or should be developed. Furthermore, the Scottish reasoning for

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ascribing this consequence to section 21(1) that ownership is acquired is based on statutory authority which unfortunately cannot be applied in the South African context since estoppel is not a statutory measure in South African law.[231] This dissertation considers the possible development of the common law of estoppel and not the possibility of statutory development, although it would probably be much easier to regulate the *bona fide* purchaser problem by way of statute in South African law.

Remarkably, the chapter showed that in the context of immovable property personal bar does not apply due to the positive nature of the registration system of Scotland. In this regard, where the purchaser was registered mistakenly as owner in the land registry the purchaser would acquire indefeasible title due to registration and not due to any construct that is comparable to estoppel by representation that exists in the South African context. Accordingly, the Scottish position pertaining to immovable property is not comparable to the South African position.[232]

The discussion of English law as a comparable jurisdiction showed that there are fundamental differences between the English and South African legal systems. In this regard, the chapter indicated that both the concept of ownership and the actions available to owners or titleholders in the English context are not identical to those that exist in South African law. However, some comparisons can be made. Although no unitary concept of ownership exists in English law and no unitary action to reclaim lost possession exists either, contrary to the situation in South African law, for comparative purposes, titleholders can, for all intents and purposes, be regarded as owners and the English tort claims as vindicatory actions.[233]

Titleholders of goods in English law are as a rule entitled to reclaim lost possession by instituting trespass proceedings on the basis of section 3(2) of the Torts Act. In circumstances that would ordinarily give rise to an estoppel defence in South African law; a purchaser would be able to rely on section 21(1) of the SGA of England. This is the same provision that applies in Scotland. In this regard, the same general rule and exception applies in English law. However, instead of the exception to the general rule encompassing the personal bar doctrine it encompasses common law estoppels (estoppel by representation and estoppel by negligence). The chapter

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[231] See section 4 2 2 above.

[232] See section 4 2 3 above.

[233] See section 4 3 1 above.

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showed that these estoppels are not identical to the South African estoppel by representation since both these English law estoppels do not have negligence as a requirement.

Furthermore, the chapter showed that it was initially unclear whether the purchaser acquires better title once the requirements for estoppel by negligence or representation under section 21(1) of the SGA has been satisfied. The chapter also revealed that all the suggestions advanced by scholars in this regard have already been made in the South African context and that the English scholars do not take these arguments made in South Africa any further. However, the *Eastern Distributors* case showed that it has become trite that good title is acquired by the purchaser that successfully relies on the exception found in section 21(1) of the SGA. Accordingly, the Scottish and the English legal systems both accept that in the context of the sale of movable property by non-owners the successful reliance on constructs similar to South African estoppel results in acquisition of ownership in favour of the purchaser. Again, the statutory nature of section 21(1) that allows for the acquisition of ownership over movable property by the purchaser results in this finding not being in its entirety comparable or suitable for the South African context, since estoppel in South Africa is a common law construct and not regulated by statute.[234]

The chapter also showed that in English law it is clear that the registration system confers on the purchaser indefeasible title where immovable property was sold to a purchaser under the circumstances that would give rise to a successful estoppel defence in South Africa and registration in the name of the purchaser occurred subsequent to the purchase. In this situation, the true titleholder will have to apply for alteration of the registry and subsequently institute a possessory claim in terms of Rule 3 of the Civil Procedure Act. If the true titleholder fails in an application to alter the inscription in the registry, the purchaser will remain titleholder with an indefeasible title. In this regard, the chapter showed that an estoppel-like construct is not the reason for the purchaser acquiring ownership in this situation. Instead, the positive nature of the registration system of England is responsible for conferring title on the purchaser. In the event that the true titleholder succeeds with altering the inscription in the registry and institutes a possessory claim to recover possession of the property, the purchaser will be able to successfully rely on proprietary estoppel. The chapter indicated that

[234] See section 4 3 2 above.

successful reliance on proprietary estoppel can result in the acquisition of an equity in the land if the circumstances lead the court to make such an order. This means that the purchaser will secure a registrable equity over the land due to an equity qualifying as an overriding interest in terms of the LRA. As a result of the equity, the purchaser's possession is protected against successive owners. The chapter showed that the registered equity that a purchaser acquires in this instance constitutes much more substantive protection of possession than what the same purchaser would enjoy in South African law after succeeding with estoppel by representation. However, the relief the English courts award in these instances may not always result in the acquisition of an equity.[235]

Overall, the chapter showed that these jurisdictions have similar constructs concerning movable property but not with regard to immovable property. Furthermore, it is clear that the statutory nature of the constructs that applies to movable property in these jurisdictions, namely section 21(1), makes it difficult to transplant the reasoning used to argue for acquisition of ownership of the purchaser in these jurisdictions into the South African context. This is so since estoppel by representation in South African law is a common law defence and not codified in legislation. It does, however, raise the question whether it would be more desirable to rather develop the law in South Africa by way of legislative intervention. Yet, since the focus of this thesis is on whether the defence of estoppel (a common law defence) results or should result in ownership acquisition, investigation into the possible development of the law is limited to determining the suitability of developing the common law. What was quite interesting was that the consequences of the Scottish construct of personal bar and the English law estoppel by representation and estoppel by negligence (common law constructs), that most closely resemble estoppel by representation in South African law because they are also limited to operate as defences, are also contested. This arguably indicates that there is globally a difficulty with ascribing ownership acquisition consequences to a legal construct the function of which is limited to a defence. Development of the defence by way of codifying the defence in legislation or developing it into a self-standing new mode or acquisition of ownership as argued for in chapter 3, might be the only viable way to ensure that ownership is acquired by the

[235] See section 4 3 3 above.

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bona fide purchaser, if acquisition of ownership is the desired consequences in a given legal system.

Furthermore, the problem where immovable property is involved is largely regulated by the positive nature of the registration system in both these foreign jurisdictions. This finding is not helpful for the South African context since the South African registration system is a negative registration system, rather than a positive registration system. This difference in registration system implies that a *bona fide* purchaser who bought property from a non-owner where the actual owner made a representation that the seller was the owner or had the authority to dispose of the property would obtain indefeasible title at registration under the positive registration system. In other words, it is through the registration of the purchaser that the purchaser acquires the title. Conversely, the purchaser in the same situation in South African law would not obtain ownership due to the mere fact of registration under the negative registration system. In South African law, the registration of the purchaser would merely result in a rebuttable presumption being created in favour of the purchaser due to the negative nature of the registration system that operates in South African law.

Finally, what is also interesting is the equitable discretion English courts enjoy which enables them to grant an equity in favour of the purchaser to the effect that the purchaser's possession is hedged against all successive owners. This is not possible in South African law because the South African legal system knows no separate notion of equity. Yet, it prompts one to ask whether it is perhaps suitable to confer on the court a discretion to decide on a case by case basis whether it would be appropriate to order that the purchaser acquires ownership or at the very least describe the consequences of its order to provide more legal certainty. This would have to be done in terms of legislation or development of the common law. Such a discretion would, however, need to be exercised in terms of clear guidelines, which would have to stipulate when and why a court may decide on awarding an acquisition order rather than a compensation order. In this regard, there is perhaps more to learn from the English courts.

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Chapter 5: Policy analysis

5 1 Introduction

This chapter turns to investigate whether there are sufficient policy reasons for allowing the circumstances that would give rise to a successful estoppel defence in South African law currently, to develop into a mode of acquisition of ownership. In chapter 3, it was suggested that it might not be wise to ascribe ownership acquisition consequences to a successful estoppel defence. It was therefore proposed that a new mode of original acquisition should be developed to regulate the *bona fide* purchaser problem, namely equitable acquisition, which should still have to comply with the traditional requirements of estoppel. [1]

When considering development of the common law, the methodology proposed by Van der Walt is valuable in guiding such an inquiry. His methodology pertains to the question of when common law development should take place and whether sound policy reasons exist to justify the development of the common law.[2] For this reason, the current chapter will be devoted to determining whether there are sound policy reasons justifying the development of the common law to recognise a new mode of original acquisition based on the requirements of estoppel. Since it is paramount to ensure that development of the common law aligns with the Constitution, chapter 6 will focus on a constitutional analysis of both the current uncertain consequences ascribed to estoppel and the proposed development thereof.[3] The current chapter is therefore crucial as a stepping stone for the chapter conducting the constitutional analysis because the policy reasons crystallised in this chapter may be necessary to justify the limitation of property rights that potentially occurs due to estoppel. If the operation of estoppel as a defence, and the traditional consequences attached to it are found to be

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[1] See chapter 3, section 3 4 above.

[2] Van der Walt AJ "Development of the common law of servitude" (2013) 130 *South African Law Journal* 722 737. For a cursory overview of the potential constitutional issues with the traditional position and proposed developed position, see Boggenpoel ZT & Cloete C "The proprietary consequences of estoppel in light of section 25(1): Testing Van der Walt's hypotheses" in Muller G, Brits R, Slade B & Van Wyk J (eds) *Transformative property law: Festschrift in honour of AJ van der Walt* (2018) 147-172 157-158.

[3] See chapter 6 below.

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unconstitutional, such unconstitutionality might mandate development of the common law to bring the regulation of the conflict between the *bona fide* purchaser and the owner in South Africa in line with the Constitution. Yet, where no unconstitutionality can be found, the justification for development of the common law may be found in policy reasons alone. In addition, if the proposed developed position is contrary to the Constitution, it would mean that the proposed development cannot take place. However, if such development survives constitutional muster and has sound policy reasons as justification, such development should be welcomed.

With the above in mind, before the constitutionality of either position can be considered in a subsequent chapter, the current chapter will first describe the various policy reasons that exist in favour of the traditional consequences ascribed to estoppel as a defence and those that may exist in favour of the development of a self-standing mode of original acquisition, namely equitable acquisition. This is important since many of the policy reasons will play a role in the determination of whether these competing constructs comply with section 25(1) of the Constitution of the Republic of South Africa (the Constitution) in chapter 6.[4]

Therefore, the first part of the chapter will contextualise the conflict between the *bona fide* purchaser and the owner in South African law and explain the anomalies that result from estoppel in its defence form. Thereafter, the focus will shift to identifying which of the two competing legal constructs (estoppel as a defence and the proposed mode of acquisition, namely equitable acquisition) are the better construct to regulate the *bona fide* purchaser problem in South African law based on policy considerations that potentially include considerations of law and economics, equity and fairness.

5 2 Contextualisation

5 2 1 Approaches to the *bona fide* purchaser problem

There are three possible approaches to the regulation of the conflict between the interest of an owner wanting to vindicate her movable property and the purchaser of the property who bought it *bona fide* and for value. These approaches are referred to as (i) the unlimited vindication approach, (ii) the unlimited *bona fide* protection

[4] See chapter 6 below.

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approach and (iii) the limited vindication (or compromise) approach, respectively.[5] It is perhaps necessary to mention at the outset that the approaches that are applied in foreign jurisdictions exclusively pertains to movable property and not to immovable property. Ordinarily, the acquisition of immovable property where the purchaser bought the property *bona fide* and for value from a fraudulent seller is regulated by the rules and principles of the land or title registration system in place in a particular jurisdiction.[6]

The unlimited vindication approach in the context of movable property is based on the Roman maxim *ubi meam invenio ibi vindico*, which translates that an owner is normally entitled to claim back her property wherever she finds it.[7] This would mean that an owner has the absolute power to recover her property from any *bona fide* or *mala fide* possessor in whatever circumstances. With this approach, the *bona fide* purchaser enjoys no protection in principle.[8] The focus of this approach is essentially

[5] For an overview of these approaches, see Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 227-229; Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 73-75; Stoyanov D "The conflict between the legal interests of the original owner and the good faith acquirer of movables – A comparative overview of the solutions" (2015) 22 *Lex ET Scientia International Journal* 93 93-107.

[6] In this regard, whether the specific legal system follows a positive or negative registration system determines whether a *bona fide* purchaser would acquire ownership over immovable property or not. See the discussion of the difference between negative and positive registration systems in chapter 3, section 3 3 3 above. For an example of how positive registration systems operate in jurisdictions such as England and Scotland, see chapter 4, sections 4 2 3, 4 3 3 above.

[7] For a general discussion of the *ubi rem meam* principle in South African law, see Milton JRL "Ownership" in Zimmermann R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 657; Zimmermann R "Good faith and equity" in Zimmermann R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 217-260 217. See also Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 226; Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 73.

[8] For an overview of this approach, see Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 228; Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 73-74; Stoyanov D "The conflict between the legal interests of the original owner and the good faith acquirer of movables – A comparative overview of the solutions" (2015) 22 *Lex ET Scientia International Journal* 93 94-96. Portugal is an example of a jurisdiction in which the unlimited vindication approach is followed. In this regard, see article 892 of the Portuguese Civil Code of 1967.

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on the owner and her relatively unfettered power to vindicate her property irrespective of the broader circumstances under which the property was purchased.

In terms of the unlimited *bona fide* protection approach, a *bona fide* purchaser in principle acquires title over movable property irrespective of the circumstances, except for the *bona fides* requirement. This means that once a *bona fide* purchaser buys movable property, the owner loses her property. Accordingly, owners enjoy no protection under circumstances where property is purchased *bona fide*.[9] JC van der Walt indicates that the adoption of this approach is due to the belief that modern trade and commerce have made the upholding of a distinction between voluntary and involuntary loss of possession by the owner irrelevant. He bases this submission on the shift in focus from the question of how the movable property moved out of the hands of its previous owner to the question of who has possession of the goods and ascribes ownership over movables to that person or entity.[10]

Finally, the limited vindication approach can be described as a compromise between the unlimited vindication approach's absolute protection of an owner's entitlement to recover her property and the absolute protection of *bona fide* purchasers provided for by the unlimited *bona fide* protection approach.[11] Generally, this

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[9] For a general overview of this approach, see Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 228; Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 73-74; Stoyanov D "The conflict between the legal interests of the original owner and the good faith acquirer of movables – A comparative overview of the solutions" (2015) 22 *Lex ET Scientia International Journal* 93 96-98. It should be noted that the unlimited *bona fide* protection approach is only applicable when dealing with movable property and not immovable property. The Italian Civil Code of 1942, article 1153, provides that "(h)e to whom movable goods are alienated by one who is not their owner, acquires their ownership by way of possession, provided he is in good faith (article 1147) at the time of the delivery." Moreover, article 1599 holds that "ownership is acquired free of rights of another in the thing if they do not appear in the instrument or transaction and the acquirer is in good faith."

[10] Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 74.

[11] Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 227; Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 74-75; Van Heerden HJO "Estoppel: 'n Wyse van eiendomsverkryging" in Kahn E (ed) *The quest for justice: Essays in honour of Michael McGregor Corbett* (1995) 304-308 305; Stoyanov D "The conflict between the legal interests of the original owner and the good faith acquirer of movables – A comparative overview of the solutions" (2015) 22 *Lex ET Scientia International Journal* 93 98-102.

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compromise involves the owner having the right to recover possession as a point of departure, therefore essentially entrenching the *ubi rem meam invenio* principle. Yet, if the *bona fide* purchaser can satisfy certain requirements, such purchaser is either protected in her possession or ownership is acquired by the *bona fide* purchaser and automatically lost by the original owner, depending on the jurisdiction.[12] The compromise approach is generally followed by Anglo and Continental jurisdictions although the type of protection may differ based on whether the law provides the *bona fide* purchaser with a cause of action to protect her position or with a defence to merely defend her position.[13]

What this essentially means is that in some jurisdictions there is no need for the owner to first institute proceedings for the *bona fide* purchaser to be able to receive protection. A *bona fide* purchaser can approach a court directly to assert her right of ownership over the property. In this sense, this approach creates the possibility that *bona fide* purchaser could have an independent cause of action, and not simply a defence against an owner's action as is the case in South African law.[14] An example of such a jurisdiction is England where section 21(1) of the Sale of Goods Act of 1977 can directly be relied on by the *bona fide* purchaser of movable property to assert her ownership.[15]

Interestingly, the limited vindication approach may also manifest in a somewhat more conservative manner, as is the case in South African property law. In South Africa, the owner is in principle able to institute proceedings to recover lost possession of movable and immovable property from either *bona fide* or *mala fide* purchasers of such property. However, a *bona fide* purchaser will be able to raise estoppel as a defence against the owner's *rei vindicatio*. If the *bona fide* purchaser is successful in her defence meaning she can satisfy the requirements of the defence, the owner will not succeed with her *rei vindicatio* and therefore will not be able to claim her property from the *bona fide* purchaser. As a result, the *bona fide* purchaser would be able to

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[12] See chapter 4, section 4 2 2, 4 3 2 above.

[13] For a discussion of the limited vindication approach in Anglo-American jurisdictions, see chapter 4, section 4 3 2 above where section 21(1) of the Sale of Goods Act and proprietary estoppel are explained in detail. An example of the Continental approach can be found in article 3:86 of the Dutch Civil Code, which allows for acquisition of ownership by *bona fide* purchasers in certain circumstances.

[14] See chapter 2, section 2 3 2 above.

[15] See chapter 4, section 4 3 2 above.

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remain in possession of the property. Therefore, it can be said that the traditional position pertaining to the consequences ascribed to a successful estoppel defence in South African law accords with the limited vindication approach although it might be described as a more conservative limited vindication approach, since it does not involve a direct cause of action and also does not have acquisition of ownership as consequence, as is the case in some foreign jurisdictions.[16] Rather, ownership is merely limited by the suspension of the *rei vindicatio*.[17] This is because the position regarding the consequences of estoppel has traditionally been the suspension of the owner's right to recover her property from a *bona fide* purchaser and not the acquisition of ownership, although this position has been rendered quite uncertain subsequent to the *Oriental Products* case.[18]

Given that various possible approaches can be employed to solve the *bona fide* purchaser problem, it is interesting that in South African law, the conservative version of the limited vindication approach is preferred as encapsulated in the consequences traditionally ascribed to a successful estoppel defence. This is remarkable, especially since there are several anomalies caused by the approach followed in South African law that bring the chosen approach into question.[19] In view of the above, the part below explores these anomalies that the South African approach to limited vindication, namely suspension of the owner's right to vindicate, results in.

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[16] See for example article 3:86 of the Dutch Civil Code of 1992 and article 932 of the German Civil Code of 1900. See further Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 227; Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 74-75; Van Heerden HJO "Estoppel: 'n Wyse van eiendomsverkryging" in Kahn E (ed) *The quest for justice: Essays in honour of Michael McGregor Corbett* (1995) 304-308 305.

[17] Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 74-75; Van Heerden HJO "Estoppel: 'n Wyse van eiendomsverkryging" in Kahn E (ed) *The quest for justice: Essays in honour of Michael McGregor Corbett* (1995) 304-308 305.

[18] See chapter 2, section 2 4 5 above.

[19] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 27.

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5 2 2 Estoppel's anomalies

5 2 2 1 The position of the owner

The legal anomalies caused by the traditional consequences attached to a successful estoppel defence are arguably problematic not just for the *bona fide* purchaser but also for the owner of the property and even third parties. It is the anomalous nature of the consequences of estoppel that actually forced scholars to question the South African approach to the so-called *bona fide* purchaser problem.[20]

Traditionally ownership has always been strongly protected in the South African context.[21] This idea that the South African legal system "jealously protects ownership and the correlative right of the owner with respect to her property"[22] *vis-à-vis* other interests that come up against it, was encapsulated early on, by the court's remarks in *Adams v Mocke*:[23]

> "The rule rather is that the owner has the right of vindication, and the cases where he is deprived of this right are really exceptions to the general rule."[24]

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[20] Van Heerden HJO "Estoppel: 'n Wyse van eiendomsverkryging" (1970) 33 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 19 20; Van der Merwe CG *Sakereg* 2 ed (1989) 373; Visser PJ "Estoppel en die vekryging van eiendomsreg in roerende eiendom" (1994) 57 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 633 635; Van Heerden HJO "Estoppel: 'n Wyse van eiendomsverkryging" in Kahn E (ed) *The quest for justice: Essays in honour of Michael McGregor Corbett* (1995) 304-308 304; Pelser FB "Aspekte van eiendomsverkryging deur estoppel" (2005) 38 *De Jure* 153 154. For a contrasting view, see Carey Miller DL *The acquisition and protection of ownership* (1986) 308-309.

[21] Van der Walt AJ "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446 447; Van der Walt AJ "Roman-Dutch land and environmental land-use control" (1992) 7 *South Africa Public Law* 1 4; Milton JRL "Ownership" in Zimmermann R & Visser DP (eds) *Southern cross: Civil law and common law in South Africa* (1996) 657-699 692-699. Yet, it has been convincingly shown that ownership in general has always been inherently limited in South African law. In this respect, see Dhliwayo P *A constitutional analysis of access rights that limit landowners' right to exclude* (unpublished LLD dissertation Stellenbosch University 2015); Van der Walt AJ & Dhliwayo P "The notion of absolute and exclusive ownership: A doctrinal analysis" (2017) 134 *South African Law Journal* 34 34-52; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 103-107.

[22] *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) 252.

[23] (1906) 23 SC 782.

[24] *Adams v Mocke* (1906) 23 SC 782 788.

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The same sentiment is evident in the court's dictum in *Grosvenor Motors (Potchefstroom) Ltd v Douglas*[25] a case concerned with the estoppel defence:

> "It is only necessary to add that according to *Matthaeus Paroemia*, 7, 7, i.f., enactments derogating from an owner's vindicatory rights are to be very strictly *(strictissime)* construed, a view with which Voet, *Commentarius*, 6, 1, 12, agrees. *This serves to emphasise the importance which, notwithstanding recognised exceptions, our law attaches to the owner's right to vindicate his property*, and suggests that, where estoppel is pleaded, he is not debarred from asserting that right, unless there is clear proof of estoppel."[26] (Own emphasis added)

In the context of the conflicting interests between the protection of the owner's rights and the interest of the *bona fide* purchaser, it is accepted that the owner's rights can only be trumped where *good reason* can be advanced for doing so.[27] Accordingly, the default position concerning ownership has (arguably always) been the protection of ownership as a point of departure, unless strong justification can be provided to the contrary. Some American scholars refer to this advantaged position as the presumptive power of ownership.[28] In South African law, Van der Walt describes this starting point as the normality assumption, which automatically puts the interest of the owner above that of anyone who wishes to challenge the owner's rights.[29]

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[25] 1956 (3) SA 420 (A).

[26] *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A) 427. The idea that hefty weight should be ascribed to ownership where estoppel is concerned was confirmed in *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A) 406 and subsequently also upheld in *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) 252.

[27] See Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 227; Visser PJ "Estoppel en die vekryging van eiendomsreg in roerende eiendom" (1994) 57 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 633 634; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 356.

[28] Singer JW *Entitlement – The paradoxes of property* (2000) 3; Underkuffler LS *The idea of property: Its meaning and power* (2003) 65–70; Van der Walt AJ *Property in the margins* (2009) 39, 59. See also Boggenpoel ZT "(Re)defining the contours of ownership: Moving beyond white picket fences" (2019) 30 *Stellenbosch Law Review* 234 234-249.

[29] Van der Walt AJ "Exclusivity of ownership, security of tenure and eviction orders: A model to evaluate South African land reform legislation" 2002 *Tydskrif vir die Suid Afrikaanse Reg* 254-289. Van der Walt states that "[t]he protection afforded by this action [the *rei vindicatio*] is very strong, as it is based on the 'normality' assumption that the owner is entitled to exclusive possession of his or her property – this is what is considered the 'normal state of affairs', and what would most likely be upheld in the absence of

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This starting point is important to note because it indicates that in the conflict between the *bona fide* purchaser of the property and the owner of the property, the owner starts off in an advantaged position as opposed to the *bona fide* purchaser that has to convince the court (by arguing a good enough justification) that the owner's right should not be protected. In this regard, a good enough reason for the limitation of the owner's right to recover, in particular, has been accepted to be the circumstances that meet the requirements of estoppel.[30]

As shown in chapter 2, the *bona fide* purchaser has a recognised defence, namely estoppel by representation if she satisfies the requirements of the defence.[31] Yet, the requirements of estoppel are notoriously difficult to satisfy, making the chances of success very slim. Furthermore, after the reception of estoppel into the South African legal system, it was made even more difficult for a *bona fide* purchaser to succeed with the defence against an owner's *rei vindicatio* because a further requirement, namely negligence, was introduced to provide more protection to the owner's interest.[32] Arguably, this proves that the circumstances that could give rise to a successful estoppel defence were further narrowed down in favour of protecting ownership.

Interestingly, scholars have shown that if the traditional consequences of estoppel are maintained, the owner whose interest the outcome purports to protect is in fact left in a legally unsatisfactory position after estoppel is successfully raised against her *rei vindicatio.* Although she retains her ownership, she is precluded from vindicating her movable or immovable property from the estoppel raiser.[33] In this respect, several the owner's entitlements are automatically suspended due to the suspension of her *rei vindicatio*.

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good reason for not doing so." See further Boggenpoel ZT "(Re)defining the contours of ownership: Moving beyond white picket fences" (2019) 30 *Stellenbosch Law Review* 234 234-249.

[30] The requirements of estoppel represents the circumstances that justifies its effects. For a discussion of these requirements see chapter 2, section 2 3 2 above.

[31] See chapter 2, section 2 3 2 above.

[32] For a discussion of the role the further requirement of negligence plays in justifying acquisition of ownership consequences see section 5 3 2 3 below.

[33] See chapter 2, section 2 3 2 above.

When attempting to determine the suspension of the owner's entitlements over movable property the following becomes evident. The absence of physical control over the movable property after a successful estoppel defence is raised, purportedly results in the owner not being in a position to use and enjoy the movable property. In addition, she will be unable to deliver such property to a subsequent purchaser, lessee or pledgee, or, at the very least, provide effective control in terms of any of the constructive modes of delivery that ordinarily would allow her to burden the property.[34] Therefore, the owner would likely not be able to sell, lease or pledge movable property that she failed to claim back with the *rei vindicatio* due to estoppel.

In the same way, the owner of immovable property will also be unable to exercise the normal entitlements of ownership in respect of the property. Since the facts that could give rise to a successful estoppel defence in the context of immovable property will always be unique, a distiction will have to be drawn here between cases that are similar to *Oriental Products* in the sense that successive sales took place where the owner was deregistered on the one hand, [35] and cases in which the sale took place but the registration into the name of the purchaser has not been concluded. In other words, the owner is still registered in the deeds registry as owner. In cases similar to *Oriental Products*, where the plaintiff owner is denied the rectification of the deeds register as well as possession of the immovable property due to estoppel being successfully raised, not only are her entitlements over the immovable property limited, they are limited for an indefinite period. The owner cannot occupy the property as she would ordinarily be able to do, and since she does not have occupation of the property, she cannot use and enjoy the immovable property.[36] It also seems like the owner would not be able to exercise her entitlement to dispose of the immovable property, since she

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[34] See chapter 3, section 3 3 3 above.

[35] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) paras 23-24. It is however noted that the facts of *Oriental Products* case are quite perculiar since it concerns successive sales before estoppel was raised because the registration of the name of the purchaser took place in the deeds register and since the misrepresentation was specifically about the failure to rectify the deed. It is also trite that the circumstances in which estoppel could be raised succesfully would always be unique. Therefore, it is very difficult to envisage a standard estoppel scenario.

[36] In this regard, see the court's remark in *Apostoliese Geloofsending van Suid-Afrika (Maitland Gemeente) v Capes* 1978 (4) SA 48 (C) 60, where it was held that the owner could not exercise her normal entitlements over the property subsequent to estoppel being raised succesfully against the owner's *rei vindicatio*.

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would purportedly be unable to provide registration as well as vacant possession of the immovable property to a potential buyer.[37] Furthermore, her entitlement to encumber or burden the property will in all likelihood also be of no real value. The encumbering of immovable property with real rights ordinarily requires that the particulars of the owner who wishes to burden the immovable property must be reflected in the deeds register.[38] However, since the owner's particulars are not reflected on the deed, and no endorsement to explain the estoppel situation is made in the Deeds Office, it is very unlikely that the Registrar would allow registration of a real security right or servitude against the property where the unregistered owner requests such registration. It would therefore seem that the owner could be described as a *bare owner*, in the sense that she retains the status of owner but has virtually none of the ordinary ownership entitlements at her disposal for an indefinite period of time.

In the scenario where the owner who has misrepresented that she was the owner or that her representative had the right to dispose of her property is still *registered as owner in the deeds registry* the owner would effectively also be a *bare owner* once her vindication claim is defeated by estoppel. The owner would be denied possession of the immovable property and would not be allowed to occupy or to use and enjoy the property. In practice, the owner's right of disposal of the property would presumably also be severely restricted, mainly because she would be unable to provide vacant possession of the property to a third party because of the indefinite hedged possession of the successful estoppel raiser even though the property is still registered in her name. Furthermore, her entitlement to lease, encumber or burden the property will in all likelihood also be of little practical value. She would not be able to lease the property to a third party because she is incapable of transferring possession to the third party. Because she is still reflected as the registered owner of the property in the deeds registry, she may in principle still be capable of burdening the property with a mortgage or a servitude, but it is uncertain how the relevant registrars of deed will handle the situation. It would therefore seem that the owner could be described as a *bare owner*, in the sense that she retains the status of owner but has virtually none of the ordinary ownership entitlements at her disposal for an indefinite period.

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[37] See chapter 3, section 3 3 3 above.

[38] See chapter 3, section 3 3 3 above.

However, the fact that the owner is effectively a bare owner is not the only reason why the traditional consequences of estoppel are problematic. It has been shown that the owner is not only affected in the exercise of her normal entitlements, but also purportedly remains liable in instances relating to the property, even though she is unable to prevent certain situations due to her bare ownership status. For instance, the owner presumably stands to be held liable for (i) any prescribed taxes payable in respect of the property in certain circumstances and (ii) any damage caused by the property where the property is a domestic animal.[39] What makes the owner's position even more precarious is that her ownership can potentially be lost if the successful estoppel raiser is sequestrated or defaults in paying rent to such an extent that the lessor's tacit hypothec is triggered and her property is attached and sold in execution.[40] These anomalies transpire due to the suspension of the owner's right to vindicate the property from the successful estoppel raiser and the failure of existing legal principles to regulate the consequences of such suspension adequately.

The extent to which a successful estoppel defence affects the remedies, ordinarily available to an owner, beyond the suspension of the *rei vindicatio* is also uncertain. Typically, an owner has various real, delictual or enrichment remedies at her disposal to protect her ownership, over and above the *rei vindicatio*.[41] Against the successful estoppel raiser, the owner is precluded from instituting the *rei vindicatio* and will most probably not succeed with the only other real remedy, the *actio negatoria,*

[39] Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 555; Visser PJ "Estoppel en die vekryging van eiendomsreg in roerende eiendom" (1994) 57 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 633 635; Pelser FB "Aspekte van eiendomsverkryging deur estoppel" (2005) 38 *De Jure* 153 154. For the general requirements of the *actio de pauperie*, see *Loriza Brahman v Dippenaar* 2002 (2) SA 477 (SCA) para 13. See further Midgley JR "Delict" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 15 Part 1 3 ed (2016) para 30; Loubser MM & Midgley R *The law of delict in South Africa* 2 ed (2012) 28−29.

[40] Pelser FB "Aspekte van eiendomsverkryging deur estoppel" (2005) 38 *De Jure* 153 154. For a discussion of the landlord's tacit hypothec over third parties' property, see Siphuma NS *The lessor's tacit hypothec: A constitutional analysis* (unpublished LLM thesis Stellenbosch University 2013) 44−78; Van der Walt AJ & Siphuma NS "Extending the lessor's hypothec to third parties' property" (2015) 132 *South African Law Journal* 518 523−533; Viljoen S *The law of landlord and tenant* (2016) 335−339.

[41] Van der Merwe CG *Sakereg* 2 ed (1989) 346-347; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 464-476; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 538−539; Boggenpoel ZT *Property remedies* (2017) 38-90; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 269.

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since it is questionable whether this remedy still has a place in South African law.[42] The vindication remedy will also not succeed against the fraudulent seller in the estoppel scenario because, the seller is not in possession of the property.

Where the owner's real remedies may not provide protection, the owner can ordinarily look to delictual remedies. In particular, delictual remedies that are associated with the protection of ownership are the *condictio furtiva*, the *actio ad exhibendum* and the *actio legis Aquiliae*. The *condictio furtiva* is described as a remedy that is traditionally available to the owner of stolen property, for the recovery of the value of such property or the property itself from the thief who stole it or the heirs of the thief.[43] In the context of the *condictio furtiva*, the concept of theft is wider than that found in criminal law and includes "the fraudulent handling of anything with the intention of profiting by it, which applies either to the article itself or to its use or possession."[44] This means that the act of fraudulently using or disposing of the property will constitute theft for purposes of the *condictio furtiva*. Moreover, in *Clifford v Farinha*[45] the court further expanded on who can be held liable under this remedy. The court held that

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[42] This remedy may be utilised in the situation where a servitude holder exceeds the bounds of its rights over the owner's property or where a person tries to exercise a servitude over the owner's property that such person does not have. However, whether the *actio negatoria* still forms part of modern South African law remains uncertain. See *Rekdurum (Pty) Ltd v Weider Gym Athlone (Pty) Ltd t/a Weider Health & Fitness Centre* 1997 (1) SA 646 (C) 654. See also Van der Merwe CG *Sakereg* 2 ed (1989) 360-361; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 475-476; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 541; Boggenpoel ZT *Property remedies* (2017) 85-89; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 291-292.

[43] Voet 13.1.2: Full citation Voet J *Commentarius ad Pandectas* (1829) translated by Gane P *Commentary on the Pandect* (1955-1958). See also Van der Merwe CG *Sakereg* 2 ed (1989) 358-359; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 475; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 544-545; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 244; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 295. For the application of the *condictio furtiva*, see *Minister van Verdediging v Van Wyk* 1976 (1) SA 397 (T) 398. See further Midgley JR "Delict" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 15 Part 1 3 ed (2016) para 34.

[44] *D* 47.2.1.3: Full citation *Digesta Iustiniani* in *Corpus Iuris Civilis* eds T Mommsen & P Krüger translated by Watson A *The Digest of Justinian* Vol IV (1985) Digest 47 2 1 3. See also *Clifford v Farinha* 1988 (4) SA 315 (W) 322; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 244; M Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 296.

[45] 1988 (4) SA 315 (W).

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liability under the *condictio furtiva* also lies against a person who "wrongfully withdraws a thing from the possession of another and uses it while intending to restore possession after the use thereof."[46]

On application of the *condictio furtiva* to the parties involved in the estoppel scenario, it is apparent that the action would probably not lie against the successful estoppel raiser since she purportedly does not fit (even) the wide description of a thief as contemplated above. Yet, since the wider definition includes the disposing of the property fraudulently, the fraudulent seller could be held liable in terms of the *condictio furtiva*. If the owner chooses to institute this remedy against the fraudulent seller, she will not be able to recover the property, since the seller would not be in possession of the property. Instead, the *condictio furtiva* will allow her to recover from the fraudulent seller the highest value of the property from the time of the theft.[47]

Another delictual remedy that may purportedly also be available to the owner to claim the value of the property in the context of estoppel is the *actio ad exhibendum*. The *actio ad exhibendum* can be instituted by an owner to recover the value of the property from a person who fraudulently ceased to possess the property.[48] In order for liability to lie against the defendant in such circumstances, the owner must prove the generic requirements for delictual liability and in particular: (i) that she was the owner at the time that the defendant disposed of the property; (ii) that the disposition was intentional or *mala fide*, and (iii) that she suffered damage as result of the disposition.[49]

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[46] *Clifford v Farinha* 1988 (4) SA 315 (W) 322. See also Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 475; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 545; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 244; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 296.

[47] Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 475; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 545; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 244; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 295.

[48] Van der Merwe CG *Sakereg* 2 ed (1989) 353-354; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 475; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 542−543; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 242; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 293.

[49] *Philip Robinson Motors (Pty) Ltd v NM Dada (Pty) Ltd* 1975 (2) SA 156 (A). See also Van der Merwe CG *Sakereg* 2 ed (1989) 354-356; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 475;

When considering against which party the owner in the estoppel scenario may have such a claim based on the requirements of the action, the fraudulent seller stands out. The owner would be able to show her ownership at the time that the fraudulent seller disposed of the property, since she never transferred her ownership to the seller. In addition, the owner would be able to show *mala fides* and intention on the part of such a seller, because the seller sold the property to the successful estoppel raiser knowing she does not have the authority to do so. Accordingly, it would be relatively easy for the owner to satisfy the requirements of the *actio ad exhibendum* to recover the value of the property from the fraudulent seller.

Given the specific requirements of the *actio ad exhibendum* it seems unlikely that the owner would be able to institute this remedy against the successful estoppel raiser since this party cannot be described as *mala fide* or having disposed of the property. Whether the owner will be able to succeed with the general delictual remedy, the *actio legis Aquiliae* can also be considered, since this remedy constitutes one of the remedies ordinarily available to an owner to protect her ownership. This remedy is a delictual remedy with a much broader application scope than the *actio ad exhibendum* considered above. The *actio legis Aquiliae* is available to an owner of property to claim *compensation for loss or damage suffered in the situation where the defendant wrongfully deprived, disturbed or interfered with the owner's possession of her property or lost, damaged or destroyed the property*.[50] Since it is a delictual action, the generic requirements for the establishment of delictual liability must be met namely, conduct, wrongfulness, harm, causality and fault.[51] Although the owner may be able to show that there was conduct, wrongfulness, harm and causality on the part of the estoppel raiser, she most likely will not succeed in showing fault. Fault requires that the estoppel

Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 542-543; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 242; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 293.

[50] Van der Merwe CG *Sakereg* 2 ed (1989) 356; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 475; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 544; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 243; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 296-297.

[51] *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) 838-839. See also Loubser MM & Midgley R *The law of delict in South Africa* 2 ed (2012) 24-25; Midgley JR "Delict" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 15 Part 1 3 ed (2016) para 3.

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raiser must have caused the harm to the owner with intent (*dolus*) or at least negligently (*culpa*). Since the estoppel raiser's reliance was completely reasonable for it to in the first place constitute a valid representation for purposes of succeeding with estoppel, the estoppel raiser cannot be said to have acted negligently.[52] In both instances, negligence depends on the reasonableness of the estoppel raiser. It, therefore, seems unlikely that the owner would be able to institute and succeed with this action against the estoppel raiser.[53] However, it would ostensibly be possible for the owner to succeed with this remedy against the fraudulent seller since the same problem regarding the fault requirement would not crop up in that context because the fraudulent seller easily fits the description when a party may rely on the *actio legis Aquiliae*.

The above exposition shows that all the delictual remedies ordinarily available to the owner would likely succeed against the fraudulent seller of the property in the estoppel scenario, meaning that the owner would generally not be without a remedy where her property is sold to a *bona fide* purchaser by an unauthorised fraudulent seller. However, it may be that the owner may find it difficult to enforce her compensation claim against the fraudulent unauthorised seller due to such seller disappearing or becoming insolvent. Although these events would not result in an unsuccessful delictual claim, they could make it very difficult for the owner to enforce her claim.

Whether an enrichment remedy would be available to an owner generally depends on if the owner would succeed with any of the real or delictual remedies discussed above against the defendant.[54] Since the above delictual remedies are still available to an owner in the estoppel situation to obtain monetary compensation from the fraudulent seller, the owner will purportedly not be able to institute an enrichment

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[52] See chapter 2, section 2 3 2 above.

[53] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 160. See further Boggenpoel ZT *Property remedies* (2017) 79; Boggenpoel ZT & Cloete C "The proprietary consequences of estoppel in light of section 25(1): Testing Van der Walt's hypotheses" in Muller G, Brits R, Slade B & Van Wyk J (eds) *Transformative property law: Festschrift in honour of AJ van der Walt* (2018) 147-172 151.

[54] Van der Merwe CG *Sakereg* 2 ed (1989) 358; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 466; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 546; Sonnekus JC *Unjustified enrichment in South African law* 2 ed (2017) 44-63, 520-521; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 297-298.

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remedy against such a seller. The reason for this is that it would be difficult for the owner to satisfy the court that she indeed is impoverished, due to the availbale delictual claim qualifying as a patrimonial asset.[55]

Accordingly, it would seem that the insolvency of the fraudulent seller or the fact that he cannot be found, is not sufficient reason to allow the owner a claim in enrichment liability against the successful estoppel raiser. However, whether the owner would be able to hold the successful estoppel raiser liable under enrichment law remains unexplored. The only enrichment action that could be considered given the circumstances of the owner and the successful estoppel raiser would most probably be the *condictio sine cause specialis*.[56]

However, it is at best uncertain, however, whether the *condictio since cause specialis* can be instituted in South African law where the defendant was enriched by the use and enjoyment of the plaintiff's property at the expense of the plaintiff.[57] Importantly, if it is found that the *condictio since cause specialis* can certainly be instituted in these circumstances, the plaintiff as owner of the property in use by the defendant will have to satisfy the general requirements for enrichment liability. The court in *McCarthy Retail Ltd v Shortdistance Carriers*[58] explained the requirements for enrichment liability as follows: (i) the defendant must have been enriched; (ii) while the plaintiff was impoverished; (iii) the enrichment of the defendant must have taken place at the expense of the plaintiff (meaning a causal link must be established between the enrichment and the impoverishment); and (iv) the enrichment must have taken place without just cause.[59] The requirement that the owner would most likely have difficulty satisfying would be the requirement to show that she was impoverished by the

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[55] Sonnekus JC *Unjustified enrichment in South African law* 2 ed (2017) 48.

[56] Van der Merwe CG *Sakereg* 2 ed (1989) 358; Sonnekus JC *Unjustified enrichment in South African law* 2 ed (2017) 517-521, 534-537; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 297-298.

[57] Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 466; Sonnekus JC *Unjustified enrichment in South African law* 2 ed (2017) 534-535.

[58] 2001 (3) SA 482 (SCA).

[59] *McCarthy Retail Ltd v Shortdistance Carriers* 2001 (3) SA 482 (SCA) para 15. See also Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 466; Sonnekus JC *Unjustified enrichment in South African law* 2 ed (2017) 551-565; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 299; Visser DP "Enrichment" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 17 3 ed (2019) para 248.

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defendant's use of the property.[60] When it comes to the possible impoverishment caused by the situation where another uses one's property, the courts have been reluctant to find that enrichment liability lies against the user of the property, since finding impoverishment in such circumstances would presumably be the result of speculation about what the owner would have if the owner in fact had possession.[61] It, therefore, remains uncertain whether a court will be prepared to find that an owner can succeed with such a claim. It is very improbable that an owner would be able to institute an enrichment claim against the fraudulent seller of the property or the successful estoppel raiser.

Considering the above analysis of the scope of an owner's entitlements, liability and her ownership remedies, a few preliminary observations can be made. Regarding the owner's entitlements, it seems as though the owner is practically a bare owner after a successful estoppel defence. This bare ownership status continues for an indefinite period and can be argued to place the owner in a very weak position with regard to her property. In addition, the owner stands to be held legally liable in a number of instances and may even lose her ownership, while she is not in a position to avoid liability or loss of her property due to her bare ownership status and since she is not allowed to interfere with the estoppel raiser's possession over the property. Moreover, the preliminary finding of the investigation into whether the owner might have ownership remedies at her disposal to obtain relief during the indefinite period in which she has to endure her bare ownership status is not positive. The investigation showed that the owners' real remedies are of no value to her. Since the owner will generally be unable to make use of her real remedies, the owner will have to look to a possible delictual claim to obtain compensatory relief. However, the only party against whom the owner could succeed with a damages claim would be the fraudulent seller who sold the property to the *bona fide* purchaser in the first place without permission of the owner.

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[60] Sonnekus JC *Unjustified enrichment in South African law* 2 ed (2017) 534-535; Visser DP "Enrichment" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 17 3 ed (2019) para 248.

[61] In *Van Staden v Fourie* 1989 (3) SA 200 (A) the court was willing to find that the owner was impoverished by the use that the plaintiff made of its property. This finding however pertained to a claim the respondent had in terms of the Alienation of Land Act 68 of 1981 and not in terms of common law enrichment liability. See Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 466. However, the courts have not completely dismissed the possibility that an enrichment claim may lie against the user of the property. In this regard, see the *obiter* statement made in *Hefer v Van Greuning* 1979 (4) SA 952 (A) 959. See also Sonnekus JC *Unjustified enrichment in South African law* 2 ed (2017) 534-535; Visser DP "Enrichment" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 17 3 ed (2019) para 248.

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In this regard, the owner could successfully institute the *condictio furtiva*, *actio ad exhibendum* or the *actio legis Aquiliae* against the fraudulent seller. However, if the fraudulent seller is untraceable or insolvent, which is usually the case, the chances that the owner would be able to enforce her compensatory order might be very slim. An owner will also not have an enrichment claim at her disposal as an alternative against the fraudulent seller because delictual claims are available. Enrichment liability will purportedly also not lie against the successful estoppel raiser, since it is uncertain in our law whether an owner would be able to succeed with showing impoverishment because the estoppel raiser used and enjoyed the property of the owner.

In other words, the owner practically has none of her entitlements to the property, is held liable in situations that she is unable to prevent due to her bare ownership and practically has very little useful remedies at her disposal after a successful estoppel defence. It can therefore be said with certainty that the traditional consequences of a successful estoppel defence are not favourable to the owner at all. Except for her ownership status that essentially remains intact, she is practically in the position of someone with little to no rights over the property, while she at the same time has to endure the risk of liability in certain circumstances that she she mostly would not be able to avoid.

Given the owner's fragile legal and factual position, it would seem that it might be more appropriate to develop the common law estoppel scenario into a new mode of original acquisition of ownership as proposed in chapter 3.[62] Such a development will release her from liability that attach to her ownership while she would still have delictual remedies to institute against the fraudulent seller, inter alia the *actio ad exhibendum* or the *actio legis Aquiliae*. Moreover, she will arguably have a better chance of succeeding with an enrichment claim against the *bona fide* purchaser that would have acquired the property in terms of equitable acquisition. The reason why the action would likely succeed in this situation is because she will not base her impoverishment on the *bona fide* purchaser's use of the property. Instead, the argument for impoverishment will be based on the owner's loss of ownership and the *bona fide* purchaser's acquisition of the ownership due to the proposed original mode of equitable acquisition. This means that the problem of showing impoverishment for purposes of establishing enrichment liability would not arise if the proposed mode of

[62] See chapter 3, section 3 4 above.

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acquisition regulates the situation. Moreover, the court in *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd*[63] held that in the situation where an owner lost ownership as a result of accession,[64] the owner would have an enrichment claim against the acquirer.[65] If this *ratio* is applied by analogy to equitable estoppel that would also constitute a self-standing mode of original acquisition like accession, it would seem that the owner who would stand to lose ownership due to equitable estoppel would likely have an enrichment claim against the *bona fide* purchaser who acquired the property.[66] If this is the case, the owner would not really be prejudiced to the extent that she is left with nothing. The law still provides her with some relief, after the *ipso iure* loss of ownership. This finding would constitute an important consideration in chapter 6 where it will be determined if the consequences of equitable acquisition would result in an arbitrary deprivation of property in conflict with section 25 of the Constitution.[67]

This observation indicates that the law by way of ascribing the traditional consequences to a successful estoppel defence fails to regulate the consequences of estoppel adequately since these consequences of estoppel leave the owner in a very

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[63] 1999 (2) SA 986 (T).

[64] For a discussion of accession as a mode of original acquisition of ownership see chapter 3, section 3 2 3 1 above.

[65] *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1016-1017. See also the discussion of this case and support for the *ratio* of the court indicating that an enrichment claim was the appropriate remedy for the owner who lost ownership due to accession in Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 245; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 298-299.

[66] However, this remains an unexplored scenario that gives rise to a number of questions including whether the owner who lost ownership would be able to prove the requirements to succeed with an unjustified enrichment claim. A cursory analysis of the requirements indicates that it would seem that the only problematic requirement might be the requirement that the enrichment must be unjust (meaning without legal cause). However, the definition of unjust for purposes of unjustified enrichment is quite narrow, only referring to the absence of a legal ground/cause for the loss, meaning a contract. See Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 78. The result would arguably be that the owner who lost ownership would be able to show that there was no contract between the owner and the purchaser who subsequently became the owner for the loss of ownership (impoverishment of the owner) and the acquisition of ownership (enrichment of the purchaser). As a result the owner who lost ownership would purportedly not have any difficulty satisfying the requirements to establish enrichment liability on the part of the *bona fide* purchaser as the new owner.

[67] See chapter 6, section 6 2 below.

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weak and uncertain position for an indefinite period. One could argue that the unsatisfactory legal position of the owner is simply due to the inability of the *bona fide* purchaser to receive adequate protection under the law. It is for this reason that the part below will consider the *bona fide* purchaser's legal position after a successful estoppel defence.

5 2 2 2 The position of the bona fide *purchaser*

The *bona fide* purchaser's legal position seems equally problematic in South African law under the current application of the law regulating estoppel. Although the South African approach to limited vindication aims to protect the *bona fide* purchaser, it in fact, contrary to its supposed aim, leave the *bona fide* purchaser in a vulnerable position. This is mainly due to the lack of remedies available to a successful estoppel raiser to protect her possession once deprived thereof by either the owner or another party.

For instance, for the successful estoppel raiser to recover lost possession she would need to have standing to institute a recovery claim. Since the successful estoppel raiser is not the owner or placed in charge of the property by the owner, she does not have the *rei vindicatio* at her disposal to ensure that the property is returned into her possession.[68] The general question that arises here is what the legal relationship is that the successful estoppel raiser has in (or over) the property. The legal relationship will be instructive as to which, if any, possessory and or delictual remedies may be available to the estoppel raiser after her successful estoppel defence. It is trite law that the successful estoppel raiser may remain in possession of the property over which the dispute arose.[69] What this entails is however not clear from case law or literature. Hence, one should turn to the law on possession and holdership for some guidance.

Possession constitutes the most basic legal relationship that may exist between a legal subject and property and refers to the control that is exercised over the property

[68] See chapter 2, section 2 3 2 above.

[69] See chapter 2, section 2 3 2 above.

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with an appropriate intention.[70] The generally accepted view is that it is possible for a legal subject to have possession over property due to a right to possession (*ius possidendi*) or to have possession over property due to only the factual situation of being in physical control of the property (*ius possidendi*) with the appropriate intention.[71] The type of possession that a legal subject has over property determines which remedies are available to her in the event that possession is disturbed by another. It is due to the importance of correctly identifying the possessory relationship that Van der Walt suggests that the control-based approach to possession should be employed.[72] The control-based approach allows one to determine the type of controller and ascribe the correct legal consequences to a given scenario based on the determination. The approach advanced by Van der Walt requires putting the type of control that a legal subject has over property at the forefront. What needs to be determined is whether the legal subject has lawful or unlawful control over the property. If the legal subject can be said to have control over the property based on a right to control the property (*ius possidendi*), her control is lawful. Lawful control could take the form of ownership, where the right to control the property is an incident of ownership.[73] Lawful control can also take the form of lawful holdership where the right to control the property is derived from a right other than ownership and the property is controlled with the intention to derive a benefit from it (*animus ex re commodum acquirendi*) rather

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[70] Van der Walt AJ *Die ontwikkeling van houerskap* (unpublished LLD dissertation University of Potchefstroom 1986) 10-11. See further Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 122-123; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 70; Muller G et al *General principles of South African property law* (2019) 175; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 309.

[71] Van der Walt AJ *Die ontwikkeling van houerskap* (unpublished LLD dissertation University of Potchefstroom 1986) 10-11. See further Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 123-124; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 70; Muller G et al *General principles of South African property law* (2019) 177-178; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 309.

[72] Van der Walt AJ *Die ontwikkeling van houerskap* (unpublished LLD dissertation University of Potchefstroom 1986) 10-11. See also Muller G et al *General principles of South African property law* (2019) 181.

[73] Van der Walt AJ *Die ontwikkeling van houerskap* (unpublished LLD dissertation University of Potchefstroom 1986) 10-11. See also Muller G et al *General principles of South African property law* (2019) 181.

than the intention to be the owner (*amimus domini*).[74] Lawful holdership or ownership gives rise to a number of remedies that would be available to the lawful controller to protect her physical control.[75]

If the legal subject exercises control over the property without a right to do so, the legal subject would be an unlawful possessor or holder.[76] An unlawful possessor is a person who exercises control over property without a right to do so, but as if owner (meaning with *animus domini*). This particular exercise of control can possibly be done *bona fide* or *mala fide*.[77] Where the unlawful possessor is exercising control over the property in good faith, meaning under the mistaken belief that she is the owner, she would be regarded as a *bona fide* unlawful possessor. However, where the unlawful possessor exercises control over the property as if owner, while she knows she is not the owner, she would qualify as a *mala fide* unlawful possessor.[78]

On the other hand, an unlawful holder is a legal subject who exercises physical control over property without having a right to do so in order to derive a benefit from

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[74] Van der Walt AJ *Die ontwikkeling van houerskap* (unpublished LLD dissertation University of Potchefstroom 1986) 10-11. See also Muller G et al *General principles of South African property law* (2019) 182.

[75] It must be kept in mind that this understanding of possession is not the commonly held perception of possession. Courts commonly refer to possession both in terms of lawful and unlawful control. See *Matthee v Schietekat* 1959 (1) SA 344 (C) 347; *Buchholtz v Buchholtz* 1980 (3) SA 424 (W) 425; *Chiloane v Maduenyane* 1980 (4) SA 19 (W) 22–23. See also Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 310. The idea that possession is always unlawful while holdership is always lawful is the view that is held by the prominent scholars Van der Walt and Middelburg, respectively. See Middelburg AWF "Die beskerming van die houerskap in die Suid Afrikaanse reg" (1954) 17 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 268 269-270; Van der Walt AJ *Die ontwikkeling van houerskap* (unpublished LLD dissertation University of Potchefstroom 1986) 10-11. See also Muller G et al *General principles of South African property law* (2019) 181.

[76] Van der Walt AJ *Die ontwikkeling van houerskap* (unpublished LLD dissertation University of Potchefstroom 1986) 10-11. See also Muller G et al *General principles of South African property law* (2019) 181-183.

[77] Van der Walt AJ *Die ontwikkeling van houerskap* (unpublished LLD dissertation University of Potchefstroom 1986) University of Potchefstroom 1986) 511. See also Muller G et al *General principles of South African property law* (2019) 10-11.

[78] Van der Walt AJ *Die ontwikkeling van houerskap* (unpublished LLD dissertation University of Potchefstroom 1986) 10-11. See also Muller G et al *General principles of South African property law* (2019) 182-183.

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such control. Like the unlawful possession example, unlawful holdership can also be either *bona fide* or *mala fide*. Where it is *bona fide*, it means the unlawful holder is unaware she is controlling the property to obtain a benefit from it without a right to do so, whereas *mala fides* will be present where the unlawful holder controls the property to obtain a benefit from it knowing she does not have a right to the property.[79] It is, however, necessary to note that there are differing scholarly views when it comes to the terms possession, holdership and control, and that the above view is held by Van der Walt.[80]

The principles regarding control, possession and holdership set out above raise some questions regarding the successful estoppel raiser's legal status, in particular, what type of controller she is. Since the traditional consequences of estoppel, meaning suspension of the *rei vindicatio* and hedged possession in favour of the purchaser, do not ascribe ownership to the successful estoppel raiser, it would be incorrect to argue that she is a lawful controller, meaning owner.[81] However, whether she is a lawful holder is not excluded by this fact. The question would therefore be whether a successful estoppel raiser can be said to be controlling the property based on a right to do so and whether such control is exercised with the intention of deriving a benefit from the property (*animus ex re commodom acquirendi*) and not with the intention to be the owner of the property (*animus domini*). The estoppel raiser cannot be said to have acquired a right to control the property from the owner, since such consent was never given. In addition, the successful estoppel raiser would most probably continue to exercise control over the property with ownership intent as she was before the vindication proceedings and likely not with the intention to merely derive a benefit from the property. Therefore, it may be appropriate to say that the successful estoppel raiser would not qualify as a lawful holder in the absence of consent from the owner for her

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[79] Van der Walt AJ *Die ontwikkeling van houerskap* (unpublished LLD dissertation University of Potchefstroom 1986) 511. See also Muller G et al *General principles of South African property law* (2019) 589-634.

[80] See Kleyn DG *Die mandament van spolie in die Suid Afrikaanse reg* (unpublished LLD dissertation University of Pretoria 1986) 344-376; Van der Merwe CG *Sakereg* 2 ed (1989) 107-112; Boggenpoel ZT *Property remedies* 91-93; Muller G et al *General principles of South African property law* (2019) 181-183.

[81] However, it must be noted that the traditional position regarding the consequences of estoppel as a defence subsequent to the *Oriental Products* case is uncertain. See chapter 2, section 2 4 5 above.

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controlling the property and since she would arguably be exercising control over the property as if owner and not merely to derive a benefit.

Whether a right to control the property can be derived from the law meaning that it comes into existence by operation of law, is uncertain. The Supreme Court of Appeal's remark in *Apostoliese Geloofsending van Suid Afrika (Maitland Gemeente) v Capes*[82] suggested that the estoppel raiser merely has possession over the property.[83] In terms of the control-based approach, possession refers to unlawful control,[84] meaning the successful estoppel raiser's control after the proceedings is not based on a right. Scholars who argue that estoppel does not have substantive effect support this position.[85] Conversely, Boggenpoel shows that the remarks made in *Oriental Products* may suggest that estoppel does provide the successful estoppel raiser with "an unassailable right to continue possessing the property".[86] However, since the court's remarks regarding the consequences of estoppel, in this case, can be regarded as

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[82] 1978 (4) SA 48 (C).

[83] *Apostoliese Geloofsending van Suid-Afrika (Maitland Gemeente) v Capes* 1978 (4) SA 48 (C) 58. See further Van der Merwe CG *Sakereg* 2 ed (1989) 373; Boggenpoel ZT *Property remedies* (2017) 79; Boggenpoel ZT & Cloete C "The proprietary consequences of estoppel in light of section 25(1): Testing Van der Walt's hypotheses" in Muller G, Brits R, Slade B & Van Wyk J (eds) *Transformative property law: Festschrift in honour of AJ van der Walt* (2018) 147-172 151.

[84] Van der Walt AJ *Die ontwikkeling van houerskap* (unpublished LLD dissertation University of Potchefstroom 1986) 589-634. See also Muller G et al *General principles of South African property law* (2019) 181.

[85] Sonnekus and Neels opine that estoppel has no substantive effect because it operates to prevent the owner from relying on her ownership in contradiction of her previous representation. Therefore, no legal consequences can be ascribed to a successful estoppel defence against an owner's *rei vindicatio*. This means that the legal position of both the owner and the *bona fide* purchaser remains unaffected by a successful estoppel defence. See Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 473; Sonnekus JC "Eienaars en ander reghebbendes mag ervaar dat swye nie altyd goud werd is nie" 2013 *Tydskrif vir die Suid Afrikaanse Reg* 326 330. Whether this stance is accurate subsequent to *the Oriental Products* case is not certain.

[86] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 20. See Boggenpoel ZT *Property remedies* (2017) 79; Boggenpoel ZT & Cloete C "The proprietary consequences of estoppel in light of section 25(1): Testing Van der Walt's hypotheses" in Muller G, Brits R, Slade B & Van Wyk J (eds) *Transformative property law: Festschrift in honour of AJ van der Walt* (2018) 147-172 151. See also Harms LTC "Estoppel" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 18 Part 1 3 ed (2015) para 79.

obiter, the position remains uncertain.[87] Moreover, it is rather likely that the *bona fide* purchaser's status is similar to that of an applicant who unlawfully controlled the property but succeeds with the *mandament van spolie* against unlawful spoliation.[88] When the court makes an order for the restoration of possession in terms of the *mandament van spolie* in favour of the dispossessed unlawful controller the court order does not transform the previous unlawful possession of the applicant into lawful possession. Where the applicant relying on the *mandament van spolie* previously had unlawful control over the property, the court order merely reinstates that unlawful control and protects the unlawful controller until the right holder follows the applicable legal processes to enforce her right. Based on analogy, it would arguably be possible to expect that the court order, which confirms that the purchaser successfully raised estoppel would also not transform the unlawful possession of the purchaser into lawful possession. The hedged possession, that the purchaser is said to have subsequent to a successful estoppel defence, purportedly entails that the representation created by the owner estops the owner from denying the representation and thereby prevents the owner from interfering with the possession of the purchaser. This however does not mean that the purchaser acquired a right to possess by way of the court order. Accepting that the law does not create a right in terms of which the estoppel raiser may continue to control the property when estoppel is successfully raised, means that the estoppel raiser is arguably an unlawful controller of the property. Therefore, although the implication of the court order is that the purchaser can remain in control of the property, the purchaser is nonetheless an unlawful possessor.

More specifically, the estoppel raiser may qualify as an unlawful possessor rather than an unlawful holder, given that the intention with which the estoppel raiser would probably continue to control the property is the intention to be owner and not the intentention to obtain merely a benefit from the property, based on how she obtained the property in the first place. Whether the estoppel raiser is a *mala fide* or *bona fide*

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[87] Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 259.

[88] Van der Merwe CG *Sakereg* 2 ed (1989) 368; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 171; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 112; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 328-329; Muller G et al *General principles of South African property law* (2019) 184.

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unlawful possessor after her successful estoppel defence, will depend on the context of each case, specifically whether the estoppel raiser knows that she is not the owner. At best, the status of the estoppel raiser after the unsuccessful vindication proceedings would most probably be that of an unlawful possessor, although this cannot be said with absolute certainty.

If it is accepted that the successful estoppel raiser is an unlawful possessor, the only recovery remedy available to her, although a temporary one, would be the spoliation remedy. The spoliation remedy requires of the spoliator to place the spoliatee in the position she was (namely in possession) before the dispossession, to restore the *status quo ante*.[89] Importantly, when a spoliation remedy is brought to court, no consideration is given to any rights in the property. Consideration is only given to whether the dispossessed party can satisfy the requirements of the *mandament van spolie* and whether the spoliator can raise a valid defence against the spoliation action.[90]

In *Nino Bonino v De Lange*[91] the requirements for successful spoliation proceedings were set out. These are: (i) that the dispossessed applicant must have been in peaceful and undisturbed control of the property at the moment of the dispossession; and (ii) that the applicant must have lost possession of the property due to the unlawful spoliation by the defendant.[92] A cursory consideration of these

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[89] Voet 41.2.16. See also Van der Merwe CG *Sakereg* 2 ed (1989) 368; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 168; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 93; Boggenpoel ZT *Property remedies* (2017) 94; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 326; Muller G et al *General principles of South African property law* (2019) 197.

[90] Van der Merwe CG *Sakereg* 2 ed (1989) 368; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 168-169; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 93; Boggenpoel ZT *Property remedies* (2017) 96; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 326; Muller G et al *General principles of South African property law* (2019) 197. See also *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC) para 29.

[91] 1906 TS 120.

[92] *Nino Bonino v De Lange* 1906 TS 120 122. See also Van der Merwe CG *Sakereg* 2 ed (1989) 368; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 170-174; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 94; Boggenpoel ZT *Property remedies* (2017) 101-128; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and*

requirements in the context of estoppel reveals that a successful estoppel raiser who was deprived of her possession by any person including the owner, would be able to show that she was in peaceful and undisturbed control of the property without much trouble. This is because subsequent to a successful estoppel defence, the estoppel raiser is allowed to remain in possession of the property, although not in terms of a right as was explained above. However, whether the requirement of unlawful spoliation would be met will depend on whether the person who dispossessed the successful estoppel raiser did so without the consent or permission of the same and without following due legal process.[93] Therefore, the only instance in which dispossession would be unlawful would be where another person or the owner deprived the successful estoppel raiser of possession without permission or without following due legal process. Where the successful estoppel raiser permitted the dispossessor to take control of the property and such dispossessor afterwards refuses to return the property, the spoliation remedy would purportedly not succeed. This means that the circumstances that would allow for a successful spoliation application are limited. In addition, where the defendant can show that restoration of the deprived property is impossible, the successful estoppel raiser's spoliation application will also fail.[94] Accordingly, it would seem that the successful estoppel raiser's chances of recovering the property from either the owner or another party who dispossessed her might be very slim, since the only remedy she could institute, namely the spoliation remedy is

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Schoeman's The law of property 6 ed (2019) 332-346; Muller G et al *General principles of South African property law* (2019) 199-207.

[93] *Nino Bonino v De Lange* 1906 TS 120 122; *Ntshwaqela v Chairman, Western Cape Regional Services Council* 1988 (3) SA 218 (C) 225. See also Van der Merwe CG *Sakereg* 2 ed (1989) 368; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 172-173; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 108; Boggenpoel ZT *Property remedies* (2017) 101-128; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 335; Muller G et al *General principles of South African property law* (2019) 206.

[94] *Moleta v Fourie* 1975 (3) SA 999 (O) 1001. For a discussion of the full list of defences that can be raised against a spoliation action, see Van der Merwe CG *Sakereg* 2 ed (1989) 134-137; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 176-180; Van der Merwe CG "Things" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 27 Part 2 2 ed (2014) para 110; Boggenpoel ZT *Property remedies* (2017) 128-153; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 349-355; Muller G et al *General principles of South African property law* (2019) 207-216.

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only available in very limited and specific circumstances. This observation emphasises the weak position a successful estoppel raiser finds herself in.

When the possibility of the estoppel raiser having standing to institute delictual remedies is considered, the following becomes evident. Since the *actio ad exhibendum* is a remedy that is only available to the owner of the property as explained previously,[95] the estoppel raiser would arguably not have standing to claim for compensation where another party intentionally with *mala fides* disposes of the property and the estoppel raiser suffers harm due to the disposition. Furthermore, when the viability of a claim based on the *condictio furtiva* is considered, a remedy traditionally described as one available to the owner for the recovery of the value of her stolen property from a thief,[96] it would seem that the remedy is also not available to the successful estoppel raiser who lost possession as a result of theft.[97] This position remains even though the scope of application of the *condictio furtiva* regarding the question of who has *locus standi* subsequent to *Clifford* includes anyone with an interest in the property.[98] The reason why a successful estoppel raiser would purportedly not succeed with the *condictio furtiva* would most probably be because the action in its developed form seems to be only available to lawful holders with an interest in the property. Since a successful estoppel raiser would purportedly be classified as an unlawful possessor, based on how she acquired possession of the property, it arguably cannot be said that she acquired the property in terms of established legal principles and rules and therefore lawfully. This would mean that the successful estoppel raiser would not have *locus standi* to institute the *condictio furtiva*, since she is not a lawful holder of the property, in the sense that she has an interest in the property.

Whether the estoppel raiser would have any success with the general delictual action, namely the *actio legis Aquiliae*, which is ordinarily available to owners or those with an interest in the property to claim compensation for patrimonial damage suffered in certain circumstances, is also worth considering.[99] For *locus standi* purposes, the notion "any person with an interest" includes lawful holders as it was held in *Smith v*

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[95] See section 5 2 2 1 above.

[96] See section 5 2 2 1 above.

[97] See section 5 2 2 1 above.

[98] *Clifford v Farinha* 1988 (4) SA 315 (W) 322. See section 5 2 2 1 above.

[99] See section 5 2 2 1 above.

Saipem.[100] Moreover, some possessors may also institute a claim for compensation even though they are not the owner or lawful holders. The category of possessors include *bona fide* possessors but excludes *mala fide* possessors.[101] However, if she knew she is not the owner after a successful estoppel defence, which would ordinarily be the case since the owner would have satisfied the court of her ownership allowing the successful estoppel raiser to take notice of this, she would arguably not have standing for purposes of obtaining compensation.

The final remedy for consideration is the enrichment remedy. The enrichment remedy as explained earlier is an action available in the situation where the defendant (owner or any other third party) has been enriched at the expense of the plaintiff (successful estoppel raiser) without legal cause in relation to the property.[102] In other words, value must have moved from the plaintiff's estate to the defendant's estate without legal cause (a valid contract). In these circumstances, the plaintiff can claim the value equal to her impoverishment from the defendant.[103] When it is considered whether a successful estoppel raiser would have the enrichment action at her disposal in the event that the owner perhaps succeeds with claiming the property back from a party in whose possession the successful estoppel raiser left the property, one problem potentially arises. It would be very difficult to show that the property formed part of the successful estoppel raiser's estate in the first place for impoverishment to have taken place, since the estoppel raiser merely had hedged possession over the property. In this light, the initial protection provided to her by way of estoppel seems very weak.

Due to the limited number of remedies available (*mandament van spolie* and the *actio legis Aquiliae* where the estoppel raiser is *bona fide*) to the successful estoppel raiser to protect her hedged possession against the owner and third parties, it is likely that she will purportedly refrain from entering into commercial agreements with third

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[100] 1974 (4) SA 918 (A) 931-932. See also Muller G et al *General principles of South African property law* (2019) 160-161. Pauw P "Die bevoegdheid van 'n nie-eienaar van 'n saak om deliktueel te eis" 1977 *Tydskrif vir die Suid Afrikaanse Reg* 56 61.

[101] Grotius 3.37.5: Full citation De Groot H *Inleidinge tot de Hollandsche rechtsgeleertheyd* (1631) translated by Lee RW *The jurisprudence of Holland* (1926). See also Van der Walt AJ *Die ontwikkeling van houerskap* (unpublished LLD dissertation University of Potchefstroom 1986) 589-634; Muller G et al *General principles of South African property law* (2019) 161.

[102] See section 5 2 2 1 above.

[103] See section 5 2 2 1 above.

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parties to lease, insure or use the property for security purposes. Yet, if she does enter into commercial transactions, she clearly runs the risk of losing the property while having little to no legal recourse for the recovery of the property. These practical consequences transpire due to the insecure interest (or right) the *bona fide* purchaser receives once successful with her defence based on estoppel. As a result, the question arises whether the way in which estoppel as a mechanism to protect the *bona fide* purchaser's interest is currently applied, can really be said to be effective and appropriate for its intended purpose, given the other available alternatives to regulate the *bona fide* purchaser problem as explained above.[104]

The possibility that innocent third parties could transact with the successful estoppel raiser to purchase, lease, or burden the property with real security rights or contractual rights could potentially occur. However, whether such transactions would be valid and confer rights on the third party remains questionable, since the consequences of the defence are unclear. Consequently, the current position also leaves third parties vulnerable to having concluded insecure and uncertain transactions.[105]

Given the above anomalies that result from the South African version of the limited vindication approach in the context of estoppel, some academic scholars have argued for a more realistic approach to be adopted by the courts. In this regard, they argue that it is necessary to recognise acquisition of ownership in favour of the *bona fide* purchaser who is successful in raising estoppel as a defence against the owner's *rei vindicatio*.[106] However, my submission is that merely recognising that the adverse consequences of estoppel amounts to acquisition of ownership will not be sufficient.

[104] The alterantives to the less liberal approach followed in South African law are discussed in section 5 2 1 above.

[105] A subsequent possessor will arguably not be able to satisfy the requirements of estoppel *vis-à-vis* the true owner. See Van der Merwe CG *Sakereg* 2 ed (1989) 373; Van der Merwe CG & Pope A "Property" in Du Bois F (ed) *Wille's principles of South African law* 9 ed (2007) 405-729 554; Pelser FB "Aspekte van eiendomsverkryging deur estoppel" (2005) 38 *De Jure* 153 154.

[106] Van Heerden HJO "Estoppel: 'n Wyse van eiendomsverkryging" (1970) 33 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 19 20; Van der Merwe CG *Sakereg* 2 ed (1989) 373; Visser PJ "Estoppel en die vekryging van eiendomsreg in roerende eiendom" (1994) 57 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 633 635; Van Heerden HJO "Estoppel: 'n Wyse van eiendomsverkryging" in Kahn E (ed) *The quest for justice: Essays in honour of Michael McGregor Corbett* (1995) 304-308 304; Pelser FB "Aspekte van eiendomsverkryging deur estoppel" (2005) 38 *De Jure* 153 154.

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Instead, the circumstances of estoppel should rather be developed to constitute a self-standing mode of original acquisition.[107] If the circumstances of estoppel are recognised as a mode of acquisition, the above-mentioned practical and legal anomalies would most likely be resolved by the existing rules and principles of the law of property.

Since scholarly work supports the adoption of a more realistic approach to the consequences of estoppel, it needs to be determined whether such a development would be sound from a policy perspective. This consideration is necessary since the anomalies explained in these sections would arguably not, on their own, constitute enough justification for the development of the law. With the above in mind, the following section explores whether law and economics, as well as considerations of equity and fairness, may favour development of a new mode of original acquisition of ownership as an alternative to the current regulation of the *bona fide* purchaser problem in South African law.

5 3 Justifications for ownership acquisition

5 3 1 Law and economics analysis

The economic analysis of law concerns the assessment of the efficiency of legal rules and principles governing disputes.[108] In this regard, the economic approach to law is a useful analysis to apply and rely on when having to choose between two regulatory measures or legal rules with different incentives and consequences. For purposes of this dissertation, the first legal rule under scrutiny is estoppel as a defence mechanism; with its limited consequences, namely that ownership remains unchanged. The second regulatory rule is the proposed development of a new mode of original acquisition in terms of which the *bona fide* purchaser in the circumstances that would traditionally

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[107] See chapter 3, section 3 4 above.

[108] For a general discussion of the economic approach to law, see Schafer HB & Ott C *Economic analysis of civil law* (2004) 3-12; Cooter R & Ulen T *Law and economics* (2000) 3-7; Miceli TJ "Property" in Backhaus JG (ed) *The Elgar companion to law and economics* 2 ed (2005) 246-260 246; Posner RA *Economic analysis of law* 8 ed (2011) 30-31. For an overview of the usefulness of law and economics analysis in the context of the *bona fide* purchaser problem, see Salomons AF "On the economics of good faith acquisition protection in the draft CFR" in Somma A (ed) *The politics of the draft common frame of reference* (2009) 199-216 206; Mautan M "'The triangles of the law': Toward a theory of priorities in conflicts involving remote parties" (1991) 90 *Michigan Law Review* 100.

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give rise to a successful estoppel defence acquires ownership. The question central to this chapter is whether the South African approach to the *bona fide* purchaser problem should change from an approach that merely limits the owner's right to vindicate the property to an approach that fully recognises that the *bona fide* purchaser acquires ownership over the property through the proposed new mode of ownership acquisition. Since this chapter aims to investigate these respective rules and approaches, the economic analysis can be helpful to show which of these two legal positions are more efficient and therefore the better rule to implement from a law and economics perspective.

For ease of discussion and analysis, the position in favour of protecting the title of the original owner when estoppel is successfully raised against the owner's *rei vindicatio*, and which merely results in suspension of the *rei vindicatio* will be referred to as the original owner rule, since it is the original owner who is allowed to retain ownership under this rule.[109] The development of a new original mode of acquisition of ownership in favour of the purchaser, namely equitable acquisition, will be referred to as the *bona fide* purchaser rule.[110] In this section of chapter 5, two separate but interlinked economic tools will be used to determine the best rule from a law and economics perspective, namely the least cost-avoider measure[111] and the interests of trade and commerce measure.[112]

To determine which of these two rules is the most efficient rule and thereby the most optimal rule to regulate the *bona fide* purchaser problem in South African law, law and economics generally regards *the least cost avoider* measure as an appropriate

[109] See chapter 2, section 2 3 2 above.

[110] See chapter 3, section 3 4 above.

[111] See in general Schafer HB & Ott C *Economic analysis of civil law* (2004) 3-12; Posner RA *Economic analysis of law* 8 ed (2011) 219-221. See further Weinberg HR "Sales law, economics and the negotiability of goods" (1980) 9 *Journal of Legal Studies* 569 583; Medina B "Augmenting the value of ownership by protecting it only partially: The 'Market-overt' rule revisited" (2003) 19 *Journal of Law Economics & Organization* 343 344; Salomons AF "On the economics of good faith acquisition protection in the draft CFR" in Somma A (ed) *The politics of the draft common frame of reference* (2009) 199-216 213.

[112] Weinberg HR "Sales law, economics and the negotiability of goods" (1980) 9 *Journal of Legal Studies* 569 591; Hawkland WD "Curing an improper tender of title to chattels: Past, present and commercial code" (1962) 46 *Minnesota Law Review* 697 700; Gilmore G "The commercial doctrine of good faith purchase" (1954) 63 *The Yale Law Journal* 1057 1057.

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measure for this determination.[113] The least cost avoider measure enables the determination of the most efficient rule by way of establishing under which of the two rules the lowest transaction costs will be incurred to ensure optimal utilisation of resources.[114] Each rule provides an incentive to one of the parties to refrain from acting in a certain way, since their respective actions may lead to loss under the relevant rule. For instance, the original owner rule provides an incentive to the *bona fide* purchaser to investigate the seller's title before entering into a sale transaction with the seller. The purchaser's incentive is found in the effect of the original owner rule, which is that the *bona fide* purchaser will not acquire ownership over the property if she finds out later on that the seller was not the owner or had no authority to dispose of the property. Consequently, the original owner rule places the burden of transaction costs on the *bona fide* purchaser, since if she does not incur the additional search costs, she will carry the risk of loss.

On the other hand, the *bona fide* purchaser rule provides an incentive to the owner to investigate thoroughly the trustworthiness of the person in whose hands the property is entrusted, since the owner will lose her ownership over the property in the event that the entrusted person ends up selling the property to a *bona fide* purchaser for value. The *bona fide* purchaser rule, therefore, places the burden of transaction costs on the owner who also bears the risk of losing her ownership if she fails to investigate the trustworthiness of the entrusted.

The least cost avoider measure justifies, from an economic perspective, favouring low transaction costs rather than higher transaction costs.[115] The party who would incur the lowest transaction costs is regarded as the party on whom the burden of incurring

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[113] Posner RA *Economic analysis of law* 8 ed (2011) 219-221. See also Salomons AF "On the economics of good faith acquisition protection in the draft CFR" in Somma A (ed) *The politics of the draft common frame of reference* (2009) 199-216 213.

[114] Salomons AF "On the economics of good faith acquisition protection in the draft CFR" in Somma A (ed) *The politics of the draft common frame of reference* (2009) 199-216 213. The assumption being that the external costs for both rules are the same. Externalities refer to costs that are external to the decision making of the relevant stakeholders. In this regard, see Posner RA *Economic analysis of law* 8 ed (2011) 90.

[115] Posner RA *Economic analysis of law* 8 ed (2011) 219-220. See also Medina B "Augmenting the value of ownership by protecting it only partially: The 'Market-overt' rule revisited" (2003) 19 *Journal of Law Economics & Organization* 343 346-347; Salomons AF "On the economics of good faith acquisition protection in the draft CFR" in Somma A (ed) *The politics of the draft common frame of reference* (2009) 199-216 213.

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transaction costs and the risk of loss must rest. In other words, the party who is the least cost avoider is the party in the best position to prevent or insure against potentially unauthorised transactions. This party is also referred to as the superior risk bearer and the rule that allows this party to bear the risk would be the most optimal rule and would ensure the most efficient allocation of resources.[116]

As indicated earlier, the original owner rule places the burden of incurring transaction costs and the risk of loss on the *bona fide* purchaser, while the *bona fide* purchaser rule places the burden of incurring transaction costs and the risk of loss on the owner. The question that needs to be investigated to identify the least cost avoider or superior risk bearer between the owner and the *bona fide* purchaser is which one of these parties will incur the lowest transaction costs under the respective rules. In law and economics, the concept of transaction costs includes the costs that the parties involved would incur under each of the relevant rules to avoid the risk.[117]

The costs that would be incurred by the *bona fide* purchaser under the original owner rule would be the cost associated with investigating the validity of the seller's title (ownership), in other words, investigating whether the seller is in fact entitled to dispose of the property as the owner or an authorised representative of the owner.[118] These transaction costs generally refer to search and information costs. In South African law, the purchaser of movable property can make assumptions concerning the seller's purported authority based on whether the property is under the seller's physical control. This is because the seller's control over the property creates a rebuttable presumption that the seller is the owner.[119] Yet, since it is a rebuttable presumption, it

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[116] Weinberg HR "Sales law, economics and the negotiability of goods" (1980) 9 *Journal of Legal Studies* 569 585; Medina B "Augmenting the value of ownership by protecting it only partially: The 'Market-overt' rule revisited" (2003) 19 *Journal of Law Economics & Organization* 343 346; Salomons AF "On the economics of good faith acquisition protection in the draft CFR" in Somma A (ed) *The politics of the draft common frame of reference* (2009) 199-216 213.

[117] Posner RA *Economic analysis of law* 8 ed (2011) 41. Salomons AF "On the economics of good faith acquisition protection in the draft CFR" in Somma A (ed) *The politics of the draft common frame of reference* (2009) 199-216 213.

[118] Schafer HB & Ott C *Economic analysis of civil law* (2004) 18-20. See also Weinberg HR "Sales law, economics and the negotiability of goods" (1980) 9 *Journal of Legal Studies* 569 584; Salomons AF "On the economics of good faith acquisition protection in the draft CFR" in Somma A (ed) *The politics of the draft common frame of reference* (2009) 199-216 213.

[119] See chapter 2, section 3 3 3 above.

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means that a purchaser cannot accept the factual situation of control over the property as conclusive proof of ownership. A diligent purchaser will require more than the fact of physical control to be satisfied as an ostensible indication that the seller is the owner, or at the least has the authority to transfer ownership over the property, since transactions in modern-day commerce often require possession (in the sense of effective control over the property) and ownership having to be separated.[120] Accordingly, the observation that the seller is in physical control of the property may indicate ownership, but will certainly not suffice as conclusive proof of title. As a result, a potential purchaser will ordinarily request documentary proof of ownership. For instance, where a motor vehicle is for sale, the purchaser would seek the registration papers that show that the motor vehicle is registered in the seller's name. In the event that the seller is only averring authority to sell the vehicle on the owner's behalf, the registration papers, as well as authorisation documentation, would be requested by the prospective purchaser to validate title.[121] Since the purchaser will have to gather the above detailed information in her endeavour to confirm the seller's authority to dispose of the property, the burden of information costs is placed on the purchaser.

Furthermore, when immovable property is the subject of the sale, a rebuttable presumption of ownership exists in favour of persons who are registered as owners in the deeds registry.[122] However, the negative nature of the deeds registry system, allows those who can prove that the person registered as owner is not the rightful owner, to rebut the presumption of ownership. Such rebuttal is achieved by way of an application for the rectification of the deeds registry in terms of which the applicant has to satisfy the court that she is the rightful owner.[123] The fact that a registered owner's title can be challenged and if such challenge is successful result in the rectification of the deeds registry, points out that registration of ownership is not conclusive proof of such ownership. This means that purchasers of immovable property in land can, as a

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[120] See Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 95.

[121] These inquiries that a diligent purchaser would make in the ordinary course of purchasing property is evident in the facts of the *Pretorius v Loudon* 1985 (3) SA 845 (A) case in which the purchaser requested registration papers from the seller regardless of the seller having physical control over the property. For a discussion of this case, see Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 485-490.

[122] See chapter 3, section 3 3 3 above.

[123] See chapter 3, section 3 3 3 above.

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starting point, look to the deeds registry to determine whether the seller is indeed the owner. The deeds registry should provide a seller with accurate information regarding who has real rights in the immovable property, yet, if the deeds registry reflects incorrect information, the purchaser's reliance on such information would not be protected. In other words, purchasers of immovable property in South Africa must investigate further than the deeds registry to determine a seller's title and to protect themselves from loss. However, the likelihood of entries in the deeds registry regarding real rights in property being inaccurate is very low since the legal process of conveyancing and the established practices followed in the Deeds Office ordinarily ensures a high level of accuracy.[124] The conveyancing practices of attorneys, who are appointed to ensure that the transfer of ownership complies with legal rules and regulations, constitute a prescribed and expensive process that is aimed at amongst other things investigating and ensuring that the party who transfer's ownership has the right to do so.[125] After the conclusion of the conveyancing processes, there is not much more that a purchaser can do to verify the seller's title. However, the application of the original owner rule in the context of sale of immovable property seems to suggest that in the unlikely situation that the conveyancer fails to identify the defect in the seller's title, the purchaser will carry the loss. This would be the case since the title will remain with the owner if it becomes known, after the sale occurred, that the seller was not the owner of the immovable property and that the conveyancing process did not reveal this.

The above account of the investigation that purchasers must ordinarily undertake according to the principles of South African law, shows that purchasers are generally expected to investigate beyond mere possession or registration, depending on the nature of the property. Moreover, even where a purchaser undertakes the costly further investigations into the seller's title, by way of obtaining information regarding registration papers of movable property where such papers do exist and by paying for a conveyancing process, the purchaser still carries the risk of loss. The extent to which the risk of loss is placed on the purchaser is further evident in the requirement of reasonable reliance under estoppel, together with the consequence of a mere limitation of vindication that results from a successful estoppel defence. In this regard, even

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[124] See chapter 3, section 3 3 3 above.

[125] Carey Miller DL & Pope A *Land title in South Africa* (2000) 123; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 235-236.

where the purchaser's reliance on the representation of ownership is deemed as reasonable in law, the purchaser will still carry the loss. Under the original owner rule that is enforced when the *rei vindicatio* is unsuccessful against a defence of estoppel, ownership remains with the owner. This is the case even where the circumstances would not have induced a reasonable person to investigate further, meaning even where a reasonable person would not have questioned the title or authority of the seller. This is apparent when considering the requirement of estoppel that the purchaser's reliance on the owner's negligent representation must be reasonable.[126] The only way in which the *bona fide* purchaser could protect herself against loss is if she investigates beyond what a reasonable person in her circumstances would have done and then discovers that the seller does not have the title or does not have authority to dispose of the property. However, it is also possible that she will never be satisfied with any proof of title for fear that any proof presented to her being forged. This virtually never-ending investigation into the title of the seller would likely result in very high transaction costs, simply because the information regarding the title of the seller on face value is not sufficient for the purchaser to rely on. The purchaser will have to approach legal professionals to obtain an opinion as to the validity of title documents, which will result in further search and information costs.

In the event that the property is movable, the purchaser's transaction costs will include costs for locating the seller to determine if the seller has physical control over the property. Where the property is immovable, the purchaser would have to determine whether the seller is the registered owner in the Deeds Office. Costs for determining physical control and registration can be argued to be acceptable transaction costs for the sale of property. However, further investigation would increase the search and information costs involved with ascertaining the title of the seller significantly. These costs for further investigating would ordinarily include search costs to find documentary proof of title where the property is movable, and the costly conveyancing process undertaken to transfer ownership over immovable property. These costs may also be acceptable since they allow the purchaser to confirm beyond the rebuttable presumptions that the seller is indeed the owner or has the right to dispose of the property. Yet, the original owner rule requires the purchaser to investigate even further. This is what is expected from purchasers even where the true titleholder indicated to

[126] See chapter 2, section 2 3 2 above.

the purchaser (albeit negligently) that the seller has the authority or the right to dispose of the property, where such indication certainly would have removed any suspicion that a purchaser might have reasonably had about the legitimacy of the transaction she is entering into.[127] Investigating the validity of the documentary proof provided in the context of movable property and investigating beyond the conclusion of a conveyancing process that complied with all the procedural and legal requirements in what seems to be unsuspicious circumstances would result in a further significant increase in the transaction costs for the prospective purchaser.

Since the investigation into the seller's title could be time-consuming, one would also have to include the potential loss of expenditure on the gathering of information regarding the title of the seller in the event that the seller sells the property to another purchaser while the interested purchaser was still busy investigating the title of the seller. This would obviously result in extensive costs incurred for nothing. In addition, the purchaser in the circumstances can suffer a loss where the costs incurred for the investigation into the title of the seller becomes too high and forces the potential purchaser to walk away from the transaction. The result of the above is that whether or not the purchaser ends up purchasing the property, the costs associated with an investigation into the title of the seller could easily outweigh any benefit or value that the owner would have obtained from the investigation and the property. Mautne comes to the following conclusion when he puts the cost that purchasers would have to incur under an original owner rule, into words:

> "Generally purchasers of assets or rights in assets are unable to take any meaningful precautionary measures to verify whether a prior conflicting claimant exists. The only meaningful way potential purchasers can prevent triangle conflicts is by interviewing past owners of the assets they intend to purchase to verify that no conflicting claims exist. But obviously, this procedure is unreasonable under any cost-benefit test and, besides, the question arises: How far in the past should the purchaser inquire?"[128]

Mautne indicates that the investigation into the validity of a seller's title could be never-ending and result in very high transaction costs that would very likely outweigh

[127] See chapter 2, section 2 3 2 above.

[128] Mautner M "'The eternal triangles of the law': Toward a theory of priorities in conflicts involving remote parties" (1991) 90 *Michigan Law Review* 95 117. See also Epstein RA "Inducement of breach of contract as a problem of ostensible ownership" (1987) 16 The *Journal of Legal Studies* 1 15.

purchasing the property at all. The effect of the original owner rule on the transaction costs that the purchaser is expected to incur in order to prevent loss would be unimaginably high.

On the other hand, the transaction costs that the owner would incur to avoid the risk of losing her ownership under the *bona fide* purchaser rule refers to the costs that the owner would have to incur to obtain information about the trustworthiness of the entrusted party.[129] Since the owner chooses whom she wants to entrust her property to and deals directly with such person, she has the opportunity to inspect the person, the documents relating to their transactions as well as to make enquiries about the person whom she is dealing with before entrusting the property to such person.[130] The owner is in a strong position to demand information without having to incur high costs for such information. This is the case since the property gives the owner an advantage in the sense that the owner can rather use the services of another service provider if the potential entrustee does not cooperate. Moreover, it would also not be very costly for the owner to validate the information it received from the potential entrustee against the information that is readily available in the public domain regarding the reputation of a potential entrustee. To gather this information the owner would not have to incur high costs since the information pertains to the character of the potential entrustee and is not in the exclusive knowledge sphere of for instance experts, such as legal professionals. Consequently, the information costs regarding the entrustee would entail costs that arguably can be expected of any owner to incur to protect its rights in its own property and would be information that can be obtained relatively easily. Law and economics scholars who analysed the least cost avoider in the context of stolen goods that are sold to *bona fide* purchasers have argued that in the context of entrustment (meaning voluntary handing over of the property to another), the owner would always be the least cost avoider under the *bona fide* purchaser rule.[131] These

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[129] Schafer HB & Ott C *Economic analysis of civil law* (2004) 18-20. Salomons AF "On the economics of good faith acquisition protection in the draft CFR" in Somma A (ed) *The politics of the draft common frame of reference* (2009) 199-216 213.

[130] Weinberg HR "Sales law, economics and the negotiability of goods" (1980) 9 *Journal of Legal Studies* 569 584.

[131] Weinberg HR "Sales law, economics and the negotiability of goods" (1980) 9 *Journal of Legal Studies* 569 584; Levmore S "Variety and uniformity in the treatment of the good faith purchaser" (1987) 16 *The Journal of Legal Studies* 43 59; Salomons AF "On the economics of good faith acquisition protection in

authors argue that in the context of entrustment, the owner is the least cost avoider because the owner is in a better position than the *bona fide* purchaser to determine whether the person to whom she is entrusting the property to is in fact trustworthy.

My analyses of the costs that the *bona fide* purchaser, on the one hand, would incur under the original owner rule and the costs that the original owner would incur, on the other hand under the *bona fide* purchaser rule, forces me to agree with the above-mentioned scholars. When the costs that the *bona fide* purchaser would incur under the original owner rule and the costs that the owner would incur under the *bona fide* purchaser rule are compared, it is indeed evident that the *bona fide* purchaser would incur the highest cost between the two parties under the respective rules. This becomes stark when looking at the type of sources that the *bona fide* purchaser under the original owner rule would have to consult to try to validate the title of the seller as opposed to the sources the owner would consult to determine the trustworthiness of the person who the owner chooses to entrust with her property. The *bona fide* purchaser will have to approach legal professionals to attempt to validate the title of the seller whereas the owner would merely need to make general inquiries online or talk to competitors or persons who have made use of the services of the person that the owner is considering to entrust with her property. For the *bona fide* purchaser, commissioning legal professionals would cost much more due to high legal fees than what it will cost the owner to approach persons to inquire about the character of the potential entrustee. Consequently, the owner would be the least cost avoider under the *bona fide* purchaser rule. This means that the rule protecting the purchaser, by allowing the purchaser to become owner, would be the most optimal/efficient rule in terms of the least cost avoider economic measure.[132]

The second economic measure that will be assessed to determine which rule would be the most optimal rule from a law and economics point of view is the assessment of how the *interest of trade and commerce* is promoted under these opposing rules with their different consequences.[133] Arguably, between the two

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the draft CFR" in Somma A (ed) *The politics of the draft common frame of reference* (2009) 199-216 213.

[132] Salomons AF "On the economics of good faith acquisition protection in the draft CFR" in Somma A (ed) *The politics of the draft common frame of reference* (2009) 199-216 213.

[133] Levmore S "Variety and uniformity in the treatment of the good faith purchaser" (1987) 16 *The Journal of Legal Studies* 43 59; Weinberg HR "Sales law, economics and the negotiability of goods" (1980) 9

opposing rules, the rule that promotes the interest of trade and commerce the most, is regarded as the optimal rule under this analysis.

Unlike the least cost avoider measure that has not been used in South African academic writings and case law to pronounce on the efficiency of the consequences of estoppel, the argument for the promotion of trade and commerce has been relied upon to support the *bona fide* purchaser rule in South African law. As mentioned in chapter 2, the Supreme Court of Appeal in *Barclays Western Bank Ltd v Fourie*[134] had the opportunity to look at the impact of the consequences of estoppel on the interest of trade and commerce, after council argued that the interest of trade and commerce requires the court to recognise that estoppel results in ownership acquisition in favour of the *bona fide* purchaser.[135] The opportunity to assess the merits of the submission was, however, missed in the *Barcalys Western Bank* case, perhaps due to council's poorly formulated and unsubstantiated argument. The court rejected the argument without looking into the merits thereof.[136] This missed opportunity is unfortunate, especially because at the time, several scholars considered the interest of trade and commerce argument in the context of a successful estoppel defence. Therefore, it seems necessary to look into and investigate the merits of this submission to determine if the promotion of trade and commerce indeed justifies the operation of the *bona fide* purchaser rule rather than the original owner rule in the circumstances that would ordinarily give rise to a successful estoppel defence.

The argument advanced as a potential justification for the *bona fide* purchaser rule is that it is in the interest of trade and commerce that the *bona fide* purchaser should be protected, rather than the owner.[137] In this regard, continued and swift

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Journal of Legal Studies 569 584; Medina B "Augmenting the value of ownership by protecting it only partially: The 'Market-overt' rule revisited" (2003) 19 *Journal of Law Economics & Organization* 343 360; Salomons AF "On the economics of good faith acquisition protection in the draft CFR" in Somma A (ed) *The politics of the draft common frame of reference* (2009) 199-216 212.

[134] 1979 (4) SA 157 (C).

[135] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 162. For a discussion of the facts of the case, see chapter 2, section 2 4 4 above.

[136] See chapter 2, section 2 4 4 above.

[137] See in general, Thiel JH *De Goede trouw van derdes en hare bescherming tegenover de handelingen va partijen* (unpublished LLD dissertation Universiteit van Amsterdam 1903) 84; Reichel H "Gutglaubigkeit beim fahrniserwerb" (1916) 42 *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart* 173 178; Zweigert K "Rechtsvergeleichend-kritisces zum gutglaubigen mobiliarerwerb"

commercial and trade activities depend on the protection of the *bona fides* of third parties purchasing property in the normal course of business.[138] The assumption is that the facilitation of transactions in a free market requires that it should not be expected of the purchaser to investigate the validity of the seller's title. This is to ensure the continuation of trade and the circulation of goods in the economy since it would be less cumbersome and less costly for purchasers to purchase goods under these circumstances.[139] If purchasers are protected in their reliance on the title or authority of the seller, they are incentivised to continue purchasing property and so ensure the continuation of trade and the strengthening of commerce. In the event that purchasers are required to investigate the seller's title at infinitum, this being the case under a strict application of the original owner rule, economic activity would be stifled, since the costs involved with verifying title would most probably not justify the value that a purchaser may obtain when purchasing the property.[140] In other words, the original owner rule may cause slower economic activities or a complete termination thereof. Consequently, to protect commerce by encouraging the circulation of goods in the economy, purchasers should be incentivised to purchase goods. The *bona fide* purchaser rule, that protects the purchaser from loss where the seller did not have the right to dispose of the property, is regarded as an essential incentive for the protection

(1958) 23 *Zeitschrift für ausländisches und internationales Privatrecht* 1 4 where these authors argue that the advancement of trade and commerce requires that *bona fide* purchaser for value must be protected rather than the owner. See also the view of South African scholars De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 94-95; Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 94-96 where these scholars argue that the advancement of trade and commerce does not support absolute protection of *bona fide* purchasers as opposed to the protection of owners. For a contrasting view in the South African context, see Pelser FB "Aspekte van eiendomsverkryging deur estoppel" (2005) 38 *De Jure* 153 156-157; Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 230-231.

[138] See further Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 94.

[139] Salomons AF "The purpose and coherence of the rules on good faith acquisition and acquisitive prescription in the European draft common frame of reference. A tale of two gatekeepers" (2013) 21 *European Review of Private Law* 843 858.

[140] See the argument made regarding the cost of investigating the seller's title under the least cost avoider rule discussed above.

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and the promotion of commerce and trade.[141] It provides the purchaser with certainty that she will be protected if the title of the seller turns out to be invalid since the *bona fide* purchaser rule will protect the purchaser's reliance on the seller's title. This means that where a dispute arises the purchaser's title should be protected, rather than that of the owner.[142] In this regard, it seems that the statement of the interest of trade and commerce considers protecting the reliance of the *bona fide* purchaser over the protection of the seller's title necessary in order to prevent uncertainty and burdensome investigations that may stifle trade and commerce. The protection of reliance safeguards trade and commerce and justifies a rule that rather protects the *bona fide* purchaser's title than the title of the original owner.

However, in the South African context, JC van der Walt rejects the above-formulated general statement of the interest of trade and commerce on the basis that it ignores another important element of trade and commerce, namely certainty of title.[143] He restates what trade and commerce needs to include the legal certainty

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[141] Medina B "Augmenting the value of ownership by protecting it only partially: The 'Market-overt' rule revisited" (2003) 19 *Journal of Law Economics & Organization* 343 360; Salomons AF "The purpose and coherence of the rules on good faith acquisition and acquisitive prescription in the European draft common frame of reference. A tale of two gatekeepers" (2013) 21 *European Review of Private Law* 843 858-859.

[142] Thiel JH *De Goede trouw van derdes en hare bescherming tegenover de handelingen va partijen* (unpublished LLD dissertation Universiteit van Amsterdam 1903) 84; Reichel H "Gutglaubigkeit beim fahrniserwerb" (1916) 42 *Zeitschrift für das Privat- und öffentliche Recht der Gegenwart* 173 178; Zweigert K "Rechtsvergeleichend-kritisces zum gutglaubigen mobiliarerwerb" (1958) 23 *Zeitschrift für ausländisches und internationales Privatrecht* 1 4. Interestingly, this argument constitutes the basis upon which Dutch law, by way of the provisions of the Dutch Civil Code, holds that the public interest in a certain and secure trade and commerce environment is of decisive importance. This public interest requires that the owner's interest be sacrificed to ensure that all uncertainty is eliminated for *bona fide* purchasers of property. For this to happen, the *bona fide* purchaser must acquire ownership in order to ensure that her economic interest is protected. Accordingly, the Dutch Civil Code of 1992 protects the *bona fide* purchaser by way of article 3:86. See further Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 94−96; Sonnekus JC "*Bona fide*-verkryging vir waarde en estoppel" (1999) 62 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 463 468-469.

[143] De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 95; Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 94. The same argument regarding certainty of title also being central to the promotion of trade and commerce has also been made in various other jurisdictions. In this regard, see Levmore S "Variety and uniformity in the treatment of the good faith purchaser" (1987) 16 *The Journal of Legal Studies* 43 55-56; Weinberg HR "Sales law, economics and the negotiability of goods (1980) 9

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pertaining to title. The idea is that potential participants in commerce may be unwilling to participate and purchase property if the law does not adequately protect the title that such participants would acquire. In this sense, the protection and advancement of trade and commerce also require purchasers to know that the title they acquired is certain. Thus, the protection of the original owner's title also promotes trade and commerce. JC van der Walt, therefore, concludes that the interest of trade and commerce is not in itself an adequate reason for sacrificing the interest of the owner. He argues that the interest of trade and commerce will only be adequate justification to trump the owner's interest in the event of it functioning in conjunction with other valid justifications.[144]

In my view, it seems that the implementation of a strict *bona fide* purchaser rule or the implementation of a strict original owner rule would not be good for trade and commerce either way. Rather, the advancement of trade and commerce requires a measured and balanced approach to the protection of these two distinct, but related interests. In particular, a balance may need to be struck between the enforcement of a strict or absolute *bona fide* purchaser rule that may result in uncertainty of title for owners of property and strict or absolute enforcement of an original owner rule that may discourage commercial transactions due to lack of protection for purchasers.

Consequently, it may be useful to consider qualified protection for both the owner and the purchaser as parties to the *bona fide* purchaser problem. This so-called qualified protection should arguably involve subjecting the protection of the owner and the purchaser to strict requirements to protect both parties to a certain extent. Where owners know that their rights are for the most part protected against *bona fide* purchasers, except for the very limited circumstances in which they may lose their ownership to *bona fide* purchasers and when these circumstances are clearly articulated by the law, trade and commerce will likely not be impacted negatively. On the one hand, *bona fide* purchasers will arguably be encouraged to participate in trade and commerce because the legal rules are clear and certain regarding when the

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Journal of Legal Studies 569 584; Medina B "Augmenting the value of ownership by protecting it only partially: The 'Market-overt' rule revisited" (2003) 19 *Journal of Law Economics & Organization* 343 360-361; Salomons AF "On the economics of good faith acquisition protection in the draft CFR" in Somma A (ed) *The politics of the draft common frame of reference* (2009) 199-216 212-213.

[144] Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 96.

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requirements for acquisition of ownership in their favour would be met. On the other hand, titleholders would likely also be encouraged to continue participating in the market since title will remain certain and will only be lost in limited circumstances, which are prescribed and relatively clear.

Under the current dispensation that regulates the *bona fide* purchaser problem by way of a qualified version of the original owner rule in South African law achieved by the defence of estoppel, ownership remains with the original owner, although the purchaser is allowed to remain in possession of the property. As indicated in the section that focussed on the anomalies caused by this qualified version of the original owner rule, both the owner and the possessor are left in legally unsatisfactory positions.[145] For the reasons advanced there, it is very difficult to see how this rule promotes and protects trade and commerce. This is because the consequences of the rule in effect places commercial dealing with the property in a deadlock. The owner is not able to transfer ownership over the property[146] *and* the *bona fide* purchaser is not able to extract the maximum utility from the property since the law does not protect her possession sufficiently.[147] Consequently, the current dispensation arguably does not promote the interest of trade and commerce in the circumstances that would give rise to a successful estoppel defence. Moreover, this rule does not allow for the efficient use of the property under the least cost avoider economic measure either.

In light of the above exposition, it seems fitting to explore how a qualified version of the *bona fide* purchaser rule may affect trade and commerce. This dissertation considers the possibility of developing a new mode of original acquisition of ownership that will take place when a purchaser can satisfy the requirements of the defence of estoppel, albeit under a newly recognised mode of acquisition.[148] This proposed mode of acquisition would constitute a qualified version of the *bona fide* purchaser rule in terms of which the purchaser will become owner of the property if she can show that the traditional requirements of estoppel are met. This means that the purchaser will only acquire ownership under the very strict requirements of estoppel.

[145] See section 5 2 2 above.

[146] See section 5 2 2 1 above.

[147] See section 5 2 2 2 above.

[148] See chapter 3, section 3 4 above.

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For instance, one of these requirements that must be met is that the owner must have made a negligent representation that the seller was owner or had the authority to dispose of the property. This requirement arguably assists with striking a balance between the absolute protection of the owner and the absolute protection of the purchaser.[149] Where the owner did not make a negligent representation, title will remain with the owner. However, where such representation was made, and all the other requirements of the estoppel defence are complied with, the owner will lose ownership to the purchaser. In the context of the interest of trade and commerce, it would mean that owners would know that when they make negligent representations they would stand to lose their ownership because of the mode of acquisition that operates to this effect. However, this would not deter participation as is suggested by commerce, since there is certainty regarding when and how ownership would be lost. On the contrary, owners will be incentivised to be more diligent and careful when entering into transactions regarding their property. In this way, trade and commerce is promoted because owners know what they should (and should not do) in relation to transacting in respect of their properties.

In addition, another requirement that will enable striking a better balance between the absolute protection of ownership under the original owner rule and the absolute protections under the *bona fide* purchaser rule for purposes of promoting trade and commerce is that the purchaser is required to have been reasonable in her reliance on the representation.[150] This means that the purchaser will only be protected if the circumstances would not have induced a reasonable person to be more careful and investigate the title of the seller. There is therefore a duty on the purchaser to be reasonable in her reliance. This means that mere reliance on the seller's authority under suspicious circumstances will not allow acquisition. Rather, the unreasonableness of the reliance will justify the title remaining with the original owner. In this sense, the reasonable reliance requirement also ensures that the transaction costs of the purchaser remain lower than under a strict original owner rule, since the purchaser need not investigate the seller's title further than what a reasonable person would do. This requirement allows a balance to be struck between the interest of the purchaser and the original owner since the owner can hold on to her title if the

[149] See chapter 2, section 2 3 2 above.

[150] See chapter 2, section 2 3 2 above.

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purchaser's reliance on the representation was unreasonable. The owner will, however, lose ownership in the situation where the purchaser's reliance was reasonable and the other strict requirements of the self-standing mode of acquisition of ownership are met.[151]

Moreover, the requirement that the representation must be the cause of the purchaser's detriment further narrows the scope of the situation when the owner will lose ownership and the purchaser will acquire ownership.[152] These requirements imply that where the purchaser would not suffer prejudice due to her reliance on the negligent representation, she will not be able to acquire ownership. In addition, where the purchaser, solely relied on the fraudulent representation created by the seller to her detriment, and did not rely on the negligent representation created by the owner, she will not succeed with proving the requirements necessary to acquire ownership.

The result of the above economic analysis of the least cost avoider measure and the interest of trade and commerce employed to find the most optimal and efficient rule to regulate the *bona fide* purchaser problem in South Africa, showed that the current qualified version of the original owner rule that is encapsulated in the estoppel defence is not the most optimal rule. In other words, the conservative limited vindication approach employed in South African law, which allows for the limitation of the owner's right to recovery her property as opposed to ownership acquisition in favour of the *bona fide* purchaser, not only causes doctrinal and practical anomalies, but is also more costly from a law and economics perspective. Both the least cost avoider and the interest of trade and commerce economic measures indicate that not only is the *bona fide* purchaser rule the most efficient rule in that it results in fewer costs being wasted in terms of gathering information, but also that a qualified version of such a rule as the proposed new mode of acquisition would in fact better promote the interest of trade and commerce. As a result, the economic analysis conducted here points towards and ultimately justifies development of the proposed mode of original acquisition.

It is noteworthy, that the law and economics analysis with its focus on efficiency of legal rules has been criticised for not taking account of whether a rule that is found

[151] See chapter 2, section 2 3 2 above.

[152] See chapter 2, section 2 3 2 above.

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to be optimal may be unjust and inequitable.[153] To ensure that the analysis done in this chapter addresses this inadequacy of the law and economics approach, the part below will consider whether principles of equity justify the development of the identified optimal rule.

5 3 2 Equity and fairness

5 3 2 1 Estoppel as an equitable doctrine

In chapter 2 it was shown that estoppel by representation originated in the English law of equity and that it is, therefore, an equitable doctrine.[154] It should be noted that South African law has no separate or parallel law of equity as is the case in English law. Yet, it has been reiterated on numerous occasions that the South African common law (which predominantly reflects the civilian legal tradition) has equity built into its rules and principles.[155] In this regard, it is often said that the South African legal common law is inherently equitable, and that the existence of a separate body of equitable rules would be superfluous.[156] This means that in South African law equity in the sense of fairness should reflect in how the law operates and its impact on the parties.

Equitable doctrines are created primarily to ensure more equitable and fair results where the strict application of common law rules would result in unfair and

[153] Alexander GS "The social-obligation norm in American property law" (2009) 94 *Cornell Law Review* 745 750; Miceli TJ "Property" in Backhaus JG (ed) *The Elgar companion to law and economics* 2 ed (2005) 246-260 246; Posner RA *Economic analysis of law* 8 ed (2011) 26-28. This has been noted in the context of prescription in South African law. In this regard, see Marais EJ *Acquisitive prescription in view of the property clause* (unpublished LLD dissertation Stellenbosch University 2011) 217.

[154] See chapter 2, section 2 3 1 above. See also scholarly support for the basis if estoppel being equity in Harms LTC "Estoppel" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 18 Part 1 3 ed (2015) para 79.

[155] Hahlo HR & Khan E *The South African legal system and its background* (1968) 178; Zimmermann R "Good faith and equity" in Zimmermann R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 217-260 217. See also Bennet TW "Ubuntu: An African equity" in Diedrich F (ed) *Ubuntu, good faith and equity* (2011) 3-23 3. For an overview of the operation of equity in Roman and Roman-Dutch law, see Van Zyl DH "Aspekte van billikheid in die reg en regspleging" (1986) 19 *De Jure* 110 114-123.

[156] *Estate Thomas v Kerr and Another* (1903) 20 SC 354. See also *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A) 606; Hahlo HR & Khan E *The South African legal system and its background* (1968) 137; Zimmermann R "Good faith and equity" in Zimmermann R & Visser D (eds) *Southern cross: Civil law and common law in South Africa* (1996) 217-260 218.

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unsustainable outcomes.[157] Louw argues in this regard that equitable doctrines and principles do not merely provide equitable results, but they also have the potential to change those rigid common law principles by building equitable considerations into them. In this light, an understanding that estoppel by representation is a doctrine of equity, reveals its true purpose, namely that it is meant to counter the harsh effects of the application of rigid common law rules and that it has the potential to set in motion legal development in the circumstances where it finds application.[158] The particular application of estoppel that this dissertation is concerned with is the situation where an owner leaves her property in the hands of a third party and where such third party sells the property to a *bona fide* purchaser for value without such seller having the authority to transfer ownership over the property to the purchaser. In particular, the owner in these circumstances created a negligent representation to the purchaser that the seller has authority to transfer ownership, where the purchaser reasonably relied on the negligent representation to her detriment.[159] When estoppel is raised as a defence against an owner's *rei vindicatio*, the owner's relatively strong vindication rights are forced to submit to equity in the circumstances described above. Therefore, estoppel forces the owner's strong right to vindicate to give way to the interest of the *bona fide* purchaser for value and to provide protection to such purchaser where the traditional application of the *rei vindicatio* would not have provided any protection.

It can be argued that the problematic consequences of the limited protection that estoppel in its defence form affords the purchaser, as well as the unsatisfactory position it leaves the owner in, were probably not anticipated when estoppel was introduced to provide protection to purchasers in these circumstances.[160] In addition, when estoppel was received into the South African legal system, it was arguably favourable to have a legal construct like estoppel that merely limits the owner's right to vindicate to provide some recourse in law to purchasers. The strong overtones of

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[157] Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 220; Van Zyl DH "Aspekte van billikheid in die reg en regspleging" (1986) 19 *De Jure* 110 114-124. See also Pelser FB "Aspekte van eiendomsverkryging deur estoppel" (2005) 38 *De Jure* 153 154; Bennet TW "Ubuntu: An African equity" in Diedrich F (ed) *Ubuntu, good faith and equity* (2011) 3-23 3.

[158] Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 220.

[159] See chapter 2, section 2 3 1 above.

[160] See section 5 2 2 above.

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absolutism of ownership that academic writings reflected at the time, although not so much in case law, would have supported a legal construct with minimum effect on ownership rather than a construct that could allow for the acquisition of ownership by the purchaser.[161] This is also reflected in the courts' finding it necessary to reiterate that estoppel must be brought in line with the demands of South African law, after recognising that the doctrine of estoppel established itself firmly in the legal system.[162]

Subsequent to the reception of estoppel, there was a deliberate move away from the way in which estoppel was traditionally applied in English law in the South African context.[163] This move away from the traditional application of the doctrine (with specific reference to its requirements that sets out the circumstances in which it may apply) is seen in *Grosvenor Motors* where the Supreme Court of Appeal confirmed that although negligence is not required in English law when estoppel by representation is raised in a given case, negligence is required in the South African context.[164] The addition of negligence to the requirements of the doctrine limits the circumstances in which an estoppel defence would succeed against an owner's *rei vindicatio* even further. Consequently, this addition ensures that estoppel subscribes to the strong approach South African law generally takes to the protection of ownership.[165] The development of the circumstances in which it was regarded to be equitable to provide the purchaser with some protection, was therefore extended to require the owner to not only have made a representation to the detriment of the purchaser but that such representation must also have been the result of the owner's negligence. The effect that the additional

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[161] See section 5 2 2 above.

[162] See chapter 2, section 2 3 2 above.

[163] *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) 452. Holmes JA held that reference to English cases will only be useful in so far as their principles and interpretations can be reconciled with the decisions of the Supreme Court of Appeal in the *Grosvenor Motors* and *Johaadien* cases. See also Van Heerden HJO "Estoppel: 'n Wyse van eiendomsverkryging" (1970) 33 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 19 19.

[164] *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A) 427. Importantly, negligence as a requirement for a successful estoppel defence is only a prerequisite in cases where estoppel is raised as a defence against an owner's *rei vindicatio* and not in all other instances where estoppel could be raised. In this regard see *Sonday v Surrey Estate Meat Market* 1983 (2) SA 521 (K) 532-535. See further Bester DH "The scope of an agent's power of representation" 1972 *South African Law Journal* 49 56; Lubbe G "Estoppel, vertouensbeskerming en die struktuur van die Suid-Afrikaanse privaatreg" 1991 *Tydskrif vir die Suid Afrikaanse Reg* 1 1-3.

[165] See section 5 2 2 above.

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requirement of negligence has on estoppel's equitable function is that it limits the circumstances in which the equitable outcome may apply. Estoppel developed to provide for the needs of the legal system at the time and this development in my view underscores the ability of estoppel as an equitable doctrine to be developed even further to ensure that equity regulates the *bona fide* purchaser problem in current-day South African law adequately.

With this thought, it, therefore, appears that estoppel functions as an agent of equity in the South African context. This means that its purpose is still to ensure equitable and fair outcomes albeit by way of subjecting common law rules to its application or by development of the law by the incorporation of equitable considerations as argued by Louw.[166] Although it is clear that estoppel was adopted to provide equitable results where a strict application of the vindication principles would have left the *bona fide* purchaser for value unprotected, I have tried to argue that the protection it provides to purchasers remains weak, uncertain and unsatisfactory from a practical as well as an economics perspective. This is so especially given the practical and legal anomalies that result from the operation of estoppel in this context.[167] These indeed raise the question whether the defence of estoppel is still the appropriate equitable legal construct for the regulation of the *bona fide* purchaser problem in South African law and whether it might be time for estoppel to evolve. When consideration is given to the equitable nature of estoppel, it seems questionable whether the consequences currently ascribed to a successful estoppel defence actually give effect to the true nature of the doctrine as an agent of equity. I would argue that it only partially does so. The traditional effect of a successful estoppel defence is to suspend the owner's *rei vindicatio* against the *bona fide* purchaser of her property and by doing so, the doctrine limits the owner's right to vindicate indefinitely.[168] It has been shown above that for legal and practical purposes, the mere suspension of these entitlements is untenable because it leaves both the estoppel raiser and the estoppel denier in precarious positions.[169] Describing the position of the parties subsequent to the application of an equitable doctrine as precarious, uncertain

[166] Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 220.

[167] See section 5 2 2 above.

[168] See chapter 2, section 2 3 2 above.

[169] See section 5 2 2 above.

and unstable, brings into question whether the consequences traditionally attached to a successful estoppel defence, meets its goal of providing an equitable outcome. In other words, it seems questionable whether the outcomes currently achieved can be said to constitute results in line with the sole purpose of estoppel which is to ensure equitable outcomes.

Estoppel as a defence seems to be rather limited in how it currently operates and what it can do for the purchaser. The consequences of a successful estoppel defence have been said to elevate the representation to the true state of affairs.[170] In other words, when the *bona fide* purchaser satisfies the requirements of the defence, the representation created by the owner that the seller indeed was the owner or had the authority to dispose is maintained by the court. The estoppel denier is precluded from claiming back the property because the representation is accepted as the truth. Stated differently, it is because the court accepts that the seller was indeed the owner or had the authority to dispose of the property (or at least accepts this as real, even though it is not), that the owner fails with the *rei vindicatio* against the possessor who raises estoppel. When estoppel is successfully raised and the fiction of the representation is elevated to being the true state of affairs, such elevation of the fiction is a once-off phenomenon and not accepted as the true state of affairs for *all* legal purposes.[171] In other words, the elevation of the fiction as the true state of affairs only applies to the vindication proceedings but does not change the legal position of the parties. This is evident from the earlier cases of *Apostoliese Geloofsending*[172] and *Barclays Western Bank*.[173] The courts' dicta in these judgments indirectly pointed out that the elevation

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[170] Carey Miller DL *The acquisition and protection of ownership* (1986) 308; Visser PJ "Estoppel en die vekryging van eiendomsreg in roerende eiendom" (1994) 57 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 633−636; Pelser FB "Aspekte van eiendomsverkryging deur estoppel" (2005) 38 *De Jure* 153 159.

[171] Lubbe G "Estoppel, vertouensbeskerming en die struktuur van die Suid-Afrikaanse privaatreg" 1991 *Tydskrif vir die Suid Afrikaanse Reg* 1 19. Visser also shows that the consequence of a successful estoppel defence is currently constructed in a negative way, which means that the fiction is only elevated as the truth in a once-off fashion whereby the owner is prevented from relying on the true state of affairs against the estoppel raiser only for purposes of the vindication proceedings. See Visser PJ "Estoppel en die vekryging van eiendomsreg in roerende eiendom" (1994) 57 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 633 633.

[172] *Apostoliese Geloofsending van Suid-Afrika (Maitland Gemeente) v Capes* 1978 (4) SA 48 (C) 58.

[173] *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 161.

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of the representation, as the true state of affairs is restricted to the vindication proceedings for the sole purpose of precluding the application of the *rei vindicatio*.

Interestingly, Visser and Lubbe in turn explain that a broader interpretation, namely positive or complete enforcement of the elevation of the fiction can be applied when articulating the consequences of a successful estoppel defence.[174] They submit that estoppel can be construed in a positive manner, where it is acknowledged that the negligent representation that prejudiced the possessor not only precludes the owner from denying the representation for purposes of the vindication proceedings, but for all legal purposes. This means that the fiction indicating that there was authority to dispose will automatically cause acquisition of ownership in favour of the successful estoppel raiser. This suggestion, however, does not take account of the defence nature of estoppel; in particular, the impracticalities of allowing a legal construct that may only be raised as a defence to have as a result acquisition of ownership.[175]

At its reception, the use of estoppel as a defence rather than a cause of action was transplanted from English authorities into the South African legal system.[176] It is from the English courts that the South African courts adopted the phrase that estoppel functions only as a shield (defence) and not a sword (cause of action).[177] However, some scholars[178] and more recently the Supreme Court of Appeal have questioned

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[174] Lubbe G "Estoppel, vertouensbeskerming en die struktuur van die Suid-Afrikaanse privaatreg" 1991 *Tydskrif vir die Suid Afrikaanse Reg* 1 18; Visser PJ "Estoppel en die vekryging van eiendomsreg in roerende eiendom" (1994) 57 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 633 633. Compare Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 473.

[175] See chapter 3, section 3 4 above where the practical problem with asserting the acquired right acquired by way of estoppel in its defence form is highlighted.

[176] The English court in *Low v Bouverie* [1891] 3 Ch 82 held that: "Estoppel is not a cause of action – it is a rule of evidence which precludes a person from denying the truth of some statement previously made by himself". See chapter 4, section 4 3 2 above.

[177] *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 31. See also earlier cases in which this phrase was used: *Pandora's Trustee v Beatley & Co* 1935 TPD 358 363; *Union Government v National Bank of South Africa Ltd* 1921 (AD) 121 128; *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) 160. See further Carey Miller DL *The acquisition and protection of ownership* (1986) 309; Van der Merwe CG *Sakereg* 2 ed (1989) 372; Sonnekus JC & Neels JL *Sakereg vonnisbundel* 2 ed (1994) 472; Sonnekus JC & Rabie PJ *The law of estoppel in South Africa* 3 ed (2012) 30−34.

[178] See Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 96; Van Heerden HJO "Estoppel: 'n Wyse van eiendomsverkryging" (1970) 33 *Tydskrif vir Hedendaagse*

whether this formalistic designation of estoppel can and should still be maintained.[179] Despite this, it remains trite law that estoppel can only be raised as a defence in the circumstances that would give rise to it. Since estoppel is a defence, a better approach to achieve what Louw suggests may be to latch onto the equitable nature of estoppel that allows for estoppel as a doctrine of equity to develop and evolve.[180] Perhaps, it is time to give full force to estoppel by allowing it to evolve into a mode of original acquisition that is not constrained by its limiting defence form. Estoppel potentially has the capacity and scope to do more in this context than what it currently is restricted to do as illustrated earlier. Developing estoppel into a mode of original acquisition, will allow the defence to evolve into an original mode of acquisition that will provide substantive and certain protection to the *bona fide* purchaser. It follows that an argument can be made that the understanding of the inherent equitable nature of South African common law rules should make it more possible to readily welcome development of the law to give effect to equitable considerations where rules and principles, seem to have inequitable, uncertain and unstable results, especially where such rules purport to be equitable, like estoppel. In this respect, equity is usually seen as sufficient reason for a court to develop the common law.[181] Development of the law, or the adoption of certain interpretations of the law, are possible solely based on equity. It, therefore, follows that since estoppel is capable of evolving into a different legal

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Romeins-Hollandse Reg 19 20-22; Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 221−223; Visser PJ "Estoppel en die vekryging van eiendomsreg in roerende eiendom" (1994) 57 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 633 636; Pelser FB "Aspekte van eiendomsverkryging deur estoppel" (2005) 38 *De Jure* 153 155−156.

[179] In *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) para 31 the court held that: "[The fact that] estoppel may only be used as a defence is part of English law, the same may be said to apply in our law . . . Whether this formalistic approach can still be justified need not be considered in this case even though successful reliance on estoppel has the effect that the appellant may not deny that the first respondent holds the unassailable title . . . This means that should the latter wish to dispose of the property the appellant would not be able to interfere…"

[180] Louw JW "Estoppel en die *rei vindicatio*" (1975) 38 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 218 220.

[181] Van Zyl DH "Aspekte van billikheid in die reg en regspleging" (1986) 19 *De Jure* 110 128-129; Neels JL "Regsekerheid en die korrigerende werking van redelikheid en billikheid (deel 1)" 1998 *Tydskrif vir die Suid Afrikaanse Reg* 702 706. For other examples of the development of the common law on the basis of equity, see Temmers Z *Building encroachments and compulsory transfer of ownership* (unpublished LLD dissertation Stellenbosch University 2010) 83-85,93-99,156-160; Siphuma NS *The lessor's tacit hypothec: A constitutional analysis* (unpublished LLM thesis Stellenbosch University 2013) 69-75.

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construct, it should perhaps develop into a new mode of original acquisition of ownership as proposed in chapter 3 in order to ensure that the manner in which the *bona fide* purchaser problem in South African law is regulated indeed results in equitable outcomes. The following section aims to determine whether the risk principle as an indicator of equity and fairness also supports the finding of this section that developing estoppel into a self-standing mode of ownership acquisition would safeguard and ensure equitable results much better than the way in which estoppel in its traditional form currently does.

5 3 2 2 The risk principle as justification

The facilitation theory has been advanced as a potential justification for the protection of the interest of the *bona fide* purchaser by way of the estoppel doctrine in South African law. The principle underlying the facilitation theory is of English origin and is described in *Lickbarrow v Mason*[182] in the following terms:

> "[W]herever one of two innocent parties must suffer by the acts of a third, he who has *enabled* such third person to occasion the *loss* must sustain it."[183] (Own emphasis added)

Accordingly, the principle ascribes liability to the party who facilitated or enabled the detriment suffered by another party, making it a useful criterion for determining what would be equitable and fair in a given situation. Furthermore, it provides a solution to the question of which of the two innocent parties should carry the loss. When considering the original circumstances that give rise to a successful estoppel defence in South African law, the parties in the dispute are both presumably innocent and the law has to determine which of the two innocent parties must carry the loss caused by the seller who was not the owner.[184] Consequently, it seems plausible to use this principle as a justification for the limitation placed on the owner's right to vindicate at the instance of a successful estoppel defence. The facilitation principle, therefore,

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[182] (1787) 2 TR 63. See also Bridge M *Benjamin's sale of goods* 9 ed (2014) 361.

[183] *Lickbarrow v Mason* (1787) 2 TR 63 70. See also chapter 4, section 4 3 2 above.

[184] The original circumstances that give rise to an estoppel defence refers to the requirements as they were before the addition of the negligence requirement. In other words, the requirements for estoppel by representation in English law. For a discussion of the requirements in English law see chapter 4, section 4 3 2 above.

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requires that the owner must carry the consequences because she enabled the loss through the creation of the representation. In this respect, the consequence refers to the limitation of her right to vindicate as provided for in terms of a successful estoppel defence.

In *Grosvenor Motors* this argument was made on behalf of the estoppel raiser. It was submitted that because the note, that was written by the owner and that stated that the car was sold to the seller, was shown to the estoppel raiser as proof that the seller was indeed the owner, the written document, therefore, enabled the seller to act fraudulently to the detriment of the estoppel raiser. Since it was the owner's written note that enables the seller to act fraudulently to the detriment of the estoppel raiser, the owner who issued the note should carry the loss.[185] However, Centilivres CJ indicated that this English law principle of facilitation is too broad and that it should therefore be qualified by requiring that the facilitation must be the *proximate cause* of the detriment.[186]

In light of the above, JC van der Walt correctly identifies that in South African law the facilitation theory is not readily applied because of its unqualified nature.[187] Therefore, he submits that more than mere facilitation is required. Instead, facilitation together with detriment that flows from conduct that can be said to be materially risky in accordance with the *risk principle* should be present.[188] The application of the risk principle as a justification was confirmed by the Supreme Court of Appeal in South Africa in *Randbank Bpk v Santam Versekeringsmaatskappy Bpk*[189] where the court held:

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[185] *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A) 425.

[186] *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A) 425. See also *Union Government v National Bank of South Africa Limited* 1921 AD 121 121 where Innes CJ held:

> "[T]he rule is too widely stated and needs to be qualified . . . [S]o qualified it becomes necessary, amongst other things, that the neglect must be the proximate cause of the loss; and that, in my opinion, is where the defence of estoppel breaks down in the present case."

[187] Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 91.

[188] Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 91.

[189] 1965 (4) SA 363 (A).

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> "Dit is redelik dat die prinsipaal wat sy verteenwoordiger kies en hom voorhou as 'n betroubare persoon, en nie die ander party wat geen seggenskap by die keuse het nie, die *risiko* van sy moontlike oneerlike voorstellings of verswygings sal dra, ook waar die oneerlikheid so 'n gestalte aanneem dat die verteenwoordiger dit uit die aard van die saak ongetwyfeld vir die ander party sal verberg."[190] (Own emphasis added)

The risk principle holds that where conduct creates a risk for the world to be misled, it is materially risky and establishes a ground for legal accountability.[191] In this regard, JC van der Walt considers whether in the creation of the misrepresentation of ownership or authority to dispose, a legal accountability ground can be established on the part of the owner. An owner that gives a third party control of her property and also through her outward actions creates an indication to the world at large that the third party has the *ius dispondendi* over the property generally also creates a risk that the world at large may be misled.[192] This representation is created if a reasonable person in the position of the misled third party would also have been misled by the representation created by the owner. Accordingly, if the owner's conduct can be said to be reasonably misleading, in other words, a reasonable person in the position of the *bona fide* purchaser would also be misled, the owner's conduct can be classified as legally risky.

The risk here is that third parties will act to their detriment when relying on the representation.[193] Therefore, to determine whether the owner's conduct can be said to have caused a legal risk to justify the limitation on the owner's right to vindicate, it will have to be determined whether the representation was reasonably misleading. This is

[190] *Randbank Bpk v Santam Versekeringsmaatskappy Bpk* 1965 (4) SA 363 (A) 372. Here is a free translation of the quoted text: *It is reasonable that the principal who chooses his representative and presents himself as a trustworthy person, and not the other party who has no say in the choice, should carry the risk of the principal's possible dishonest representations or omissions, even where the representative, undoubtedly, conceal the dishonesty from the other party*.

[191] Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 91.

[192] Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 91.

[193] Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 91.

interesting, because this element for the establishment of risk under the risk principle involves some of estoppel's requirements, namely representation and detriment.

When assessing whether the representation made in the estoppel scenario constitutes a risk which triggers a ground for accountability on the part of the owner, JC van der Walt concedes that the mere entrusting of possession to another does not cause a legal risk in South African law because it is an everyday phenomenon.[194] Moreover, estoppel requires more than the mere entrusting of possession to another, it requires that the owner by her representation clothe the seller with the *indicae* of *dominium* or *ius dispondendi*.[195] To establish a representation for purposes of estoppel, it must be shown that a reasonable person exposed to the representation would believe that the seller had the *dominium* or *ius dispondendi* and is therefore entitled to dispose of the property. Interestingly, what must be shown to establish a representation is identical to that which is required to prove risky conduct, namely that where a reasonable person in the position of the estoppel raiser would also be misled, the owner's conduct can be classified as lhaving caused a legal risk

Accordingly, JC van der Walt opines that where a representation for purposes of estoppel is proven and the detriment requirement of estoppel is also satisfied, it is automatically established that the conduct of the owner caused a legal risk and that the owner facilitated or enabled the detriment that resulted from the risk.[196] The argument can be made that grounds for holding the owner accountable is established where the traditional requirements of estoppel namely, representation, detriment and by implication reliance and causality, are satisfied. The ground for accountability is being found in the risk principle.

However, it should be noted that De Wet's analysis of the risk principle as a potential justification for the limitation of the owner's right to vindicate suggests otherwise. De Wet links the risk principle to the causation requirement in that the risk

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[194] Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 91. See in general Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 95.

[195] Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 91.

[196] Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 92.

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principle holds that those who cause detriment are responsible for the same, in so far as the detriment is caused by such person's hand.[197] However, he does concede that it is not a ground for accountability purely based on the causation principle. The argument is that the party responsible for the detriment is only accountable as far as her conduct puts the other party in a detrimental position. He stresses that the core of the risk principle is, therefore, the *risk setting*. According to De Wet, when evaluating risk setting, it is important to ask whether the owner should have foreseen the risk her conduct could create for the world at large. He points out that this formulation of the risk principle shows how the risk principle encapsulates the requirement of negligence.[198] Where De Wet uses the risk principle to justify the limitation on the owner's right to vindicate, the limitation is connected to the requirements of estoppel as developed in South African law, namely representation (conduct), detriment, reasonable *bona fide* reliance, causation and importantly, negligence. In this respect, estoppel is sufficiently justified where negligence forms part of the justification.

Evidently, De Wet's account of the test to determine legally risky behaviour differs from the account advanced by JC van der Walt. As explained, De Wet judges the conduct of the owner from the perspective of the owner and asks whether she should have foreseen that she is creating a risk. In contrast, JC van der Walt, determines risky behaviour from the perspective of the world at large, asking whether a reasonable person exposed to the owner's conduct would have been reasonably misled by the conduct to her detriment. Therefore, the conduct of the owner is regarded as risky if it is reasonably misleading conduct that results in detriment. The focus falls on the reasonableness of reliance rather than negligence as advanced by De Wet.

JC van der Walt's interpretation of the risk principle seems more plausible than De Wet's interpretation. This is because logic requires us to acknowledge that irrespective of whether the owner was aware of, or should have been aware of the fact that her conduct is creating a risk of detriment to others, the conduct remains a risk.

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[197] De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 96.

[198] De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 96. For a contradictory view, see Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 92. Van der Walt submits that the risk is found in the representation and not in whether the owner should have foreseen the risk. This latter element, which encapsulates negligence in Van der Walt's opinion, only increases the already existing risk.

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The risk nature of the conduct is found in its potential haphazard consequences, not the intention or negligence with which it was created. It would seem that the risk principle could still apply in the absence of foreseeability on the part of the risk creator. The risk principle indicates that since the owner created the risk of misleading the purchaser to her detriment, the owner must carry the loss instead of the purchaser. In other words, the risk principle justifies the protection of the purchaser as opposed to the protection of the owner, without taking account of whether the owner acted culpably. Even where the owner did not act culpably, the law should still protect the purchaser in accordance with the risk principle. This means that according to the application of the risk principle to the *bona fide* purchaser problem in South African law, the protection of the purchaser can be regarded as a more equitable outcome than if the law protected the owner who created the risk.

The question that forthwith arises is what the impact of the owner's negligence should be on the type of protection that the law affords to the purchaser. In this regard, the part below explores the impact that the addition of the negligence requirement to estoppel may have on the scope of the protection awarded to purchasers that can satisfy the requirements of estoppel, to ultimately establish what equity and fairness requires in these circumstances.

5 3 2 3 Negligence as justification

In South African law it is required that a defendant who wishes to raise estoppel as a defence must amongst other requirements, satisfy the court that the plaintiff was negligent when she created the representation.[199] De Wet shows that negligence has a tiebreaker function when considering which party should carry the loss and which party should be protected when dealing with the *bona fide* purchaser problem in South African law. He points out that the *bona fides* of the purchaser does not make it more desirable to protect the purchaser or make the purchaser more worthy of protection from an economic point of view. However, he concedes that where one of the parties acted in a blameworthy manner it can be said that it would be in the interest of trade and commerce to protect the other party that acted in good faith. Accordingly, in De Wet's view, the requirement of negligence is apparently pivotal in considering whether

[199] See chapter 2, section 2 3 2 above.

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modern-day commerce necessitates the protection of the *bona fide* purchaser above the negligent owner and thereby arguably justifies the owner's rights giving way to the protection of the purchaser.[200]

Furthermore, as illustrated under the risk principle discussed above, De Wet also ties negligence to the risk principle and argues that the operation of estoppel is sufficiently justified where negligence is seen to form part of the justification, in other words where negligence creates the risk.[201] According to De Wet, in the absence of negligence, the various considerations that are encapsulated in the requirements of estoppel seem unable to provide strong enough justification for estoppel and the potential impact it can have on the owner's rights.

Conversely, JC van der Walt submits that the requirement of negligence, which exists in South African law as a requirement of estoppel, provides stronger protection than necessary, to the interest of owners.[202] Firstly, JC van der Walt, opines that the impact of the owner's culpability is not to justify protecting the purchaser above the owner, since the risk principle (which encapsulates the traditional requirements of estoppel) already justifies such protection. Instead, JC van der Walt argues that where the owner knowingly leaves her property in the hands of a person who she can foresee may deal with the property in an untrustworthy manner (in other words in a culpable manner), the risk of misleading on the owner's part increases significantly. The increase in the risk of misleading originates from the owner's negligence. However, the negligence on the part of the owner does not create the ground for accountability, contrary to what De Wet suggests. An accountability ground is already present when the owner creates the representation that can lead to detriment, since the owner engaged in legally risky behaviour. Where the owner was also negligent, the already established risk arguably increases perhaps to justify stronger protection in favour of the purchaser.[203] Yet, the addition of the negligence requirement to the traditional

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[200] De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 94.

[201] De Wet JC *Estoppel by representation in die Suid-Afrikaanse reg* (unpublished LLD dissertation Stellenbosch University 1939) 99.

[202] Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 92−93.

[203] Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 92.

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requirements of estoppel was not coupled with more substantive protection to the purchaser. Instead, the protection afforded to the purchaser remained the same: limited and uncertain.

JC van der Walt also points out, with reference to the minority judgment in *Johaadien v Stanley Porter (Paarl) (Pty) Ltd,*[204] that the evidentiary burden placed on the *bona fide* purchaser is nearly impossible to satisfy since the evidence to show negligent conduct is ordinarily held exclusively by the owner.[205] It is therefore unrealistic and perhaps arbitrary to expect *bona fide* purchasers to do an in-depth investigation into what the owner foreseen or should have foreseen in the circumstances. On this basis, JC van der Walt posits that South African law should perhaps do away with the negligence requirement for the estoppel defence.[206]

JC van der Walt's analysis gives rise to the question whether negligence should still be maintained as a requirement for the estoppel defence, given the practical difficulties and arbitrariness of expecting the purchaser to prove negligence on the part of the owner. His argument seems to highlight that the risk created by the owner together with the culpable conduct of the owner, which increases the risk of detriment, in effect provides more protection to the owner who engaged in risky and culpable conduct than to the *bona fide* purchaser. The addition of negligence, therefore, seems to favour the owner unfairly since a purchaser's chances of successfully proving all the requirements of estoppel is diminished. Moreover, even though the purchaser's burden of proof becomes more difficult to satisfy, the protection that the law provides her remains limited to hedged possession while the owner's protection increases. Arguably, the question should not be about whether negligence still ought to be a requirement but rather whether the fact that the addition of negligence increases the risk in terms of the risk principle so substantially that the increase may be seen to support the proposed development of the self-standing mode of acquisition, equitable acquisition. Perhaps when the addition of negligence is considered in isolation (meaning without regard to possible other facts) it would be rather far-fetched to argue

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[204] 1970 (1) SA 394 (A).

[205] *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A) 412-416. See further Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 93.

[206] Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 92−93.

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that the negligence element provides strong justification for the proposed development. However, when the increased risk caused by the addition of the negligence requirement is considered together with the anomalies caused by the traditional consequences of estoppel it becomes apparent that equity favours the proposed development. This finding shows that considerations of equity and fairness are in unison with the law and economics analysis and findings discussed earlier.[207]The combined preference in favour of the development of a new mode of acquisition of ownership based on estoppel's requirements, as indicated by the analysis of law and economics; equity and fairness considerations, may be argued to sufficiently justify the proposed development of the law.

5 4 Concluding remarks

This chapter investigated whether there are sufficient policy reasons for the law to develop the legal construct that protects *bona fide* purchasers in circumstances that would ordinarily give rise to a successful estoppel defence in South African law. This proposed development entails evolving the estoppel defence into a new original mode of acquisition, namely equitable acquisition. This proposed new mode of acquisition will not be the consequence of a successful estoppel defence, but rather the result of the purchaser relying on the mode of acquisition that is established when she can satisfy the traditional requirements of estoppel. In this regard, the chapter sought to evaluate which of the two competing legal constructs, namely the estoppel defence on the one hand and the proposed mode of acquisition, on the other hand, is more acceptable from a policy perspective. It soon became evident that since South African law jealously protects ownership, strong justification is required for the limitation or extinction of ownership or its entitlements.[208]

The first part of the chapter, which contextualises the conflict between the owner and the *bona fide* purchaser, revealed that various approaches exist globally for the regulation of this conflict. It became evident that by virtue of the interaction between the *rei vindicatio* and estoppel, South African law subscribes to an intermediary approach called the limited vindication approach. This approach entails that the owner

[207] See section 5 3 1 above.

[208] See section 5 1 above.

is, as a starting point, allowed to recover her property from the purchaser. Yet, the law protects the *bona fide* purchaser *via* some or other legal construct in certain circumstances. In South African law, this protection is provided to purchasers that can satisfy the requirements of the defence of estoppel. It should, however, be noted that the consequences of the approach adopted in South Africa are more conservative than those of most other jurisdictions that also follow the intermediary approach. This is because while other jurisdictions such as for instance England and Scotland recognise ownership acquisition in favour of the *bona fide* purchaser if the specific requirements of the legal constructs of the relevant jurisdiction are met,[209] South African law only allows the owner's entitlement to vindicate to be suspended upon satisfaction of the requirements of estoppel. This means that the owner does not lose her ownership to the *bona fide* purchaser. [210]

In evaluating the preferability of the limited vindication approach that manifests by way of the defence, the chapter also considered the legal position of the owner and the *bona fide* purchaser after the unsuccessful vindication proceedings. This consideration was particularly significant since scholars have indicated that a successful estoppel defence gives rise to several legal anomalies. Since the chapter confirmed that the anomalies alluded to by scholars do, indeed, result from estoppel, more reason exists to question the current approach to the *bona fide* purchaser problem in South African law, specifically from a policy perspective. Unsurprisingly, the chapter confirmed the assertions made by scholars regarding the anomalies that arise when estoppel is successfully raised against the owner's *rei vindicatio*. The chapter also exposed several new issues.

In particular, both the owner and the successful estoppel raiser's legal positions, after a successful estoppel defence, are rather disconcerting. Subsequent to estoppel being successfully raised, the owner is apparently a bare owner in that most of her entitlements in the property become unenforceable due to her right to vindicate being suspended indefinitely. Furthermore, the owner is required to endure the risk of liability in certain circumstances which she is not able to avoid. Moreover, the owner has little, if any, remedies at her disposal to protect her ownership.[211] More specifically, the

[209] See chapter 4 above.

[210] See section 5 2 1 above.

[211] See section 5 2 2 1 above.

chapter revealed that the owner would most probably not succeed with real, delictual or enrichment remedies against a subsequent purchaser following a successful estoppel defence. However, delictual actions for the infringement of the owner's property rights might still succeed against the fraudulent seller in the estoppel scenario. Although the fraudulent seller would usually be untraceable or insolvent in these situations, the fact that the owner has delictual remedies at her disposal against the seller indicates that the owner is not entirely left without a remedy after a successful estoppel defence against her *rei vindicatio*. This, however, does not not take away from the fact that the owner's legal position is very weak. [212]

The *bona fide* purchaser's legal position is equally problematic. Although the purchaser's exact legal position remains unclear, an attempt to determine the legal status of the purchaser with reference to the contested concepts of holdership and possession, revealed that it may be plausible to ascribe to the purchaser the legal status of an unlawful possessor. Due to this status, it became evident that little if any possessory remedies would likely be available to a purchaser subsequent to such a person succeeding with estoppel, except for the *mandament van spolie*. In addition, while most delictual remedies may not be available to the purchaser, the purchaser may be able to rely on the general delictual remedy the *actio legis Aquiliae* to claim damages for interference with her interest over the property. However, even with the possibility that the purchaser may be able to claim for damages if her possession of the property is disturbed, the lack of remedies available to a purchaser to protect her possession is blatantly clear. Accordingly, the chapter showed that the consequences ascribed to estoppel create various legal and practical anomalies for the owner *and* the *bona fide* purchaser. The fact that the consequences of the South African limited vindication approach can be described as problematic has already led numerous academic scholars to argue for a more realistic approach to be adopted, namely acquisition of ownership in favour of the *bona fide* purchaser who successfully relies on estoppel.[213] However, it is questionable whether these anomalies can without other strong policy reasons justify the proposed legal development.

Considering the above, the second part of the chapter focussed on whether the suggestion that the law should be developed to recognise acquisition of ownership in

[212] See section 5 2 2 1 above.

[213] See section 5 2 2 above.

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favour of the *bona fide* purchaser is supported by policy considerations of law and economics and equity (which includes fairness as it is determined by causing a risk and culpability). Stated differently, it was necessary in part two of the chapter to evaluate whether, over and above the anomalies highlighted, further justification for the proposed legal development could be found in policy. In this regard, the economic approach to law unequivocally showed that the most optimal or efficient choice between the defence of estoppel (the rule protecting the original owner's ownership status) and the proposed mode of equitable acquisition (the rule that ensures ownership is acquired by the *bona fide* purchaser) is the equitable acquisition of ownership. The law and economic analysis showed that the *bona fide* purchaser rule will ensure that the least cost avoider, which was proven to be the owner, carries the cost and risk of loss, thereby allocating resources more efficiently. It also revealed that a qualified *bona fide* purchaser rule such as the rule proposed in terms of equitable acquisition will promote the interest of trade and commerce more efficiently than what the estoppel defence currently does. Consequently, the chapter made it plain that the economics approach to law provides grounds for the proposed development of the common law. However, since the economics approach to law is often criticised for not taking into account considerations of fairness and equity due to its exclusive focus on costs, the chapter also investigated considerations of equity (including fairness) to determine if these considerations support the finding of the economics analysts.[214]

The analysis of equity and fairness highlighted that estoppel is a doctrine of equity. It further showed that equitable doctrines can expand according to the appropriate equitable solution required by a legal system. In this regard, the investigation into the effectiveness of estoppel as a defence in ensuring equitable results in terms of the *bona fide* purchaser problem, brought to light that the limits of estoppel, which is found in its defence form, seem to prevent estoppel from bringing about adequate equitable and fair results, which do not give rise to anomalies. Consequently, the fact that estoppel has shortcomings and results in several anomalies that impede equity, triggers the ability of estoppel to evolve into a more equitable construct that can ensure (more) equitable outcomes. Since the mode of acquisition proposed will not merely do away with the anomalies caused by a successful estoppel defence, but will also ensure optimal allocation of resources,

[214] See section 5 3 1 above.

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equitable considerations would arguably support the proposed development. This finding provides grounds for allowing estoppel as a defence to evolve into a new mode of original acquisition of ownership.[215]

In addition, the consideration of the risk principle and the presence of the element of negligence as further indicators of what is regarded as equitable and fair concerning the *bona fide* purchaser problem also supported the earlier findings. The part on the risk principle in the chapter indicated that since the owner creates the risk that others might be misled to their detriment; the owner should carry the loss rather than the *bona fide* purchaser who acted reasonably. The risk principle, therefore, justifies protecting the purchaser rather than the owner in the context of the *bona fide* purchaser problem.[216] Significantly, the chapter also showed that the addition of the negligence requirement arguably constitutes over-protection of the owner's interest, even in a jurisdiction that jealously protects ownership. The fact that negligence is a requirement beyond the causing of risk, was argued to increase the risk of detriment to another to such an extent that it favours stronger protection for the purchaser. As a result, these promoters of fairness (the risk principle and negligence) also supported the development of a new mode of acquisition as opposed to maintaining the defence of estoppel for the regulation of the *bona fide* purchaser problem.[217] There are therefore sound reasons for the development of the common law in the case of estoppel.

What the chapter clarifies is that although strong justification is required before ownership can be extinguished, there seems to be sufficient reason from a policy perspective to argue for this prospect. In other words, sound policy reasons do exist to develop the common law of estoppel into a self-standing mode of original acquisition of ownership. These policy reasons are found in the anomalies caused by the estoppel defence and the reasons provided in terms of law and economics, equity and fairness.

However, as mentioned in the introductory part of this chapter, the Constitution changed the way in which development of the common law must be approached. In terms of the methodology for the development of the common law, development may only occur if it is tested properly against the precepts of the Constitution. The outcome is that the proposed development must not be in conflict with the provisions of the

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[215] See section 5 3 2 above.

[216] See section 5 3 2 2 above.

[217] See section 5 3 2 3 above.

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Constitution even where there are sound policy reasons for the development of the common law.[218] Therefore, the next chapter will set out to determine whether the traditional consequences attached to a successful estoppel defence, namely suspension of the *rei vindicatio*, and the proposed developed position, namely acquisition of ownership in favour of the *bona fide* purchaser for value, align with section 25(1) of the Constitution, the constitutional property clause.

[218] See section 5 1 above.

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Chapter 6: Constitutional analysis

6 1 Introduction

The previous chapter showed that compelling policy reasons exist in favour of developing a new mode of ownership acquisition to operate in the place of the estoppel defence.[1] However, when regard is had to Van der Walt's methodology for the development of the common law, it becomes evident that strong policy reasons for development may not be sufficient to warrant development of the common law in South Africa's constitutional dispensation. Instead, the constitutional implications of the existing common law position, and the proposed development of that position, determines whether development of the law is essential and justified.[2]

The aim of this chapter is, therefore, to analyse the competing constructs dealt with in this research, namely the existing common law position pertaining to the consequences of a successful estoppel defence (that was set out in chapter 2) and the proposed development of a new mode of original acquisition of ownership due to estoppel (that was set out in chapter 3) in light of the Constitution of the Republic of South Africa, 1996 (the Constitution). As identified in chapter 2, the existing common law position has been rendered uncertain because of *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading*.[3] It is traditionally understood that the result of a successful estoppel defence is the mere suspension of the owner's *rei vindicatio* for an indefinite period. Prior to *Oriental Products*, it was relatively clear, although heavily criticised, that the effect of such suspension is hedged possession in favour of the successful estoppel raiser and that the estoppel raiser does not become owner of the property. However, after the Supreme Court of Appeal's dicta in *Oriental Products*, it can now potentially be argued that the indefinite suspension of the owner's *rei*

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[1] See chapter 5, section 5 3 above.

[2] Van der Walt AJ "Development of the common law of servitude" (2013) 130 *South African Law Journal* 722 737. See also Boggenpoel ZT & Cloete C "The proprietary consequences of estoppel in light of section 25(1): Testing Van der Walt's hypotheses" in Muller G, Brits R, Slade B & Van Wyk J (eds) *Transformative property law: Festschrift in honour of AJ van der Walt* (2018) 147-172 166-171 in which a cursory and tentative section 25 analysis was done within the framework of Van der Walt's methodology.

[3] 2011 (2) SA 508 (SCA). See chapter 2, section 2 3 above.

vindicatio in effect may lead to loss of ownership and acquisition thereof in favour of the successful estoppel raiser. In other words, the legal construct of estoppel (as a defence) could automatically have ownership acquisition consequences, although the position remains uncertain due to the arguably *obiter* nature of the statements made by the court. Yet, based on the findings in chapters 4 and 5, it became evident that from a comparative and policy perspective estoppel (as a defence), as it has always been applied, may not necessarily be a suitable legal construct to which the consequences of acquisition of ownership can be attached.[4] Furthermore, chapters 3 and 5 indicated that the development of an independent new mode of acquisition of ownership, namely equitable acquisition might be a more suitable construct to employ in these circumstances.[5] The proposed development of the existing common law position refers to loss and acquisition of ownership by way of an original mode of acquisition that would be available to possessors who can satisfy the traditional requirements of estoppel.[6] These competing positions, identified above, seem to implicate proprietary interests in that they either suspend such interests or propose the extinction of property rights. Therefore, it seems necessary that the constitutional scrutiny should involve testing these competing constructs and their consequences against the constitutional property clause, section 25 of the Constitution.[7] Section 25(1) of the Constitution prohibits arbitrary deprivation in that it stipulates that:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."[8]

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[4] See chapter 4, section 4 4; chapter 5, section 5 4 above.

[5] See chapter 3, section 3 4; chapter 5, section 5 4 above.

[6] See chapter 3, section 3 4 above.

[7] The common law cannot authorise expropriation of property. Since the legal constructs under scrutiny in this dissertation are established in terms of the common law, the question of expropriation does not arise and therefore need not be focussed on. Gildenhuys A *Onteieningsreg* 2 ed (2001) 93; Gildenhuys A & Grobler GL "Expropriation" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 10 Part 3 2 ed (2012) para 12. See also Van der Walt AJ *Constitutional property law* 3 ed (2011) 346, 453. As a result, the focus of the section 25 analysis in this chapter will exclusively fall on section 25(1) of the Constitution, dealing with deprivation of property, and not section 25(2)-(3), the sub-clause that deals with the requirements for a valid expropriation. For a discussion of expropriation as an original mode of acquisition see chapter 3, section 3 2 3 2 above.

[8] Section 25(1) of the Constitution of the Republic of South Africa, 1996. For a critical discussion of section 25 in general, see Van der Walt AJ *Constitutional property law* 3 ed (2011); Currie I & De Waal

Although the section does not positively entrench property rights, its negative expression implies that property rights will enjoy constitutional protection unless these rights are limited in accordance with the requirements expressly set out in the clause.[9] Van der Walt explains that the function of section 25 of the Constitution is not to primarily guarantee the protection of property rights, but to rather establish and maintain an appropriate balance between the rights of individuals and the interest of the public realised by way of valid regulatory deprivations.[10] To this end, the property clause indicates that limitations on property rights brought about by a non-arbitrary law of general application will be constitutionally compliant.

After the Constitution came into operation in 1996, the constitutional text of section 25 required further interpretation to determine its meaning, content and scope. Consequently, in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*[11] the Constitutional Court developed a set of questions in terms of which a section 25 analysis should proceed to determine whether the property clause has been infringed in a given case.[12] The court listed the questions as follows:

J *The bill of rights handbook* 6 ed (2013); Roux T "Property" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-1 - 46-37.

[9] The implication of the negative phraseology of section 25(1) was explained in *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) para 72 and upheld in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 48. See also Van der Walt AJ *Constitutional property law* 3 ed (2011) 34-42; Currie I & De Waal J *The bill of rights handbook* 6 ed (2013) 534.

[10] Van der Walt AJ *Constitutional property law* 3 ed (2011) 91. See also Currie I & De Waal J *The bill of rights handbook* 6 ed (2013) 534 for a similar explanation of the purpose of section 25 of the Constitution.

[11] 2002 (4) SA 768 (CC).

[12] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46. As mentioned in footnote 7 above, this chapter is limited to a discussion and analysis of deprivations. The chapter will not focus on the expropriation of property. For an exposition of the distinction between deprivations and expropriations, see *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC) para 33; *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46. See further Van der Walt AJ "Striving for a better interpretation - A critical reflection on the Constitutional Court's *Harksen* and *FNB* decisions on the property clause" (2004) 121 *South African Law Journal* 854 873; Van der Walt AJ "Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC*

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"*(a)* Does that which is taken away … amount to 'property' for purpose[s] of s 25?
(b) Has there been a deprivation of such property…?
(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[s] of s 25(2)?
(f) If so, does the deprivation (*sic*) comply with the requirements of s 25(2)*(a)* and
(g) If not, is the expropriation justified under s 36?"[13]

In this chapter, these questions will guide the constitutional analysis focussing on the existing common law position (pre and post-*Oriental Products*) pertaining to the consequences of a successful estoppel defence and its proposed development, which entails the new mode of original acquisition, namely equitable acquisition. To this end, the principal case of *FNB* will be instructive as a starting point together with more recent developments on each of the questions for purposes of ascertaining whether estoppel currently or in terms of its development is (or will be) in line with section 25.[14] These questions will then be applied to the relevant competing constructs in an integrated fashion. The findings of this chapter will ultimately be decisive in the determination of whether development of the common law of estoppel is constitutionally justified, even where strong policy reasons for such development may exist.

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for Local Government and Housing, Gauteng" (2005) 123 *South African Law Journal* 75 77; Van der Walt AJ *Constitutional property law* 3 ed (2011) 339-341; Marais EJ "When does state interference with property (now) amount to expropriation? An analysis of the *Agri SA* court's state acquisition requirement (Part I)" (2015) 18 *Potchefstroom Electronic Law Journal* 2983 2985.

[13] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46. See also Van der Walt AJ *Constitutional property law* 3 ed (2011) 75-78; Currie I & De Waal J *The bill of rights handbook* 6 ed (2013) 535; Roux T "Property" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-2.

[14] Since *FNB* has been criticised (sometimes quite vehemently) by scholars and subsequently elaborated on and developed by some cases, the directive for the application of section 25 as provided for in *FNB* will be used in conjunction with the more recent developments. For criticism of the *FNB* methodology, see Roux T "Property" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-22; Slade BV "The effect of avoiding the *FNB* methodology in section 25 disputes" (2019) 40 *Obiter* 36 44-46.

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6 2 Section 25 analysis

6 2 1 The property question

The first question for determination is whether the interest allegedly infringed constitutes "property" for purposes of section 25 of the Constitution.[15] In this regard, if the interest qualifies as property, such an interest is regarded as deserving of constitutional protection under the property clause. Therefore, the property inquiry as prescribed by *FNB* established a threshold requirement for the application of section 25 of the Constitution.[16] Interestingly, the Constitution itself does not provide guidance as to what interest or right would qualify for constitutional protection under section 25, apart from indicating in section 25(4)(b) that property is not limited to land.[17] In *FNB* it was decided that the property concept has to be interpreted generously, because it would be both impossible and unwise to ascribe a fixed meaning to what constitutes property for purposes of section 25(1), especially so early on in a constitutional democracy.[18] This dictum is in line with the same court's observation concerning the property concept in the earlier case of *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996.[19] As a result, the South African approach to the constitutional property concept is

[15] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

[16] Van der Walt AJ *Constitutional property law* 3 ed (2011) 85; Roux T "Property" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-10.

[17] Section 25(4)(b) of the Constitution. See also *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 48.

[18] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51. For a discussion of the court's generous approach to the property concept, see Van der Walt AJ *Constitutional property law* 3 ed (2011) 84; Roux T "Property" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-09 - 46-11.

[19] 1996 (4) SA 744 (CC). The Constitutional Court identified that most foreign jurisdictions follow a wide approach to the interpretation of the property concept for constitutional purposes because no standard international guideline exists to this end. See *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) para 72.

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described as a wide approach that allows new interests and rights to qualify as property subject to scrutiny on a case-by-case basis.[20]

Furthermore, the court prescribed a normative approach to the interpretation of section 25 as a whole and therefore to the question of whether any given interest qualifies as constitutional property. This approach requires that section 25 must be construed with all its subsections, historical context and other provisions of the Constitution in mind.[21] *FNB*'s normative approach, particularly in the context of the property question, was further developed in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape and Others.*[22] In essence, the court in *Shoprite* required that for an interest to qualify as constitutional property, such interest should

[20] Subsequent case law followed this generous approach to the interpretation of the constitutional property concept. See *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 32; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape and Others* 2015 (6) SA 125 (CC) para 104. See also Rautenbach IM "Dealing with the social dimensions of property" 2015 *Tydskrif vir die Suid Afrikaanse Reg* 822 825-829; Van der Walt AJ "Property vortices (part 1)" 2016 *Tydskrif vir die Suid Afrikaanse Reg* 412 416-419; Van der Walt AJ "Property vortices (part 2)" 2016 *Tydskrif vir die Suid Afrikaanse Reg* 597 599-605; Marais EJ "Expanding the contours of the constitutional property concept" 2016 *Tydskrif vir die Suid Afrikaanse Reg* 576 576-592; Swanepoel J *Constitutional property law in Central Eastern European jurisdictions: A comparative analysis* (unpublished LLD dissertation Stellenbosch University 2016) 211-220; Badenhorst P & Young C "The notion of constitutional property in South Africa: An analysis of the Constitutional Court's approach in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 (6) SA 125 (CC)" (2017) 28 *Stellenbosch Law Review* 26 40-45; Du Plessis M & Palmer T "Property rights and their continued open-endedness – A critical discussion of *Shoprite* and the Constitutional Court's property clause jurisprudence" (2018) 29 *Stellenbosch Law Review* 73 86-87. The case-by-case approach that the court adopts in this regard is evident in the following examples: In *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC) paras 71, 83 trademarks were accepted as property; in *Phumelela Gaming and Leisure Ltd v Gundlingh and Others* 2007 (6) SA 350 (CC) paras 36-42 where goodwill was accepted to constitute property; in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape and Others* 2015 (6) SA 125 (CC) para 104 a grocer's wine license was accepted to qualify as property under section 25 of the Constitution. See also Swanepoel J & Boggenpoel ZT "Intangible constitutional property: A comparative analysis" (2018) 28 *Stellenbosch Law Review* 624 628-633.

[21] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51; Van der Walt AJ *Constitutional property law* 3 ed (2011) 49.

[22] 2015 (6) SA 125 (CC).

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promote the fundamental rights underpinning the Constitution, namely human dignity, freedom and equality.[23] Yet, the *Shoprite* approach remains questionable.[24]

When the existing common law position in the context of estoppel is considered for purposes of establishing whether the interest at stake amounts to property for constitutional purposes, the positions before and after the *Oriental Products* case should arguably be dealt with separately. The position before the *Oriental Products* case was that where a *bona fide* purchaser for value successfully raises estoppel as a defence against the owner's *rei vindicatio*, the owner's *rei vindicatio* would be suspended indefinitely and the successful estoppel raiser would as a result obtain hedged possession of the property for an indefinite period.[25] Here the affected property interest is the owner's right to vindicate, which is an entitlement that an owner would normally have by virtue of her ownership. Therefore, the question here is whether ownership entitlements are deserving of constitutional protection. In light of the broad interpretation of property adopted in *FNB* and the court's suggestion that both the objects of rights, and rights themselves, qualify as property for purposes of section 25, the right to vindicate may constitute property for purposes of the property clause.[26] Furthermore, in *Ex parte Optimal Property Solutions CC*[27] it was decided that the property concept "should be read to include any right to, or in property".[28] Moreover,

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[23] *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape and Others* 2015 (6) SA 125 (CC) para 50.

[24] For criticism of *Shoprite*'s approach to the property question, see Rautenbach IM "Dealing with the social dimensions of property" 2015 *Tydskrif vir die Suid Afrikaanse Reg* 822 826-827; Van der Walt AJ "Property vortices (part 1)" 2016 *Tydskrif vir die Suid Afrikaanse Reg* 412 416-419; Van der Walt AJ "Property vortices (part 2)" 2016 *Tydskrif vir die Suid Afrikaanse Reg* 597 599-605; Marais EJ "Expanding the contours of the constitutional property concept" 2016 *Tydskrif vir die Suid Afrikaanse Reg* 576 583; Swanepoel J *Constitutional property law in Central Eastern European jurisdictions: A comparative analysis* (unpublished LLD dissertation Stellenbosch University 2016) 213-215; Swemmer S "Muddying the waters – the lack of clarity around the use of s 25(1) of the Constitution: *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape*" (2017) 33 *South African Journal on Human Rights* 286 287-293.

[25] See chapter 2, section 2 3 2 above.

[26] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51. See also Van der Walt AJ *Constitutional property law* 3 ed (2011)112.

[27] 2003 (2) SA 136 (C).

[28] *Ex parte Optimal Property Solutions CC* 2003 (2) SA 136 (C) paras 4-6, 19.

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the High Court's remarks in *Geyser and Another v Msunduzi Municipality and Others*[29] that constitutional property includes "property rights such as ownership and the bundle of rights that make up ownership such as the right to use property or to exclude other people from using it", confirmed that ownership entitlements are property for constitutional purposes.[30] Accordingly, entitlements such as the *ius vindicandi*, that is said to be limited in terms of the pre-*Oriental Products* case's interpretation of the consequences of estoppel, would be recognised as property under section 25. Therefore, as a starting point, an owner affected by a successful estoppel defence, would be able to prove a sufficient claim under section 25 on the basis that her interest qualifies as property for purposes of the provision.

Conversely, the post-*Oriental Products* case's interpretation of the consequences of estoppel suggests that the suspension of the owner's *rei vindicatio* at the instance of a successful estoppel defence in effect leads to the owner losing ownership. When regard is had to this interpretation of the consequences of estoppel, the property interest at stake is not only the right to vindicate but constitutes ownership itself. Since *FNB* held that ownership of land is central to the constitutional concept of property,[31] the threshold requirement for the application of section 25 would also be met here because the affected interest at stake, namely ownership, constitutes property for purposes of section 25 of the Constitution.

Similarly, when the proposed development of a new mode of original acquisition of ownership is considered to determine whether the interest at stake qualifies as property, the proposed mode of acquisition would entail loss of ownership on the part of the original owner. Importantly, the development of the new mode of original acquisition of ownership is fundamentally different from the uncertain position, which exists under the current common law (post-*Oriental Products*) that suggests that the consequences of the defence of estoppel *may be* that the original owner loses

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[29] 2003 (5) SA 18 (N).

[30] *Geyser and Another v Msunduzi Municipality and Others* 2003 (5) SA 18 (N) 37. See further Roux T "Property" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-13; Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 621.

[31] See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51. See also Van der Walt AJ *Constitutional property law* 3 ed (2011) 93.

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ownership. The difference is that the development does not entail loss of ownership by way of a defence as is the case with the existing common law position, but rather entails the original owner losing ownership in favour of the purchaser that can show the estoppel requirements, which would constitute the requirements of the new mode of original acquisition.[32] The assumption has always been that where ownership is acquired by way of original means that the ownership, as well as all limited real rights existing over the property, are automatically extinguished when the purchaser acquires ownership of the property. However, as was argued in chapter 3, limited real rights do not always fall away when ownership is extinguished because the ownership is acquired by way of an original as opposed to a derivative mode.[33] Consequently, when considering the section 25 implications of the proposed development of a new original mode of acquisition of ownership in the estoppel scenario, there is no need to include the potential loss of limited real rights, as it is not an automatic consequence of original acquisition of ownership. As a result, the property interest dealt with in terms of the proposed new original mode of acquisition of ownership is limited to the original owner's right of ownership that would terminate in these circumstances. Since ownership undisputedly qualifies as constitutional property under section 25, as shown above, the new mode of original acquisition would arguably also pass the threshold requirement, for the property interest to be tested against section 25.

Once it is established that the interest at stake is constitutional property, the second question listed by *FNB* for consideration arises, namely, whether a deprivation of the identified property interest has taken place. Only if a deprivation of property can be identified, does the section 25 inquiry proceed to determine whether such deprivation complies with the requirements for a valid deprivation that are set out in section 25(1).[34] Since it is clear that both the pre and post-*Oriental Products* positions, as well as the proposed new mode of original acquisition, involve property interests that qualify as property for purposes of section 25 protection, the inquiry may proceed to the deprivation question.

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[32] See chapter 3, section 3 4 above.

[33] See chapter 3, section 3 4 above.

[34] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

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6 2 2 The deprivation question

In *FNB*, the court submitted that the enquiry whether there has been a deprivation of the identified property interest constitutes the second issue that has to be investigated when testing potential infringements against section 25 of the Constitution.[35] Van der Walt points out that the term deprivation may be confusing because it would ordinarily refer to the taking away of something, which gives the impression that it is akin to an expropriation.[36] However, he explains that deprivations and expropriations under section 25 of the Constitution are textually and conceptually distinguishable from each other.[37] The most authoritative approach to the conceptual distinction between deprivations and expropriations was laid down in *FNB*. In *FNB*, the court held that:

> "[A]ny interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned. If s 25 is applied to this wide *genus* of interference, 'deprivation' would encompass all species thereof and 'expropriation' would apply only to a narrower species of interference."[38]

Accordingly, *FNB* distinguished between deprivations and expropriations by attaching a broad meaning to deprivations of which a certain category of deprivations would qualify as expropriations to the extent that "all expropriations are deprivations, but just some deprivations are expropriations".[39]

Importantly, the definition of deprivation for purposes of the second question of the section 25 analysis is also set out in the above-mentioned extract from *FNB*. In this regard, a deprivation is any interference with the use, enjoyment or exploitation of

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[35] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

[36] Van der Walt AJ *Constitutional property law* 3 ed (2011) 190.

[37] Van der Walt AJ *Constitutional property law* 3 ed (2011) 191.

[38] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57.

[39] See also Van der Walt AJ *Constitutional property law* 3 ed (2011) 205; Currie I & De Waal J *The bill of rights handbook* 6 ed (2013) 541; Roux T "Property" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-18.

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private property belonging to a right or titleholder of the concerned property.[40] Yet, the same court in a subsequent case ascribed a much narrower meaning to the deprivation concept.[41] In *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing and Others*[42] the court held that:

> "[A]t 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."[43] (Own emphasis added)

Furthermore, the court in *Mkontwana* identified that the time and duration of the interference would be indicative of whether an interference goes beyond normal restrictions to constitute a deprivation for purposes of section 25.[44] The definition of

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[40] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 57; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Anothe*r 2009 (6) SA 391 (CC) para 35; *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape and Others* 2015 (6) SA 125 (CC) para 73. See also Van der Walt AJ "Property vortices (part 1)" 2016 *Tydskrif vir die Suid Afrikaanse Reg* 412 420.

[41] For academic commentary on the narrow approach, see Van der Walt AJ "Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*" (2005) 123 *South African Law Journal* 75 79-80; Bezuidenhout K *Compensation for excessive but otherwise lawful regulatory state action* (unpublished LLD dissertation Stellenbosch University 2014) 16-17; Van der Walt AJ "Property vortices (part 2)" 2016 *Tydskrif vir die Suid Afrikaanse Reg* 597 605-609. For arguments in favour of the narrower approach to the concept of deprivation, see Swemmer S "Muddying the waters – the lack of clarity around the use of s 25(1) of the Constitution: *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape*" (2017) 33 *South African Journal on Human Rights* 286 287-293.

[42] 2005 (1) SA 530 (CC).

[43] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing and Others* 2005 (1) SA 530 (CC) para 32.

[44] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing and Others* 2005 (1) SA 530 (CC) para 41. Interestingly, O'Regan J in her concurring judgment warned against a too narrow approach to the deprivation question. See *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing and Others* 2005 (1) SA 530 (CC) para 90.

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deprivation in *Mkontwana* was later confirmed in *Offit Enterprises (Pty) Ltd v Coega Development Corporation Ltd*[45] where the court added, "the impact [of the interference] must be of sufficient magnitude to warrant constitutional engagement".[46]

The deprivation concept was further elaborated on in *National Credit Regulator v Opperman and Others*[47] and this definition was subsequently confirmed in *Tshwane City v Link Africa and Others*.[48] These cases endorsed the idea that where the interference goes beyond normal regulation in that the interference has a "legally relevant impact on the rights of the affected party", such interference would amount to deprivation under section 25(1) of the Constitution.[49] This narrow approach was subsequently applied in recent cases such as *Shoprite* and *South African Diamond Producers Organisation v Minister of Minerals and Energy NO*.[50] Accordingly, when regard is had to whether the pre and post-*Oriental Products* positions and the proposed development of a new mode of original acquisition of ownership amounts to deprivations, it would depend on whether the interferences or limitations are so substantial that they have a legally relevant impact on the rights of the affected party.

When consideration is given to the question whether the pre-*Oriental Products* judicial view of case law on the existing common law position causes a deprivation of the identified property interest, namely the right to vindicate, it can be argued that a deprivation of property is likely to be present. This may be argued since a successful estoppel defence, under the traditional common law position pertaining to the consequences of estoppel, results in the owner's right to vindicate being suspended *indefinitely*.[51] The interference with the owner's right in the form of the suspension of the owner's right to vindicate complies with the broad benchmark laid down in *FNB* in terms of whether there was (or would be) a deprivation of property. The fact that the

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[45] 2011 (1) SA 293 (CC).

[46] *Offit Enterprises (Pty) Ltd v Coega Development Corporation Ltd* 2011 (1) SA 293 (CC) para 41.

[47] 2013 (2) SA 1 (CC).

[48] 2015 (6) SA 440 (CC).

[49] See *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 66; *Tshwane City v Link Africa and Others* 2015 (6) SA 440 (CC) para 167.

[50] *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape and Others* 2015 (6) SA 125 (CC) para 73; *South African Diamond Producers Organisation v Minister of Minerals and Energy NO* 2017 (6) SA 331 (CC) para 48.

[51] See chapter 2, section 2 3 2 above.

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right to vindicate (*ius vindicandi*) would be limited points to interference with an ownership entitlement. The fact that the right is suspended indefinitely points to it being a legally relevant interference since the owner would no longer be able to exercise the specific right for an unknown period. In other words, the estoppel defence also leads to an interference with an ownership entitlement, namely the *ius vindicandi* that is substantial in that it constitutes a legally relevant interference. Therefore, the interference with the entitlement of an owner in this context can be argued to also comply with *Diamond Producer's* narrower conceptual understanding of a deprivation. It would seem that since the traditional consequences that are ascribed to estoppel, namely the pre-*Oriental Products* case law interpretation of the existing common law position, can be argued to comply with both the generous and narrow definition ascribed to deprivations under section 25, it indeed amounts to a deprivation of property under section 25 of the Constitution.

When considering whether the post-*Oriental Products* judicial interpretation of the consequences of estoppel brings about deprivation, it must be determined whether the extinction of ownership due to estoppel complies with both the wide and the narrow deprivation concept. Since the extinction of ownership purportedly been identified as the consequence of a successful estoppel defence in *Oriental Products*, the interference with the rights or entitlements under the wide definition constitutes the interference with the right of ownership by way of the extinction thereof. Additionally, the extinction of ownership constitutes the loss of the most complete real right a person can have with regard to a thing permanently and can be characterised without hesitation as having a substantial impact on the rights of the owner in a legally relevant manner. Therefore, the termination of ownership due to estoppel under the post-*Oriental Products* judicial interpretation of the consequence of estoppel constitutes a deprivation for purposes of section 25 of the Constitution, under both the wide and narrow conceptual understanding of deprivation.

Lastly, one must determine whether the proposed development of a new original mode of acquisition leads to a deprivation of property under both the wide and narrow definition of deprivation. The consequence of the proposed development is also the extinction of ownership of the original owner. For the same reasons advanced above, extinction of ownership complies with the narrow definition of deprivations, especially since extinction of ownership constitutes an interference with rights. Furthermore, the extinction of ownership can be described as forced and based on the same reasoning

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advanced above, and arguably constitutes a legally relevant interference with the rights of the owner in that she loses her ownership permanently. Therefore, the loss of ownership that will result from the new mode of acquisition of ownership would likely comply with both definitions of deprivation and will consequently amount to a deprivation as envisioned by section 25 of the Constitution.

Considering the above, it is evident that the interests impacted by the various legal constructs under scrutiny qualify as interests worthy of constitutional protection and the impact that these constructs have on the interests under scrutiny arguably amount to deprivations. The part below will continue with the *FNB* questions by determining whether the identified deprivations are compliant with the requirements for a valid deprivation at set out in section 25(1) of the Constitution.

6 2 3 The valid deprivation question

Once a deprivation is established, the third question raised in *FNB* becomes relevant, namely whether such deprivation complies with the requirements for a valid deprivation as set out in section 25(1). In this regard, it is important to understand that deprivations are part of the normal regulation of property interests and will only be unconstitutional if the deprivation is inconsistent with the requirements in section 25(1).[52] The first leg of section 25(1) requires that a deprivation should be authorised by law of general application and the second leg requires that the deprivation should not be arbitrary.[53]

Law of general application in section 25(1) refers to a law or a rule that is authorised by valid and properly promulgated legislation, regulation, subordinate legislation, municipal by-laws, rules and principles of common law and customary law, rules of court and international conventions that apply to the citizenry.[54] The rule or law

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[52] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46. See further Van der Walt AJ *Constitutional property law* 3 ed (2011) 218-225; Currie I & De Waal J *The bill of rights handbook* 6 ed (2013) 541; Roux T "Property" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-20; Bezuidenhout K *Compensation for excessive but otherwise lawful regulatory state action* (unpublished LLD dissertation Stellenbosch University 2014) 14, 20-21.

[53] Section 25(1) of the Constitution.

[54] Woolman S & Botha H "Limitations" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 34-53. See also Van der Walt AJ *Constitutional property law* 3 ed (2011) 232-237;

should be valid and should not apply selectively to only specific individuals or members of groups.[55] In addition, the identified law of general application is required to authorise the deprivation.[56] In the event where no authority exists for the deprivation, the deprivation would be unconstitutional in terms of section 25(1). The section 25 inquiry will accordingly come to an end if there is no law authorising the deprivation. However, if valid authority for the deprivation is established, the court is required to determine whether there is compliance with the arbitrariness requirement in section 25(1).[57]

The common law would be the law authorising the identified deprivations under the defence of estoppel as interpreted (before and after *Oriental Products*), and under the proposed new mode of original acquisition, if such development of the common law is accepted. The court has held on numerous occasions that the common law constitutes law of general application.[58] The focus now turns to whether the common law actually authorises the identified deprivations of the property interests brought about by these competing common law constructs, namely the consequences of the pre-*Oriental Products* estoppel defence, the post-*Oriental Products* estoppel defence, and the proposed mode of original acquisition of ownership (or equitable acquisition).

Currie I & De Waal J *The bill of rights handbook* 6 ed (2013) 542; Roux T "Property" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-21 for an explanation of the requirements any law or rule must comply with in order to constitute law of general application.

[55] Woolman S & Botha H "Limitations" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 34-50; Roux T "Property" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-21; Bezuidenhout K *Compensation for excessive but otherwise lawful regulatory state action* (unpublished LLD dissertation Stellenbosch University 2014) 21-22.

[56] Van der Walt AJ *Constitutional property law* 3 ed (2011) 237. See also Brits R *Mortgage foreclosure under the Constitution: Property, housing and the National Credit Act* (unpublished LLD dissertation Stellenbosch University 2012) 297; Siphuma NS *The lessor's tacit hypothec: A constitutional analysis* (unpublished LLM thesis Stellenbosch University 2013) 83; Boggenpoel ZT "Compulsory transfer of encroached-upon land: A constitutional analysis" (2013) 76 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 313 320.

[57] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46.

[58] The Constitutional Court in contexts outside the ambit of section 25 of the Constitution recognised that law of general application includes the common law. In this regard, see *Du Plessis & Others v De Klerk & Another* 1996 (3) SA 850 (CC) para 44; *S v Thebus & Another* 2003 (6) SA 505 (CC) paras 64-65. Moreover, Van der Walt supports recognising the common law as law of general application. See Van der Walt AJ *Constitutional property law* 3 ed (2011) 233.

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Chapter 2 showed that in terms of the consequences ascribed to estoppel before *Oriental Products*, South African courts have articulated that once all the requirements of estoppel are complied with, the defence prohibits the plaintiff from asserting ownership rights against the defendant who successfully raised estoppel against her *rei vindicatio*.[59] As a result, the traditional consequence ascribed to estoppel is that the plaintiff's entitlement to vindicate is said to be suspended against the defendant.[60] Accordingly, a successful estoppel defence directly authorises the deprivation of property, namely the suspension of the owner's right to vindicate. Therefore, an argument can be made that the said deprivation is authorised by a law of general application, which is the common law of estoppel in this case, and that the first requirement of section 25(1) is complied with by the deprivation caused by the pre-*Oriental Products* consequences ascribed to estoppel.[61]

However, it has been identified that the constitutional requirement of authorisation of the specific deprivation may be problematic under the consequence that is ascribed to the defence of estoppel after *Oriental Product*s. This is so specifically because of the traditional view that estoppel cannot have direct substantive effect (meaning, estoppel cannot change the legal position of the parties).[62] In terms of this understanding of estoppel, the defence, in its current form, can only suspend the owner's *rei vindicatio* against the successful estoppel raiser. Estoppel, without some sort of development of the position, lacks substantive operational effect to result in compulsory loss of ownership. Since no authority for the deprivation in the form of loss of ownership arguably exists under the post-*Oriental Product*s case's interpretation of estoppel, the deprivation may be unconstitutional due to potential non-compliance with the law of general application requirement.[63] Therefore, the common law construct of estoppel does not authorise ownership acquisition in its defence form, and the law of

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[59] See chapter 2, section 2 3 2 above.

[60] See chapter 2, section 2 3 2 above.

[61] Boggenpoel ZT & Cloete C "The proprietary consequences of estoppel in light of section 25(1): Testing Van der Walt's hypotheses" in Muller G, Brits R, Slade B & Van Wyk J (eds) *Transformative property law: Festschrift in honour of AJ van der Walt* (2018) 147-172 168-169.

[62] See chapter 5, section 5 3 2 1 above.

[63] Boggenpoel ZT & Cloete C "The proprietary consequences of estoppel in light of section 25(1): Testing Van der Walt's hypotheses" in Muller G, Brits R, Slade B & Van Wyk J (eds) *Transformative property law: Festschrift in honour of AJ van der Walt* (2018) 147-172 166-167.

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general application requirement in section 25(1) is, in this context, arguably not complied with.

The proposed new mode of original acquisition of ownership, namely equitable acquisition, would result in forced termination and acquisition of ownership in favour of the purchaser. As argued in chapter 3 this position would involve a deliberate development of the common law, specifically the original modes of acquisition to allow for termination and acquisition of ownership under the circumstances that would ordinarily only provide the purchaser with the defence of estoppel.[64] Consequently, the authority for the deprivation (loss of ownership) under the mode of equitable acquisition of ownership, should not pose any difficulties, since the authority for the deprivation of loss of ownership will be found in the common law in its developed state.

In light of the above, it would seem that the traditional view of estoppel merely suspending ownership is authorised by the common law, but that ascribing acquisition of ownership consequences to estoppel is not within the scope of what estoppel can do as a defence. The latter is therefore not authorised by the common law of estoppel. As a result, the post-*Oriental Products* case's interpretation of the consequences of estoppel will likely not survive scrutiny under section 25 of the Constitution, since the requirement that the law must authorise the deprivation cannot be satisfied in that particular instance. Only the pre-*Oriental Products* case's interpretation of estoppel and the proposed new mode of acquisition, equitable acquisition, would likely survive the muster of the authorisation requirement and can therefore be tested further against the requirements of the property clause.

Once the authority of the deprivation has been confirmed the next step according to *FNB*'s questions, is to assess the arbitrariness of the deprivation. *FNB* confirmed that a deprivation would constitute an arbitrary deprivation if it is procedurally unfair and if there is insufficient reason(s) for the deprivation on a continuum ranging from rationality to proportionality.[65] Accordingly, the arbitrariness test consists of a procedural and a substantive leg. Importantly, procedural arbitrariness was not defined

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[64] See chapter 3, section 3 4 above.

[65] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 100. See Van der Walt AJ *Constitutional property law* 3 ed (2011) 220-223, 237-241; Currie I & De Waal J *The bill of rights handbook* 6 ed (2013) 543; Roux T "Property" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-22.

in *FNB*, but the subsequent case of *Mkontwana* expanded on the concept to some degree.[66] In *Mkontwana*, the court decided that procedural arbitrariness is a flexible notion that must be determined on the facts of each case much like the concept of procedural fairness in other contexts.[67] Based on the finding of the court in *Mkontwana*, Van der Walt suggests that procedural arbitrariness under section 25(1) is similar to the procedural fairness inquiry in just administrative actions under administrative law.[68]

When determining whether the possible deprivations caused as a result of a successful estoppel defence, on the one hand and as a result of the new mode of acquisition proposed on the other hand, amount to procedurally arbitrary deprivations, the above must be applied. In other words, it will have to be established whether the legal process that caused the respective identified deprivations, furnishes the original owner with sufficient legal recourse to protect her rights in the existing and proposed legal constructs under scrutiny. Under the consequences ascribed to the defence of estoppel pre-*Oriental Product*s, the deprivation arises from the original owner's failed attempt to assert her rights by way of the most powerful remedy available to owners to recover lost possession of property, namely the *rei vindicatio*. Accordingly, before the deprivation, the owner had a strong common law remedy to protect her rights in court. The fact that the court is overseeing the process and decides whether the legal requirements have been complied with for estoppel to be successful against the *rei vindicatio*, arguably guards against procedural unfairness in this context. The owner

[66] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing and Others* 2005 (1) SA 530 (CC) para 65.

[67] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing and Others* 2005 (1) SA 530 (CC) para 65. See also *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 40 in which the *Mkontwana ratio* pertaining to the procedural arbitrariness test was confirmed. The following lower court cases confirmed the idea that procedural fairness requires due process: *Janse van Rensburg NO v Minister van Handel en Nywerheid* 1999 (2) BCLR 204 (T) 221; *Cape of Good Hope v Bathgate* 2000 (2) BCLR 151 (C) para 82.

[68] Van der Walt AJ *Constitutional property law* 3 ed (2011) 265. However, subsequent to *Mkontwana* it was suggested that the procedural arbitrariness test under section 25(1) is a separate and independent test. See *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 69. See also Van der Walt AJ "Procedurally arbitrary deprivation of property" (2012) 23 *Stellenbosch Law Review* 88 90; Van der Sijde E *Reconsidering the relationship between property and regulation: A systemic constitutional approach* (unpublished LLD dissertation Stellenbosch University 2015) 122-123.

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has further recourse in that the rules of civil procedure make applications for appeal and review of court decisions and processes possible. As a result, it would seem unlikely that the deprivation caused by way of a successful estoppel defence would amount to a procedurally arbitrary deprivation on procedural grounds. [69]

When considering the deprivation of property that will result from the proposed new mode of original acquisition, the arguments made above will also apply here since the new original mode is also authorised by the common law and is subject to the very same scrutiny of the court, which also makes provision for appeal processes. It would therefore seem that the deprivation of property that may result from the defence of estoppel *and* the deprivation that potentially results from the proposed new mode of acquisition would likely comply with the procedural arbitrariness requirement of the property clause.

The second element of substantive arbitrariness involves determining whether sufficient reason exists for the deprivation of property that is authorised by the law under scrutiny. *FNB* indicated that the question of whether there is sufficient reason for a deprivation will depend on the circumstances of each case and it would have to be decided by the court by way of a strict proportionality test or a less strict rationality review.[70] Where the rationality review or test is applied, the aim is to determine whether the deprivation of the identified property interest is rationally connected to some government purpose, while the proportionality test is about determining if the deprivation is proportionate to the purpose it serves, especially in terms of the overall impact that the deprivation has on a particular individual. The substantive arbitrariness

[69] In most instances where the common law authorises deprivation of property, it is not likely that procedural arbitrary deprivations would ensue. Rather, procedural arbitrariness is likely to be problematic in the context of legislation. For instance, Boggenpoel argues in the context of encroachments that where the deprivation is brought about by a court order in terms of the common law, which presumably authorised the deprivation as opposed to a deprivation caused by way of legislation, procedural fairness should not be in issue. See Boggenpoel ZT "Compulsory transfer of encroached-upon land: A constitutional analysis" (2013) 47 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 313 324. Raphulu makes a similar argument in the context of the right of way of necessity. In this regard, see Raphulu TN *The right of way of necessity: A constitutional analysis* (unpublished LLM thesis Stellenbosch University 2013) 121.

[70] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

test is contextual, and the level of scrutiny ("the thickness of the test") varies depending on the facts of each case.[71] In this regard, the court in *FNB* held as follows:

> "Sufficient reason for the particular deprivation is to be established as follows:
> *(a)* It is to be determined by evaluating the relationship between [the] means employed, namely the deprivation in question and [the] ends sought to be achieved, namely the purpose of the law in question.
> *(b)* A complexity of relationships has to be considered.
> *(c)* In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
> *(d)* In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
> *(e)* Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.
> *(f)* Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.
> *(g)* Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.
> *(h)* Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind

[71] Van der Walt AJ *Constitutional property law* 3 ed (2011) 246. See also Van der Walt AJ "Property vortices (part 1)" 2016 *Tydskrif vir die Suid Afrikaanse Reg* 412 423, 425; Swanepoel J *Constitutional property law in Central Eastern European jurisdictions: A comparative analysis* (unpublished LLD dissertation Stellenbosch University 2016) 252-264.

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> that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25.'Arbitrary' deprivation as applied to s 114 of the Act".[72]

Although the *FNB* decision provided much-needed guidance on how to approach sections 25(1)-(2), the manner in which these factors must be applied is not clear from the case itself. It can, however, be deduced from subsequent case law that not all the factors will necessarily apply in *all* instances and that courts would likely only apply those factors that seem relevant to the specific deprivation in question.[73] This is the approach to the arbitrariness factors that will be applied to the legal constructs under scrutiny in this chapter in an attempt to provide a tentative proposal as to how a section 25 analysis of the consequences of estoppel and the proposed new mode of acquisition in this context might look like. Consequently, the anticipated relevant factors will be applied to the deprivations caused by estoppel and the proposed equitable acquisition respectively in what follows below.

The ends sought to be achieved by the deprivation caused by the estoppel defence, namely the suspension of the owner's *rei vindicatio*, is to protect *bona fide* purchasers of property in certain circumstances. These circumstances entail situations where such purchasers reasonably relied on a negligent representation made by the owner of the property that the seller was the owner or had the authority to dispose of the property to their detriment. This purpose is based on public policy of fairness which is encapsulated in the English law notion of equity, the risk principle and negligence. In this regard, equity requires that the owner's right should not be enforced against the *bona fide* purchaser because such enforcement will be unfair.[74] Equity, therefore,

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[72] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

[73] See for instance *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing and Others* 2005 (1) SA 530 (CC) paras 92-112; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 (6) SA 391 (CC) para 49; *National Credit Regulator v Opperman and Others* 2013 (2) SA 1 (CC) paras 68-77. See also Slade BV "The effect of avoiding the *FNB* methodology in section 25 disputes" (2019) 40 *Obiter* 36 40-41.

[74] See chapter 5, section 5 3 2 1 above. Also, see Boggenpoel ZT & Cloete C "The proprietary consequences of estoppel in light of section 25(1): Testing Van der Walt's hypotheses" in Muller G, Brits R, Slade B & Van Wyk J (eds) *Transformative property law: Festschrift in honour of AJ van der Walt* (2018) 147-172 147.

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requires that the owner's rights, at the very least, should be limited so that the *bona fide* purchaser's interest can be protected. It is accepted that allowing the owner to recover the property in these circumstances will be unfair.[75] In addition, risk liability by way of the risk principle supports the purpose of the deprivation, namely the protection of the *bona fide* purchaser rather than the protection of the owner, in that risk liability requires that the owner who created the risk of misleading should carry the risk of loss instead of the innocent purchaser.[76] The means by which the defence of estoppel achieves the protection of the *bona fide* purchaser rather than the protection of the owner is through the suspension of the owner's entitlements at the instance of a successful estoppel defence in court proceedings, which causes the deprivation in question. In this regard, the court is only justified to hold that the owner's *rei vindicatio* should fail against the *bona fide* purchaser if the *bona fide* purchaser proves all the requirements of estoppel, thereby persuading the court that estoppel should succeed.[77] The suspension or limitation of the owner's entitlements can only occur in very specific and limited circumstances when estoppel is raised successfully. This means that the courts are only justified to order this deprivation where the purchaser satisfies all the onerous requirements of estoppel. South African law provides no other remedy or protection to *bona fide* purchasers against the owner seeking recovery from the purchaser in these circumstances. Estoppel is the only mechanism with which a *bona fide* purchaser for value can be protected against the owner of the property. It is also rather difficult to think of achieving the aim of protecting the purchaser without at the very least placing limitations on the owner's entitlement to recover the property. Without estoppel operating as a defence that can be raised against an owner's *rei vindicatio*, the owner would be able to recover possession of the property and the law would condone an arguably unfair outcome by allowing such recovery.[78] It seems as though by suspending the owner's ability to recover the property, estoppel prevents the owner from recovering the property in service of the aims of the deprivation as set out above. A close relationship (or nexus) can therefore be said to exist between the

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[75] See chapter 5, section 5 3 2 1 above.

[76] See chapter 5, section 5 3 2 2 above.

[77] See chapter 2, section 2 3 2 above. See also *Grosvenor Motors (Potchefstroom) Ltd v Douglas* 1956 (3) SA 420 (A) 427. See further Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 274.

[78] See chapter 5, section 5 3 2 2 above.

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ends sought to be achieved by the deprivation in question and the means employed by way of estoppel, namely the protection of the purchaser and the suspension of the *rei vindicatio*. As a starting point this analysis indicates that sufficient reasons arguably exist for the deprivation caused by estoppel.

What now needs to be determined is whether the same can be said for the proposed new mode of original acquisition of ownership, namely equitable acquisition. The purpose of the deprivation is to protect the purchaser of property in the circumstances where such purchaser reasonably relied on a negligent representation made by the owner of the property that the seller was the owner or had the authority to dispose of the property. As a starting point, the aim of the deprivation is still to ensure that equity and fairness prevail and that the risk of loss falls on the person who created it, namely the owner.[79] Therefore, much of the same reasons of fairness and equity exist for the development of the mode of equitable acquisition, than what exists as justification for the use of the defence of estoppel in the same context. However, further ends in favour of the proposed new mode of acquisition are prevalent in the other policy reasons explored in chapter 5.[80] In the first place, one of the purposes of the new mode of acquisition of ownership would be to take over the function of estoppel to protect purchasers in those circumstances where they would traditionally only have had estoppel as a protective mechanism (shield) against the owner. This replacement of estoppel with a recognised mode of acquisition in this context would result in eliminating the legal anomalies and uncertainties that ordinarily follows a successful estoppel defence from a doctrinal perspective.[81] The purpose of the new mode of acquisition is also based on public policy that is aimed at encouraging the most efficient allocation of resources.[82] From a law and economics perspective, the proposed mode of acquisition ensures that the loss falls on the party who can avoid the possibility of loss at the lowest cost, thereby ensuring efficiency in the regulation of the *bona fide* purchaser problem in South African law. Moreover, the operation of the mode of acquisition of ownership under the circumstances that would ordinarily only give rise to a successful estoppel defence also ensures the protection of trade and commerce

[79] See chapter 5, sections 5 3 2 1, 5 3 2 2 above.

[80] See chapter 5, sections 5 3 1, 5 3 2 above.

[81] See chapter 5, section 5 2 2 above.

[82] See chapter 5, section 5 3 1 above.

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much more than the estoppel defence does. Therefore, the promotion of trade and commerce is also an economical purpose of the proposed mode of acquisition.

The means employed in the context of the proposed new mode of original acquisition to achieve the above ends is the forced extinction of ownership. Importantly, the extinction only becomes applicable where the very onerous requirements of the new mode of acquisition are met. The representation requires more than the mere entrusting of the property to another, meaning the purchaser must prove that beyond entrusting the property to the seller, the owner also clothed the seller with the right to dispose. In addition, the purchaser is not required to merely prove that she relied on the representation; she must show that a reasonable person in her position would also have relied on such representation.[83] This means her reliance can not be unreasonable. Although detriment is generally difficult to prove, the purchaser has to further show that the detriment she will suffer is a consequence of the representation of the owner and of her reasonable reliance.[84] As shown in chapter 5, the prospects of succeeding with estoppel were made more difficult when the Supreme Court of Appeal added negligence as a further requirement over and above the traditional requirements.[85] Negligence is notoriously difficult to prove in this context, especially because the burden of proof in this regard is on the purchaser and the information needed to prove negligence is in the exclusive knowledge of the owner who created the representation.[86] Accordingly, the requirements that the purchaser has to satisfy serves as very strong safeguards working together to protect the owner from interference. Only in those very exceptional circumstances where a purchaser successfully proves these strict requirements, the estoppel defence will succeed, and termination of ownership as argued for will follow. Based on the above, the means that would be employed by the proposed development of the common law to create

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[83] Examples of cases in which the respective defendants could not show that they relied on the representations created by the respective owners are *Standard Bank of SA v Stama (Pty) Ltd* 1975 (1) SA 730 (A) 743; *Absa Bank Ltd t/a Bankfin v Jordashe Auto CC* 2003 (1) SA 401 (SCA) 403. See Muller G, Brits R, Pienaar JM & Boggenpoel Z *Silberberg and Schoeman's The law of property* 6 ed (2019) 274.

[84] See chapter 5, section 5 3 2 3 above.

[85] See chapter 5, section 5 3 2 3 above.

[86] *Johaadien v Stanley Porter (Paarl) (Pty) Ltd* 1970 (1) SA 394 (A) 412-416. See further Van der Walt JC "Die beskerming van die *bona fide* besitsverkryger: 'n Vergelyking tussen die Suid-Afrikaanse en Nederlandse reg" in Gauntlett JJ (ed) *JC Noster 'n Feesbundel* (1979) 73-96 93.

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equitable acquisition would arguably establish a strong link to the ends sought to be achieved.[87]

Moreover, further support can be found for the existence of a strong nexus between the means employed and the ends sought under the proposed mode of ownership acquisition when the alternative to the proposed developed position is considered. The alternative to the developed position is the pre-*Oriental Products* case's interpretation, namely, mere suspension or limitation of the owner's right to vindicate together with the automatic suspension of several other ownership entitlements. The primary aim sought in both instances (traditional and proposed development) is the protection of the *bona fide* purchaser for value in the circumstances that would comply with the estoppel requirements. Such protection requires at least a limitation of the owner's entitlements and, at most, termination of ownership itself as indicated in chapter 5 when an overview of the different approaches to the *bona fide* purchaser problem was offered.[88] However, the minimum protection currently afforded to the *bona fide* purchaser results in various anomalies, which makes it untenable to maintain and undermines the equitable aim of the doctrine causing the deprivation.[89] Accordingly, the traditional position, as the alternative means to the proposed developed one, seems ineffective and unsatisfactory to achieve the equitable aim of protecting the *bona fide* purchaser's interest, hence the need for extinction of ownership. In the South African context, it must be noted that without the means proposed, namely development in favour of acquisition of ownership by the purchaser, the anomalies caused by the traditional position will have the effect that there will only be a façade of protection afforded to the *bona fide* purchaser. This is because although the owner's *rei vindicatio* is "simply" suspended, the uncertainty with which the purchaser's possession continues will cause the purchaser and owner to remain in a very vulnerable position. The comparative analysis showed that foreign jurisdictions with constructs like estoppel at common law also failed to solve the

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[87] For a similar argument, albeit in the context of the application of estoppel as justification for the extension of the lessor's tacit hypothec, see Siphuma NS *The lessor's tacit hypothec: A constitutional analysis* (unpublished LLM thesis Stellenbosch University 2013) 104; Van der Walt AJ & Siphuma NS "Extending the lessor's hypothec to third parties' property" (2015) 132 *South African Law Journal* 518 544-545.

[88] See chapter 5, section 5 2 1 above.

[89] See chapter 5, section 5 2 2 above.

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shortcomings of their constructs so much so that they looked to legislative intervention to provide for adequate protection of *bona fide* purchasers. This also supports the argument that that the protection of bona fide purchasers would be better achieved by the proposed development of equitable acquisition. Consequently, a close relationship between the means employed and the ends sought can arguably be established in the context of the proposed new mode of ownership acquisition.

When regard is had to the relationship between the person affected and the aim of the deprivation caused by the pre-*Oriental Products* interpretation of the consequences of estoppel the following becomes evident. The person affected by the deprivation is the owner of the property. A nexus is arguably present between the owner and the aim of (or reason for) the deprivation, in that it is the owner who created the risk of misleading by way of the representation, which ultimately led to the purchaser reasonably relying on the representation to her detriment.[90] In other words, the owner who fails to recover her property with the *rei vindicatio* caused the inequitable and unfair situation. The policy reason of equity indicates that it would be unfair to allow the owner who made the representation to recover the property, thereby specifically linking the owner's conduct with the unfairness that would ensue if the owner was allowed to recover the property. Moreover, the link between the owner's representation and the purpose of the deprivation is also supported by the risk principle as an indicator of fairness. It is because of the owner's risk creation and facilitation that the *bona fide* purchaser is ultimately in need of protection against possible detriment.[91] Therefore, it can be concluded that a close link exists between the person affected by the deprivation (being the owner) and the aim of the deprivation (the limitation of the owner's entitlements in that the owner is not allowed to recover the property).

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[90] This is different from what was found in the *FNB* case regarding the relationship between the aim of the deprivation and the person affected. In *FNB,* the court found that a close enough link between the person affected and the aim of the deprivation did not exist. This was because section 114 of the Customs and Excise Act 91 of 1964 that caused the deprivation allowed the South African Revenue Services to detain and sell the appellant's vehicles that were situated on the tax debtor's premises to satisfy the debt of the tax debtor. This means that the deprivation, which aimed to secure payment of the tax debt of the debtor, affected the appellant as the owner of the vehicle and not the tax debtor. Consequently, a nexus could not be established between the aim of the deprivation (to recover tax debt) and the person affected (the owner of the vehicles who was *not* also the tax debtor). See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 108.

[91] See chapter 5, section 5 3 2 2 above.

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When assessing the relationship between the person affected by the deprivation that would ensue due to the operation of equitable acquisition and the aim of the deprivation by way of equitable acquisition, the following considerations are important. The person that would be affected by the deprivation is the owner of the property. The owner of the property is, however, also the person who negligently made the representation on which the *bona fide* purchaser for value reasonably relied to her detriment. The same reasons why a link exists between the estoppel defence and the aim of the deprivation caused by the estoppel defence can be advanced here, namely equity and the risk principle. Therefore, a relationship can be argued to exist between the owner who is affected by the deprivation and the aim of the deprivation. The deprivation being the loss of her ownership and the aim of the deprivation being to ensure an equitable outcome, which allows the risk of loss to fall on the creator of the risk. The degree of closeness of this relationship can be determined by reference to some of the policy reasons advanced in favour of the proposed development in chapter 5. The policy reasons that are important in this regard include the law and economics analysis of the least cost avoider as well as the analysis of the addition of the negligence requirement.

In terms of the law and economics reasons, the analysis in chapter 5 showed that the owner should carry the loss since the owner constitutes the least cost avoider, meaning when the owner carries the risk of loss, resources will be allocated most efficiently in the context of the *bona fide* purchaser problem. Furthermore, the analysis of the negligent requirement indicated that the loss should fall on the negligent person who should have foreseen that the *bona fide* purchaser would reasonably rely on her representation to her detriment. Combined, these policy reasons all point to the role the owner plays in causing the problem and indicates that the person who should suffer the loss is the owner so that the innocent purchaser is protected. Accordingly, an argument can possibly be made that a close relationship exists between the person affected (the owner) and the aims of the deprivation.

As far as the relationship between the aim of the deprivation and the nature and extent thereof is concerned in the context of estoppel and equitable acquisition, the following seems to guide the evaluation of whether a nexus between these factors could purportedly be established. When considering the deprivation caused by the defence of estoppel, the property concerned is intangible and constitutes a right or entitlement that the owner is not allowed to exercise against the *bona fide* purchaser

who succeeds with estoppel, namely the right to vindicate by way of the *rei vindicatio*. However, the extent of the deprivation is not limited to the right or entitlement to recover property by way of the *rei vindicatio*. As shown in chapter 5, the mere fact that the owner cannot recover her property, deprives her of numerous other entitlements that she would have been able to exercise and enjoy, but for the deprivation. These entitlements include the *ius possidendi* (right to possess), *ius utendi* (the right to use and enjoy), *ius dispondendi* (the right to dispose) and perhaps even the *ius fruendi* (the right to fruits).[92] Moreover, the duration of the suspension of the owner's right to vindicate is also uncertain in that the dominant view is that the owner's right is suspended indefinitely.[93] When considering the aim of the deprivation by way of estoppel it would seem that there is potentially an argument to make that a strong connection exists between the aim and the nature of the property interest subject to the deprivation and the extent of the deprivation. The property interest being the right to recover including several ownership entitlements is directly linked to the ability of the owner to recover the property from the *bona fide* purchaser who would otherwise have no recourse against the owner. Denial of the right to recover, and by implication some other ownership entitlements as well, is required to satisfy the aim of the deprivation. At the outset, to ensure equity prevails in those instances where purchasers would be able to rely on estoppel successfully and secondly that the owner carries the loss (the suspension of the right and other entitlements) where the owner created the risk that the purchaser could act to her detriment. Moreover, the fact that several other ownership entitlements are also suspended due to the suspension of the *rei vindicatio* and the indefinite nature of such suspension also supports these aims of the deprivation, although not without resulting problems, since the indefinite suspension of the *rei vindicatio* causes several anomalies.[94] However, a link arguably does exist between the aim of the deprivation and the nature and extent of the deprivation in this regard. If the suspension was only for a short period of time or if it was practically and legally possible for the owner to still use and enjoy, sell, lease or offer the property as security, irrespective of the suspension of the *rei vindicatio*, the *bona fide* purchaser's protection would also be questionable. In addition, since the suspension of the *rei vindicatio* affects several the owner's entitlements and the

[92] See chapter 5, section 5 2 2 1 above.

[93] See chapter 5, section 5 2 2 1 above.

[94] See chapter 5, section 5 2 2 above.

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duration of the suspension is unknown an argument can be made that the deprivation is severe as opposed to being moderate or of low impact. This finding will be particularly valuable in determining whether a rationality or proportionality test should be applied when evaluating the substantive arbitrariness of the deprivation caused by the suspension of the *rei vindicatio*. As explained earlier, *FNB* held that the nature and extent of the deprivation is indicative of whether a mere rationality or a strict proportionality test should be applied in this regard.

When considering the nature of the property and extent of the deprivation caused by the proposed new mode of original acquisition, equitable acquisition, it is clear that the deprivation involves ownership and the permanent termination thereof. Similar to the link that was argued to exist between the deprivation caused by estoppel and the extent of the deprivation and the nature affected property interest, a link can likely also be found between the aim of the deprivation caused by the mode of equitable acquisition and the nature of the property and extent of the deprivation. It is submitted that the affected interest being the right of ownership and the permanent termination thereof are vital in achieving the specific aims of the deprivation. As indicated earlier, these are in summary to ensure that the *bona fide* purchaser problem is regulated in South Africa in a manner that does not create legal anomalies and uncertainties and that furthermore is arguably the most efficient, equitable and fair measure to apply as opposed to other available measures such as the estoppel defence insofar as it only suspends the owner's right to vindicate.

The above analysis and application of the factors identified in *FNB* to the legal constructs of the defence of estoppel and the proposed equitable acquisition, showed that there appear to be sufficient links between the aims of the deprivations and the means employed; the persons affected; the extent of the deprivation; and the nature of the property. However, whether a strong link (as would be required in terms of a proportionality test) or a mere rational link (as would be required by the rationality test) must be shown to satisfy the arbitrariness test still needs to be determined. The *FNB* factors provide guidance as to how to decide which of the arbitrariness tests should be applied. When selecting between applying a rationality test or a strict proportionality test to determine whether sufficient reasons do exist for an authorised deprivation, the court is required to exercise its discretion based on the nature of the property and the

extent of the deprivation as illustrated by the court in *FNB*.[95] In this regard, it needs to be established whether all the incidents of ownership are affected, or whether only some incidents are entirely or partially affected. The reason advanced for the deprivation is required to be more compelling in cases where the deprivation affects all the incidents of ownership, completely.

When these factors for establishing which test should be used to determine arbitrariness in terms of the pre-*Oriental Products* interpretation of estoppel is considered, the following becomes evident. The property concerned here is intangible and constitutes a right or entitlement, namely the right to vindicate by way of the *rei vindicatio*. In addition, the extent of the deprivation shows the severity of the deprivation since the deprivation is for an indefinite period and does not only involve the limitation or suspension of the *rei vindicatio* but also numerous other ownership entitlements by implication. In light of the identified severe extent and nature of the deprivation, it seems more probable that the arbitrariness inquiry pertaining to the deprivation caused by estoppel as a defence, would be placed on the proportionality end of the spectrum, rather than the rationality end of the spectrum. It is therefore fitting that a proportionality test is applied when determining whether the pre-*Oriental Products* view of the consequences of estoppel constitutes an arbitrary deprivation of property that would be inconsistent with section 25 and therefore unconstitutional.

In terms of the extent and nature of the deprivation caused by the proposed new mode of original acquisition, it is clear that the deprivation involves ownership and the permanent extinction thereof. In this regard, the fact that the identified constitutional property interest that is subject to the deprivation under this construct is ownership and that all incidents of ownership are extinguished permanently in this context, indicates that the deprivation is severe. Due to the nature of the property affected, and the severity of the deprivation, the court should most likely apply a strict proportionality test to determine whether sufficient reason for the deprivation exists.

The analysis for determining the most appropriate arbitrariness test to be applied under these two constructs indicated that the nature and extent of the deprivations, respectively require the application of proportionality tests. On this level of analysis, it

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[95] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

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may be reasonable to submit that sufficient justification for the respective deprivations would arguably exist under the proportionality test. The deprivation caused by the pre-*Oriental Products* case's interpretation of the consequences of the estoppel defence would purportedly be justifiable in terms of the proportionality test. This is so since a close relationship was identified between the complexities of relations, the ends sought to be achieved and the means employed, the purpose of the deprivation and the person affected, and the nature and extent of the deprivation. Therefore, the proportionality analysis shows that the deprivation caused by pre-*Oriental Products* case's interpretation of the consequences of a successful estoppel defence, namely the suspension of the *rei vindicatio,* would purportedly not constitute an arbitrary deprivation of the owner's property.

Also, the deprivation that would result from the proposed new mode of ownership acquisition, would probably also be justified by its ends. This conclusion is arguably supported by the above analysis in which it became evident that strong links exist between the relevant factors rather than only rational connections. Considering all the close links identified above, it seems probable that a court would find that the proposed developed position would not result in arbitrary deprivation of property.

However, in terms of the above analyses, it is probable that the deprivation that may be caused by the consequences of estoppel before the *Oriental Product* case on the one hand, and the deprivation that may be caused by the proposed equitable acquisition, on the other hand, would amount to non-arbitrary deprivations. This means that both these deprivations would likely survive scrutiny under section 25(1) of the Constitution. Because the deprivation caused by the traditional position would likely comply with section 25 as illustrated above, the need to apply section 36 of the Constitution – as indicated in the *FNB* questions – arguably does not arise.[96] However, the analysis above regarding the constitutionality of the post-*Oriental Products* case's interpretation of the consequences of estoppel showed that such interpretation would probably not survive constitutional muster, since no authority for compulsory loss of ownership can be found in the common law of estoppel.

According to *FNB*, if a deprivation results in an arbitrary deprivation the court is required to consider whether the arbitrary deprivation is nonetheless justified in terms

[96] See section 6 1 above.

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of section 36(1) of the Constitution, the limitation clause.[97] In this regard, the dominant view is that where a deprivation is found to be arbitrary, the deprivation will generally not survive justification under section 36(1). The reason being that the arbitrariness inquiry, specifically the proportionality test, is very similar to the justification inquiry and would therefore possibly have the same results.[98] However, neither the pre-*Oriental Products* case's interpretation of the consequences of estoppel nor the consequences of equitable acquisition resulted in arbitrary deprivations, which would have caused constitutional infringements. Therefore, section 36(1) analysis should not arise with regard to these two positions.[99] Whether section 36 can yield a different outcome for the interpretation of estoppel post-*Oriental Products* that was found to infringe on section 25 due to the lack of authority for the resultant deprivation of compulsory loss of ownership, remains questionable. Concerning the question whether deprivations that are found to be inconsistent with section 25 due to such deprivations not being authorised by law of general application could be saved by section 36, Van der Walt opines that this would be improbable.[100] He argues that since section 36 also requires the infringement to be authorised by law of general application, the same reason why the deprivation was found to be inconsistent with section 25 would arguably also cause it to be inconsistent with the limitation clause, section 36. As a result, it would seem that the post-*Oriental Products* case's interpretation of the consequences of estoppel cannot be saved by section 36 and would therefore arguably remain unconstitutional.

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[97] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 46. See further Van der Walt AJ *Constitutional property law* 3 ed (2011) 77-78; Roux T "Property" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-26; Currie I & De Waal J *The bill of rights handbook* 6 ed (2013) 557-559.

[98] See Roux T "Property" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-26; Currie I & De Waal J *The bill of rights handbook* 6 ed (2013) 557. However, Roux concedes that where the standard of the arbitrariness test is lower, in other words, the rational connection test or measure is applied instead of a full proportionality review, the section 36(1) limitation clause may have some significance. See Roux T "Property" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (RS: 6 2014) 46-27.

[99] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 70.

[100] Van der Walt AJ *Constitutional property law* 3 ed (2011) 56. See also Mostert H & Badenhorst PJ "Property and the bill of rights" in Mokgoro Y & Tlakula P (eds) *Bill of rights compendium* (RS: 34 2014) 3FB-4.

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According to *FNB*'s methodology, once it is established that the deprivation is in terms of law of general application and that the deprivation does not constitute an arbitrary deprivation, or if there was an arbitrary deprivation which is justified under section 36(1) of the Constitution, the court must determine whether the deprivation constitutes an expropriation in terms of section 25(2) of the Constitution.[101] However, in the estoppel scenario, the limitation or termination of rights takes place in terms of the common law.[102] In this regard, no power to expropriate exists at common law.[103] Therefore, the limitation or termination of rights that may result from a successful estoppel defence or the proposed new mode of acquisition cannot result in an expropriation.

6 3 Concluding remarks

This chapter considered the constitutional validity of the pre-*Oriental Products* judicial interpretation of the consequences of estoppel, the post-*Oriental Products* judicial interpretation of the consequences of estoppel and the proposed new mode of original acquisition, namely equitable acquisition. It further provided an overview of the section 25 methodology that was set out in the authoritative *FNB* case and proposed how a section 25 analysis of the consequences of estoppel before and after *Oriental Products*, as well as the consequences of the proposed new mode of the original acquisition of ownership, would purportedly look like. In terms of the first question of the section 25 analysis, namely whether the interest at stake is property, the chapter showed that the interests affected by the respective legal constructs would likely qualify as property since the affected interests constitute either ownership or the right to vindicate. The property affected under the pre-*Oriental Products* case's interpretation of the consequences of estoppel is the owner's right to vindicate by way of the *rei vindicatio*, in that estoppel suspends the owner's *rei vindicatio*. The property affected under the post-*Oriental Products* case's interpretation of the consequences of estoppel

[101] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 100.

[102] See chapter 2, section 2 3 1 2 above.

[103] Gildenhuys A *Onteieningsreg* 2 ed (2001) 93; Gildenhuys A & Grobler GL "Expropriation" in Joubert WA & Faris JA (eds) *The law of South Africa* Vol 10 Part 3 2 ed (2012) para 12. See also Van der Walt AJ *Constitutional property law* 3 ed (2011) 346, 453.

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and the proposed new mode of original acquisition is the right of ownership in its entirety and not merely an incident or entitlement of ownership.[104]

In terms of the second question set out in *FNB*, which is whether the pre-*Oriental Products* case's interpretation of the consequences of estoppel, the post-*Oriental Products* case's interpretation of the consequences of estoppel and the proposed new mode of original acquisition causes deprivation, the following became evident. The analyses and applications of the wide and narrow interpretations of the deprivation concept were applied to the respective consequences under scrutiny. It was found that the impact of the pre-*Oriental Products* case's interpretation of the consequences of estoppel is such that it constitutes an interference with the use, enjoyment and exploitation of the property over which ownership vests as required by the wide *FNB* concept of deprivations. This is the case since the owner is not able to recover the property from the successful estoppel raiser. In addition, the impact of the pre-*Oriental Products* case's consequences of estoppel also satisfies the narrow concept of deprivations as laid down in *Mkontwana*, *Offit Enterprises*, *Opperman* and the relatively recent *Diamond Producer*'s case. This is because the suspension of the *rei vindicatio* affects the operation of some of the other entitlements of the owner and continues for an indefinite period. Therefore, the interference can be argued to be substantial and it is legally relevant. The impact of the post-*Oriental Products* case's interpretation of the consequences of estoppel and the proposed new mode of original acquisition, namely termination of ownership was also found to satisfy the wide *and* narrow concept of deprivation as depicted in case law. This was evident in that the termination of ownership entails at least interference with a recognised right, namely ownership, thereby satisfying the wide definition of deprivation. Furthermore, the termination of ownership would also likely amount to a substantial and legally relevant interference to satisfy the narrow concept of deprivation in that the interference would involve the permanent termination of the most complete real right, namely ownership.[105]

Following the conclusion that the consequences of estoppel pre and post-*Oriental Products* and the proposed new mode of original acquisition of ownership constitutes deprivations of the identified property interests, the third question in terms of the *FNB* methodology is whether the deprivation complies with the requirements in section

[104] See section 6 2 1 above.

[105] See section 6 2 2 above.

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25(1). Section 25(1) of the Constitution requires that deprivation (i) should be in terms of a law of general application and (ii) should not be arbitrary. It was argued that the deprivations caused by the respective legal constructs and their various interpretations have the common law as law of general application. This is evident in that estoppel is a common law doctrine and the proposed mode of acquisition would have to be developed to form part of the original modes of acquisition of ownership recognised at common law.[106] However, the requirement of law of general application will only be satisfied once it is determined whether the identified law of general application indeed authorises the resultant deprivations in question. The authorisation of the pre-*Oriental Products* case's interpretation of the consequences of estoppel is based on the traditional view that estoppel constitutes a limitation of the owner's *rei vindicatio* in that it suspends the owner's right to vindicate.[107] Interestingly, the authorisation of the post-*Oriental Products* case's interpretation of the consequences of estoppel, which is that a successful estoppel defence results in the termination of ownership, in other words compulsory loss of ownership, was found not to be authorised by the common law of estoppel. This is because estoppel as a legal construct is aimed only at suspension of the owner's right to vindicate against the successful estoppel raiser. In contrast, the *Oriental Products* case now suggests that a court can order that ownership is acquired by the estoppel raiser and lost by the owner when estoppel is successfully raised. It was found that the common law of estoppel does not pertinently authorise a court to order that ownership has been lost by operation of law when estoppel is successfully raised. Rather, the common law of estoppel authorises the court to order only that the owner's right to recover the property be suspended. Therefore, the chapter showed that is likely that the post-*Oriental Products* case's interpretation of the consequences of estoppel is not authorised by the common law of estoppel. Since no authority could arguably be found for estoppel to have as a consequence compulsory loss and acquisition of ownership, the post-*Oriental Products* case's interpretation of the consequences of estoppel does not meet the authorisation requirement of section 25 and is therefore invalid and unconstitutional.[108] In contrast, the chapter showed that authorisation of the proposed new mode of original acquisition of ownership, namely equitable acquisition would likely overcome the authorisation requirement without

[106] See section 6 2 3 above.

[107] See section 6 2 3 above.

[108] See section 6 2 3 above.

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much trouble since this common law legal construct would specifically be developed to effect acquisition in the circumstances that would generally only have given rise to a successful estoppel defence.[109]

In terms of the question whether the remaining two constructs under scrutiny, namely, estoppel pre-*Oriental Products* and the proposed new mode of the original acquisition of ownership constitutes arbitrary deprivations, the chapter showed the following. Arbitrariness under section 25(1) has two dimensions, namely procedural arbitrariness and substantive arbitrariness. Concerning procedural arbitrariness, the chapter revealed that the consequences of both legal constructs would likely not result in procedurally arbitrary deprivations. It was argued that issues with procedural fairness would most probably not arise in terms of either of the two constructs under scrutiny since the legal process that would cause the respective deprivations furnishes the affected parties with sufficient recourse and oversight to protect the affected rights. In both cases of estoppel and the proposed new mode of equitable acquisition, the processes are subject to judicial oversight, and there are appeal and review court procedures in place that ensure the procedural fairness of the possible deprivations.[110]

With regard to the second element of the arbitrariness test, namely substantive arbitrariness, the chapter indicated that substantive arbitrariness concerns the question of whether there is sufficient justification for the identified deprivation. When investigating whether sufficient reason for a deprivation can be established, the court in *FNB* held that one of two tests, namely the rationality or proportionality test could be applied, depending on several factors. In particular, the thickness of the test to be applied must be guided by the factors identified in *FNB*. These are: the aim of the deprivations and the respective means employed; the aim of the deprivation and the person affected; and the aim of the deprivation and the nature of the property affected and the extent of the deprivation. Concerning both constructs, the chapter revealed that based on the nature of the property affected and extent of the deprivation, the deprivations would purportedly qualify as severe deprivations. In terms of the deprivation caused by the pre-*Oriental Products* case's interpretation of the consequences of estoppel, namely suspension of the right to recover the property from the estoppel raiser, it was made clear that not only is the right to vindicate suspended

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[109] See section 6 2 3 above.

[110] See section 6 2 3 above.

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but that many other entitlements are also suspended due to the suspension of the right to vindicate. Moreover, the fact that the suspension of these entitlements would probably be in place for an indefinite period further supported the finding that the deprivation would likely be classified as severe. As a result, the chapter revealed that the most appropriate analysis to apply to determine whether the deprivation is substantively arbitrary is the proportionality analysis.

Similarly, the deprivation that would arguably ensue due to the proposed mode of original acquisition would also be severe. This is because, the property affected is the most complete real right a person can have over property, namely ownership and because the effect of extinction of ownership due to acquisition by way of a recognised mode of acquisition is permanent in nature. As a result, the chapter showed that the appropriate test in the context of equitable acquisition would also arguably be the proportionality test rather than the rationality test.[111]

The proportionality analysis of the deprivations caused by these respective constructs (the suspension of the owner's right to vindicate in terms of the pre-*Oriental Products* case's interpretation of the consequences of estoppel and the termination of ownership in terms of equitable acquisition) showed that a close relationship could be established between the respective aims of the deprivations and the respective means employed. With regard to the deprivation caused by the suspension of the right to vindicate after a court finds that estoppel has successfully been raised, sufficient justification in all likelihood exists for the deprivation. This conclusion is arguably strengthened by reasons of fairness as it is encapsulated in the English notion of equity and the risk principle. This means that the defence of estoppel pre-*Oriental Products* should not be problematic in terms of section 25(1) of the Constitution.

Likewise, the deprivation caused by equitable acquisition, namely, termination of ownership by way of a court order once the purchaser can satisfy the requirements for such acquisition, also showed sufficient justification for the identified deprivation.[112] In this regard, the policy reasons of fairness (as it is encapsulated in the notion of equity and the risk principle) and law and economics showed that since equitable acquisition: would ensure equitable outcomes that eliminate the legal anomalies and uncertainties that result from estoppel; and would ensure that the risk of loss falls on the party who

[111] See section 6 2 3 above.

[112] See section 6 3 above.

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created the risk of misleading and who is the least cost avoider, a close link can arguably be found between the means employed and the ends sought. Also, a close link was found to exist between the aims of the deprivation and the person affected. This link was established based on the fact that the person that would be affected by the deprivation is the same person who created the risk in a culpable manner and who is in the position to incur the least costs to avoid the loss from a law and economics perspective. Moreover, the aims of the deprivation, the extent of the deprivation and the nature of the property also proved to be closely connected to each other. In this regard, the aims of achieving an equitable outcome, that ensures most efficient allocation of resources that also promotes trade and commerce is not possible without the permanent termination of ownership and acquisition thereof by the purchaser. [113] In light of this, the chapter revealed that it would purportedly be possible to argue that equitable acquisition does not result in arbitrary deprivation of property. This means that if equitable acquisition is created by the courts through development of the common law its consequence of termination of ownership would likely not result in an infringement of section 25 of the Constitution.

Significantly, the constitutional analysis of the common law position showed that, although the pre-*Oriental Products* case's interpretation of the consequences of estoppel at common law is not at odds with section 25(1), the post-*Oriental Products* case's interpretation might be. This is because the latter interpretation of the consequences of estoppel lacks authority for the resultant deprivation (termination of ownership). If estoppel as a defence is accepted to automatically result in ownership acquisition, the loss of ownership occasioned by such an interpretation of estoppel would not be in line with the Constitution. The effect of the invalidity of the post-*Oriental Products* interpretation of the consequences of estoppel may very well cause the common law position to be viewed as infringing on section 25(1) due to the uncertainty regarding what the consequences of estoppel at common law indeed are. This would mean that development of the common law position is arguably mandated by the Constitution since estoppel with its uncertain traditional consequences might result in an arbitrary deprivation of property.

However, if the court in future case law unambiguously clears up the uncertainty and holds that the consequences of a successful estoppel defence is not ownership

[113] See section 6 3 above.

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acquisition (meaning the pre-*Oriental Products* case's interpretation prevails), development of the proposed mode of equitable acquisition may still be desirable and prudent based on policy reasons rather than constitutional reasons. Policy reasons as identified in chapter 5 provide strong grounds for the development of the common law in this regard. According to Van der Walt's methodology, where compelling policy reasons exist for the development of the common law position, in the absence of constitutional invalidity, the common law may be developed.[114] Constiutional analysis also purportedly supports the proposed development. It has been shown that the development of a new self-standing mode of original ownership acquisition under the name of equitable acquisition would ostensibly be in line with the Constitution. However, for the development to be in line with the Constitution, the court will have to ensure clear development of a new original mode of ownership acquisition that is subject to a court order confirming that the new mode of acquisition's requirements have been satisfied, these requirements being identical to that of estoppel by representation.

[114] Van der Walt AJ "Development of the common law of servitude" (2013) 130 *South African Law Journal* 722 737.

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Chapter 7: Conclusion

7 1 Introduction

An owner can vindicate her movable or immovable property from an unlawful *bona fide* or *mala fide* possessor using the *rei vindicatio*. However, where the possessor was a *bona fide* purchaser who purchased the property from a non-owner in the specific circumstances where the owner created a negligent representation on which the possessor reasonably relied to her detriment, estoppel would be available to the possessor. Where the possessor succeeds in proving that the circumstances as mentioned above were present, she will succeed with her estoppel defence, and the owner's *rei vindicatio* will fail.

For many years, the legal consequences of estoppel, which ordinarily entail the suspension of the owner's *rei vindicatio*, with the concomitant effect of hedged possession in favour of the successful estoppel raiser, has been uncontested. However, early scholarly work and case law challenged the consequences of estoppel in favour of an approach that would allow for acquisition of ownership. The need for an investigation into the proprietary and constitutional consequences of a successful estoppel defence came to the fore after controversial remarks were made in this regard in the relatively recent Supreme Court of Appeal case of *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading*.[1] In this case, the court seemed to favour the acquisition of ownership as the likely consequence of estoppel although purportedly in *obiter* terms. This contrasts with the mere suspension of the *rei vindicatio* (and hedged possession), which is traditionally described as the consequences of estoppel.

In light of these developments, the purpose of this study was to investigate the proprietary and constitutional consequences of an estoppel defence. In this regard, the second chapter explained the general principles of the *rei vindicatio* and estoppel and determined what the consequences of a successful estoppel defence are after the *Oriental Products* case. In light of the findings of chapter 2, the third chapter assessed how acquisition should occur if the law is developed to allow for the acquisition of ownership as a result of the defence of estoppel. Chapters 4, 5 and 6, in turn, explored

[1] 2011 (2) SA 508 (SCA).

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whether the acquisition of ownership is desirable from a doctrinal, comparative, policy and constitutional perspective, in light of section 25 of the Constitution.

7 2 Conclusions

7 2 1 General principles

7 2 1 1 Historical overview and reception of the right to vindicate

Chapter 2 described and analysed the general principles governing the remedy of the *rei vindicatio* and the defence of estoppel to determine the consequences of a successful estoppel defence. In other words, the aim was to determine the common law position regarding the consequences of estoppel vis-a-vis the *rei vindicatio*. To this end, the chapter provided a historical overview of the scope and operation of both the remedy and the defence. This historical background is particularly significant for purposes of contextualising the remedy and the defence to enable an understanding of the circumstances and reasons that gave rise to the development of these constructs, in particular their respective scopes and consequences.

The historical overview of the *rei vindicatio* conducted in the first part of chapter 2 showed how the right to recover property with the *rei vindicatio* was an extensive right in Roman and in Roman-Dutch law. Contrary to Roman law, the customary Dutch law rarely allowed an owner of movable goods to recover lost possession due to the operation of the Germanic adage, *mobilia non habent sequelam* (you cannot follow movable property into the hands of its possessor). Where an owner voluntarily lost possession over her property, she had no right to recover her property from the possessor thereof. In the situation of involuntary loss of possession, an owner could, recover the property. As cross border trade increased, the need to extend the right of recovery to instances of voluntary loss of ownership arose in the Netherlands. For this purpose, the Roman maxim *ubi rem meam invenio* was adopted into the Roman-Dutch legal system, which accordingly allowed owners recovery of property in instances of both voluntary and involuntary loss of possession. Yet, soon after the adoption of the *ubi rem meam invenio* maxim, exceptions to this expansive right to vindicate was

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introduced by way of legislation based on the old Germanic principle of *mobilia non habent sequelam*.[2]

Two noteworthy legislative limitations on the right to vindicate were introduced from customary Dutch law into Roman-Dutch law, which involved sales by non-owners and representations. Although estoppel as such was not a defence known in Roman-Dutch law, defences such as: (i) goods purchased from factors or agents for sale to which the owner entrusted the goods; and (ii) goods purchased from an untrustworthy person to whom the owner entrusted her property can be argued to constitute "estoppel-like" constructs in Roman-Dutch law at the time. Given that estoppel essentially applies in the same circumstances, the fact that these circumstances constituted sufficient reason for the limitation of ownership in Roman-Dutch law can be argued to endorse the operation of estoppel in South African law and provides historical justification for the limitation of the owner's rights in these circumstances. Interestingly, the consequences ascribed to these estoppel-like defences in Roman-Dutch law are not certain, and their application in the South African law is disputed.[3] As a result, the above historical observation does not clearly provide authority or precedence for the evaluation of the consequences ascribed to a successful estoppel defence against the owner's *rei vindicatio* in South African law. However, this finding is useful as far as it shows that although the owner's power to recover possession in Roman-Dutch law was extensive, this power was limited in the instance of voluntary loss of possession where the owner entrusted her property to someone who forthwith sold the property to another without the authority to do so. Therefore, it can be argued that the existence of these limitations in Roman-Dutch law strengthens the rationale for the operation of estoppel in the South African context in the occurrence of sales by non-owners. However, it does not provideclarity as to what exactly the consequences of these constructs were. It, therefore, does not shed light on what the consequences of estoppel could be in South African law.

The chapter also showed that when Roman-Dutch law was adopted in South Africa, the extensive power of the owner to reclaim her property premised on the *ubi rem meam invenio* maxim trumped the Germanic *mobilia* maxim. As a result, many of the defences known in the Dutch provinces were not received, including the defences

[2] See chapter 2, section 2 2 1 above.

[3] See chapter 2, section 2 2 1 2 above.

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identified above, which resembled estoppel-like constructs.[4] The existence of these defences in Roman-Dutch law carved out a place for the recognition of estoppel in South African law, to counter the harsh consequences of the *ubi rem meam* maxim in the context of the sale of property by non-owners to *bona fide* purchasers. However, since the precise nature of the consequences of the estoppel-like constructs that existed in Roman-Dutch law is not certain, the historical analysis of the defences to the *rei vindicatio* could not clarify the consequences of these estoppel-like constructs. In other words, from a historical perspective, the consequence of ownership acquisition in favour of the *bona fide* purchaser based on the operation of estoppel in the South African context did not result from an analysis of the defences of these estoppel-like constructs. What did, however, transpire from the analysis in chapter 2 is that as the need arose for the *rei vindicatio* to be defeated in certain circumstances, the law responded with appropriate defences to counter the extensive right to vindicate. The analysis of the historical overview, therefore, showed the importance of critical engagement with the needs of society and the importance of constant re-evaluation of the law, which in the context of this dissertation focussed on the consequences of estoppel vis-à-vis the *rei vindicatio*.

7 2 1 2 Historical overview and the reception of the estoppel defence

The second part of the historical overview in chapter 2 turned specifically to estoppel and its origin and development. It showed that the defence of estoppel by representation, which is currently available in South African law, originated and developed in English law. Estoppel by representation that was received into South African law developed from the equity branch of English law. It is not related to estoppel in *pais* (the English common law equivalent thereof), contrary to what some South African court cases have suggested. The understanding that estoppel is a doctrine of equity has implications for the nature and scope of estoppel by representation.[5] This observation has a direct bearing on the other chapters, especially chapter 5 in which the possibility of developing estoppel is considered based on policy reasons, which include considerations of equity.

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[4] See chapter 2, section 2 2 2 above.

[5] See chapter 2, section 2 3 1 1 above.

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Besides determining the origin of the doctrine, chapter 2 also identified the consequences of estoppel by representation in English law as well as the reasons underlying the specific consequences. English law estoppel, prior to its importation into South African law, enabled the party who raised the defence successfully to defeat the right holder's claim to the extent that the right holder could not enforce her right against the successful estoppel raiser. However, the result of successfully raising estoppel by representation did not entail acquisition of ownership.[6] This is primarily why the South African common law position regarding the consequences of estoppel by representation is limited to merely preventing the owner from recovering the property and is said not to change the legal position of the parties.

Moreover, the chapter showed that the reasons underlying estoppel by representation operating as a defence to preclude enforcement of rights in certain circumstances included firstly, that the plaintiff's conduct caused the defendant to change her position with the result that the plaintiff should be held responsible in law for that changed position. Secondly, where the changed position will result in detriment to the defendant, the detriment cannot be seen to fall on the defendant. The plaintiff responsible for such detriment should instead be held liable for the harm caused. Accordingly, on the basis of *responsibility* and *detriment*, equity in English law required that the right holder be estopped from enforcing her rights in order to protect the innocent representee.[7] These equitable considerations are in valuable to justify the existence of such a defence and the consequences ascribed to the defence that entails preventing the owner from enforcing her rights. Moreover, these considerations indicate that where more substantial consequences (such as ownership acquisition in favour of the successful estoppel raiser) were to be ascribed to the development of the defence of estoppel by representation, justifications beyond responsibility and detriment would arguably be required. This observation was taken further in chapter 5 that specifically looked at policy reasons that may support ascribing acquisition of ownership consequences to the estoppel scenario.

The chapter also provided an extensive overview of the operation of this remedy and defences to it in South African law with particular emphasis on the consequences ascribed to the situation where estoppel is successfully raised against the owner's *rei*

[6] See chapter 2, section 2 3 1 1 above.

[7] See chapter 2, section 2 3 1 1 above.

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vindicatio. Here, an analysis of relevant jurisprudence and academic commentary ascertained what the proprietary consequences of a successful estoppel defence are at common law and the extent to which these consequences have been challenged in case law and by academic scholars. In this regard, chapter 2 demonstrated that estoppel was received into South African law in response to the need to protect innocent purchasers where the owner made a representation, which the defendant reasonably relied on to her detriment. Although estoppel infiltrated the South African common law (also known as the Roman-Dutch law as received into South Africa and developed in case law) as a foreign doctrine, it is now regarded as part of the South African common law.

7 2 1 3 Operation of estoppel in South African law

In South African law, estoppel is the most important defence that can limit an owner's right to vindicate her property. The overview of the requirements of the doctrine showed the narrow circumstances in which the defence succeeds. Of significance was how the requirements of estoppel developed in South Africa since the reception of the doctrine. In particular, the Appellate Division in *Grosvenor Motors (Potchefstroom) Ltd v Douglas*[8] decided that where estoppel is raised as a defence against the *rei vindicatio*, the defendant must prove the standard requirements, namely representation, reasonable reliance, causal link and detriment. In addition to these prerequisites, the court required the defendant to show that the representation was made negligently.[9] The addition of negligence as a prerequisite for a successful estoppel defence is an essential factor to consider when thinking about the primary goal of this dissertation, which is to determine and analyse the proprietary consequences of a successful estoppel defence from a doctrinal, comparative, policy and constitutional perspective. In particular, the addition of the negligence requirement may affect the arguments raised for and against the development of estoppel. This is because negligence arguably places a heavier (additional) burden on the defendant, which may not be justifiable. This observation regarding the negligence requirement was taken further in

[8] 1956 (3) SA 420 (A).

[9] See chapter 2, section 2 3 1 2 above.

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chapter 5. It is in chapter 5, where the policy reasons for and against the development of the law were considered.

7 2 1 4 The uncertainty as regards the consequences of estoppel in case law

The discussion on the jurisprudence regarding the consequences of estoppel, in chapter 2, showed that in contrast to the attention given to the requirements of estoppel in South African case law, courts have generally neglected to provide clarity regarding the consequences of a successful estoppel defence. The chapter disclosed that there are inconsistencies with how the courts have explained the consequences of estoppel over the years, although the general view is that the owner is merely estopped (or prevented) from asserting her right to vindicate. This generally accepted view can be said to constitute the common law position regarding the consequences of a successful estoppel defence. An elaboration thereof entails that the owner's entitlement to vindicate the property from the successful estoppel raiser is suspended when the owner's *rei vindicatio* is denied. As a result of this suspension, the unsuccessful owner may not disturb the estoppel raiser in her possession *ad infinitum*. The chapter demonstrated that although these consequences constitute the accepted common law position, the position has been challenged in case law on historical, doctrinal and policy grounds.[10]

In *Morum Bros Ltd v Nepgen*[11] and *Barclays Western Bank Ltd v Fourie*[12] the respective courts embarked on a historical analysis of two Roman-Dutch law defences that *bona fide* purchasers could rely on to defeat the *rei vindicatio*. This led to a better understanding of the defence of estoppel by representation that was actually raised in the *Morum Bros* case by the appellant. The first defence is the entrustment defence and the second defence is the factor or agent for sale defence. The court in *Morum Bros* indicated that, where these defences were raised against the party claiming the return of the property in Roman-Dutch law, the return of the property to the plaintiff was only allowed once the plaintiff reimbursed the *bona fide* purchaser the full purchase price. This principle leads some scholars to argue that since the plaintiff had to

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[10] See chapter 2, section 2 3 2 above.

[11] 1916 CPD 392.

[12] 1979 (4) SA 157 (C).

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reimburse the *bona fide* purchaser before being able to recover the property, the plaintiff lost ownership over the property. The argument was then that if ownership was not lost to the *bona fide* purchaser, the plaintiff would not have been required to pay the purchaser. In other words, these defences not only resulted in the *rei vindicatio* being defeated but also caused the plaintiff to lose ownership. The successful purchaser therefore acquired ownership, in terms of these defences. However, a counter argument was raised against this submission, namely that the mere fact that the owner could still claim for the return of the property where the owner reimbursed such purchaser more likely indicates that the plaintiff remained the owner. This counter argument was also raised and accepted in the *Barclays Western Bank* case. The critical analysis done in part three of chapter 2 showed that the *Morum Bros ratio* indicates, from a historical perspective, that the owner's rights were limited at the very least. However, whether ownership was actually lost and acquired by *bona fide* purchasers by way of these Roman-Dutch legislative defences remain unclear when regard is had to the commentary of the institutional writers. Accordingly, without clear evidence that ownership was indeed acquired by way of these Roman-Dutch legislative defences, the current assumptions made to this effect are purportedly not sufficient to argue that acquisition of ownership results from a successful estoppel defence. This finding is invaluable since it shows that although *Morum Bros* justifies the operation of the defence of estoppel in South African law, it does not overtly justify the position that estoppel results in ownership acquisition in favour of the *bona fide* purchaser.[13] Accordingly, an historical analysis of estoppel-like constructs that operated in Roman-Dutch law as defences against the owner's right to vindicate does not justify, nor does it really hamper, arguments in favour of possible development of the law to provide for ownership acquisition where the requirements of estoppel are satisfied.

Furthermore, the *Barclays Western Bank* decision did not only raise questions about the historical justification of the scope of the consequences of estoppel. The court also had to evaluate a policy argument made by the plaintiff that the interest of trade and commerce requires development to the effect that estoppel results in the acquisition of ownership in favour of the *bona fide* purchaser. In other words, trade and commerce require the development of the common law position regarding the

[13] See chapter 2, section 2 4 above.

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consequences of estoppel. The court dealt with the argument in a fleeting manner, before eventually dismissing it altogether. The reason for the court not engaging with the policy argument more substantially may be ascribed to the lack of evidence that was brought by the counsel for the plaintiff. Nonetheless, the lack of substantive engagement with the needs of trade and commerce in the *Barclays Western Bank* case compels a proper investigation into policy reasons in favour of developing the traditional consequences ascribed to estoppel.[14] Therefore, chapter 5 of this dissertation, which aimed at establishing policy reasons that may support the development of the law in the context of estoppel, reconsidered the trade and commerce argument in more detail. However, the discussion of *Barclays Western Bank* showed that due to the inadequate way the court dealt with the policy argument of the needs of trade and commerce, the current common law position regarding the consequences of estoppel might be hampering trade and commerce. If this was found to be the case, the common law position regarding estoppel would be at odds with priorities of society as encapsulated in policy.

From a doctrinal point of view, the case of *West v Pollak & Freemantle*[15] has been relied on to argue that estoppel in its defence form constitutes acquisition of ownership. Interestingly, the analysis of the case and its commentary conducted in chapter 2 showed that the case is the first to suggest the acquisition of ownership in favour of a *bona fide* purchaser after a successful estoppel defence. Unfortunately, the analysis showed that the acquisition of ownership in *Pollak* was not exclusively the result of the estoppel defence. The acquisition of ownership in *Pollak* resulted from the independent cause of action found in the principles of agency. This cause of action was relied on and used in conjunction with estoppel to secure ownership. The *Pollak* case indeed took the argument of acquisition of ownership a step further in that it showed how estoppel together with an existing independent cause of action, such as agency, can follow a successful estoppel defence. Yet, it is clear that *Pollak* cannot be relied on as authority to argue that estoppel can in all cases by itself result in the acquisition of ownership.[16]

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[14] See chapter 2, section 2 4 above.

[15] 1937 TPD 64

[16] See chapter 2, section 2 4 above.

Subsequent to the *Apostoliese Geloofsending van Suid Afrika (Maitland Gemeente) v Capes*[17] case in which the Supreme Court of Appeal implicitly confirmed the traditional consequences ascribed to estoppel at common law, the more recent case of *Oriental Products* expressly challenged the common law position regarding the consequences of estoppel. The court in *Oriental Products* indicated a preference for acquisition of ownership, rather than the traditional consequences of estoppel namely the mere suspension of the owner's right to vindicate. Although this preference was seemingly expressed in *obiter* terms, it is the first case since *Pollak* where the Supreme Court of Appeal apparently supported the view that estoppel results in ownership acquisition. In *Oriental Products* the court went even further than the court in *Pollak* in that the remarks suggested that estoppel can, on its own, cause reallocation of ownership.[18] However, it is unclear whether the *Oriental Products* judgment developed the common law position regarding the consequences of estoppel to allow the doctrine to result in ownership acquisition. It is uncertain since some scholars have suggested on the one hand that the remarks of the court were merely *obiter*, while others suggest that the remarks indicate that estoppel is now capable of resulting in ownership acquisition. The chapter also revealed that the subsequent case of *Rossouw v Land and Agricultural Development Bank of South Africa*[19] in which the court rejected an argument that estoppel results in deemed ownership acquisition, does not depart from the court's remarks in *Oriental Products* and the uncertainty caused by the latter case in terms of the consequences of estoppel therefore still remain. The case of *Rossouw* merely confirmed that estoppel in its current form can never be relied on as a cause of action. It can therefore be said that subsequent to the *Rossouw* case the remarks made by the Supreme Court of Appeal in *Oriental Products* about the defence of estoppel possibly resulting in acquisition of ownership still stands. Overall, chapter 2 showed that the current common law position regarding the consequences of estoppel is uncertain.

The above uncertainty about the common law position encouraged inquiry into the possibility of development of the common law. It is essential to consider what such development should look like with due cognisance of private law doctrine, similar

[17] 1978 (4) SA 48 (C).

[18] See chapter 2, section 2 4 above.

[19] 2013 JDR 2038 (SCA).

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constructs in foreign jurisdictions, policy reasons and, very importantly, the constitutional implications of developing the common law of estoppel to have as consequence ownership acquisition as opposed to retaining the existing position.

The historical background and development of the *rei vindicatio* and estoppel respectively provided a valuable contextualisation of the problem and uncertainty surrounding the proprietary consequences of a successful estoppel defence. The fact that the remedy and defence originated in very different legal systems and legal traditions are, for the most part, responsible for the unclear consequences, which follow from the interplay between these constructs. Furthermore, the discussion of academic commentary and jurisprudence on the topic of the consequences of a successful estoppel defence demonstrated the uncertainties that arise in this regard from a historical, doctrinal and policy perspective. Moreover, the *Oriental Products* case further placed the common law position into dispute.[20] The chapter, therefore, laid the foundation for posing critical questions about the possibility of developing the common law position ascribed to estoppel to allow for the acquisition of ownership. A question that cropped up in this regard, when seriously considering the development of the common law is: if such development takes place, which category of acquisition would be most fitting to acknowledge acquisition in the context of estoppel? To explore this question, the focus of chapter 3 turned to the modes of acquisition of ownership with the ultimate aim of determining whether acquisition of ownership by way of estoppel should take place by way of an original or derivative mode of acquisition.

7 2 2 Modes of acquisition

Against the background set in chapter 2, the focus of chapter 3 turned to the doctrinal considerations for the feasibility of acquisition of ownership in the context of estoppel. More specifically, the chapter aimed to determine whether the doctrinally most suitable method to develop the law is to recognise acquisition of ownership as the appropriate consequence of estoppel as suggested in *Oriental Products* or to develop a self-standing new mode of acquisition complying with the requirements of estoppel. Whether acquisition by way of estoppel can be accommodated by the existing principles and rules of property law was an important consideration to determine

[20] See chapter 2, section 2 4 above.

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whether the development of the proprietary consequences of estoppel or the development of a self-standing new mode of acquisition might be viable. Chapter 3 therefore focussed on delineating the contours of the two main categories of acquisition that exist in South African law, namely original acquisition and derivative acquisition.

From a historical perspective, it is noteworthy to indicate that the chapter showed that although the Roman-Dutch law modes of acquisition were received into the South African legal system, the way in which these modes were categorized was not received. The categories of acquisition of ownership in South African law consist of only two distinct categories, namely, original and derivative acquisition of ownership and does not reflect the broader categories that applied in Roman-Dutch law. Under original acquisition in South African law, all modes that allow ownership to be acquired without the predecessor in title's intention to transfer ownership are grouped together. In contrast, the derivative acquisition category in South African law consists of all the modes of ownership acquisition that require the intention of the predecessor in title for acquisition to occur. Accordingly, a cursory look at the two main categories of acquisition showed that the distinction between them concerns the absence or presence of the intention to transfer ownership.[21]

7 2 2 1 Estoppel and original acquisition of ownership

The first part of chapter 3, which focussed on delineating the contours of the original category of acquisition, revealed the core characteristic of this category of ownership acquisition. The core characteristic arguably entails the acquisition of ownership by operation of law and by implication without the cooperation of any predecessor in title (meaning without the intention of the predecessor in title to transfer). It followed that a new mode of original acquisition could be developed under the original category as long as the acquisition of ownership ensues by operation of law. In this regard, it was revealed that where a *bona fide* purchaser can comply with the requirements of estoppel, such compliance does not involve, and is not subject to, the owner of the property having the intention to transfer the property to the purchaser. In the context of estoppel, the law imputes consequences when the defence is successfully raised.

[21] See chapter 3, section 3 2 1 above.

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This means that if one accepts that the satisfaction of the requirements of estoppel leads to the acquisition of ownership, such acquisition will not entail the intention to transfer ownership. Accordingly, the chapter indicated that from a doctrinal perspective acquisition by way of estoppel, if recognised at all, would possibly be suited within the category of original acquisition of ownership.[22]

However, although the above finding assisted in understanding that acquisition by way of estoppel or by way of a self-standing new mode of original acquisition of ownership, could work by operation of law, this observation did not address the possible constitutional problems with recognising estoppel as a mode of original acquisition. Scholars have pointed out that if estoppel is recognised as a mode of original acquisition, thereby forming part of the original category of ownership acquisition, this might lead to the infringement of the constitutional right to non-arbitrary deprivations as enshrined in section 25(1) of the Constitution. The affected parties being the owner who would lose her ownership by way of estoppel; and those who hold limited real rights in the property that would likely terminate automatically because of the original acquisition of ownership by way of estoppel.[23] The consequence of loss and acquisition of ownership is an indisputable and expected consequence of both the original and derivative categories of ownership acquisition and was dealt with in chapter 6 of this dissertation, the constitutional chapter. It is the latter consequence of automatic termination of limited real rights that was highlighted as being unique to the original category of ownership, and that was put into question in chapter 3.

Chapter 3 revealed that the impact of the original acquisition of ownership on limited real rights is not settled in South African law although the assumption has always been that all limited real rights terminate with the original acquisition of ownership. The analysis of the impact of this category of acquisition on limited real rights over movable property, in particular, showed that there is arguably no evidence that such rights terminate due to original acquisition of ownership. In this regard, the chapter revealed that the type of movable property that can be acquired by the existing original modes of ownership acquisition is usually limited to unburdened movable property, meaning movable property not encumbered by limited real rights, except for movables subject to special notarial bonds. This is because a legal subject can only

[22] See chapter 3, section 3 2 2 above.

[23] See chapter 3, section 3 2 2 above.

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acquire ownership by way of original modes of acquisition over movable property, if the prospective owner is able to exercise physical control over the property. However, for the continued existence of limited real rights over movable property, the limited real right holder is also required to exercise physical control over the property. Since it is ordinarily impossible for both the prospective owner and limited real right holder to exercise physical control over the same movable property simultaneously, the implication is that acquisition of the property is possible only after existing limited real rights have terminated. However, it is essential to note that the termination of limited real rights would have ordinarily occurred for reasons other than, and independent from, the original acquisition of the concerned property. In other words, the termination of the limited real rights would not be because of the original modes of acquisition. For instance, if A holds the gym equipment of B in terms of a worksmanslien and sells the equipment to C under the circumstances that would ordinarily give rise to a successful estoppel defence, C would acquire ownership over the equipment without the lien burdening the property. The reason for the termination of the lien is that B the lienholder voluntarily gave up the physical control she had over the property, since voluntary loss of physical control over the property burdened by the lien is a recognised event for the termination of a lien.

In the exceptional circumstances where the termination would have taken place with the acquisition of ownership, for instance where it is the limited real right holder that becomes the owner of the property through an original mode of acquisition, the prior right arguably terminates because of distinct and established legal principles. This principle entails that you cannot have a limited real right in respect of your own property. For instance, in the event of attachment of movables to movables where the attacher is the holder of a limited real right over the accessory thing it can be argued that by attaching the property, a new thing is created, namely a composite thing. This means that the thing that the attacher might have had a limited real right over does not exist independently anymore. In this regard, the argument was made that the limited real rights terminate because the initial materials, meaning the property the rights burdened, no longer exists. The limited real rights can therefore be said to have terminated due to the principle that entails that where the burdened property is destroyed, the limited real right is extinguished. Consequently, termination of the right did not occur because of the particular category of acquisition, namely original acquisition, as opposed to derivative acquisition. It was however clear from the chapter

that although almost all limited real rights require physical control for their continued existence, one exception exists in the form of special notarial bonds, which makes provision for the possessionless pledge. Due to the possessionless nature of the limited real right of notarial bonds, the problem of the impossibility of simultaneous control does not arise. This means that there is no reason why the limited real that exists over the property should terminate. It was also the submission that even in this case, the limited real right would likely not terminate at original acquisition of ownership.[24] In the previous example where A holds the gym equipment of B in terms of a worksmanslien and sells the equipment to C under the circumstances that would ordinarily give rise to a successful estoppel defence, C would acquire ownership over the equipment. However, if the gym equipment that C acquired by way of estoppel did not only have a lien over it, but also had a registered special notarial bond burdening it, C would acquire the ownership over the property without the lien, for the reasons explained earlier, but with the special notarial bond in tact. The limited real right of special notarial bond would not terminate because no principles or rules require the termination of ownership.[25]

The finding of the chapter on the impact of original acquisition of ownership on limited real rights over movables is therefore that it is more likely than not, that limited real rights are not automatically extinguished when original acquisition of ownership occurs. As a result, the chapter demonstrated that the concern that limited real right holders would unduly lose their limited real rights over movables if estoppel would be recognised as a mode of original acquisition is an overstatement since this would arguably not happen.[26]

The findings pertaining to the impact of original acquisition of ownership over immovable property (land) brought to light that uncertainty in this regard also exists. The analysis of arguments for and against the termination of limited real rights over immovable property in this context indicated that it is more probable that limited real rights over immovable property do not terminate when original acquisition of such property occurs. In this regard, Pienaar makes a convincing argument that these rights are not extinguished the nature of limited real rights, which is to burden the object of

[24] See chapter 3, section 3 2 3 above.

[25] See chapter 3, section 3 2 3 above.

[26] See chapter 3, section 3 2 3 above.

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rights and not the rights (ownership) themselves. As a result, when due regard is given to the nature of limited real rights, it becomes clear that termination of the right (ownership) does not automatically mean the termination of the limited real rights that existed over the object, contrary to what Sonnekus argues. Therefore, from a theoretical point of view, the chapter revealed that it is more probable that limited real rights over immovable property are not extinguished due to, or as a result of, original acquisition of ownership. This theoretical view was shown to be supported by how the existing modes of original acquisition that apply to immovable property deal with limited real rights at common law and in statutes. In particular, what became clear upon a closer analysis of the existing modes of acquisition was that the only common law mode of original acquisition that pertains to immovable property is the attachment of land to land. Interestingly, the chapter demonstrated that the possibility of any limited real rights being affected by acquisition through attachment of land to land is negligible since the land usually is of such a nature that no limited real rights burden the land at acquisition by way of attachment. The other original modes of acquisition that apply to immovable property are found in legislation, namely forfeiture, prescription, expropriation, insolvency and liquidation. The chapter showed that when assessing the impact of original acquisition of ownership on limited real rights under these statutory modes, it becomes evident that the general rule is not that existing limited real rights are automatically extinguished when acquisition of ownership occurs. In most instances, it is clear that the statutes acknowledge that the limited real right would continue to exist but for provisions included in the statute that provides for the termination of limited real rights usually subject to appropriate compensation or relief. The above findings indicated that the constitutional concerns raised by some scholars, specifically regarding the constitutionality of the extinction of limited real rights that would be caused if estoppel were to result in the acquisition of ownership of burdened movable or immovable property, is arguably not a valid concern.[27] This is because limited real rights are arguably not extinguished at original acquisition of ownership. Consequently, it would seem that there is no reason why acquisition by way of estoppel could not be categorised as a mode of original acquisition of ownership.

[27] See chapter 3, section 3 2 3 above.

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7 2 2 2 Estoppel and derivative acquisition of ownership

After establishing that the estoppel scenario could easily operate as a mode of original acquisition, the chapter turned to determine if it could perhaps also be fitted into the mould of derivative acquisition of ownership. This part of chapter 3, which focussed on delineating the contours of derivative acquisition of ownership to determine whether this mode can perhaps accommodate acquisition by way of estoppel, indicated that derivative acquisition of ownership is based on agreement (intention to transfer and intention to receive transfer). In this regard, the abstract system of transfer is followed in South African law. In terms of this system, a real agreement together with a form of conveyancing (delivery or registration) is essential for ownership to pass validly.[28]

The pertinent question in this part of chapter 3 was whether acquisition by way of estoppel or a self-standing mode of acquisition based on the requirements of estoppel would involve a real agreement together with a form of conveyancing. The chapter showed that although there would generally not be any problems with the objective element of transfer, namely, conveyancing,[29] the challenge for the derivative mode of acquisition in this regard is the requirement that the intention to transfer on the part of the owner should be present for ownership to transfer. Interestingly, the argument that the function of estoppel is to change the fiction into the truth, meaning the authority created by the representation would be accepted as the truth for legal purposes, shifted the focus from the owner's intention to the fraudulent seller's intention. The argument followed that estoppel would, in effect, create an exception to the *nemo plus iuris* principle. The implication was that the question that instead needed to be asked was whether the seller intended to transfer ownership and not whether the owner intended to transfer ownership to the *bona fide* purchaser. On a closer analysis of what would ordinarily constitute the seller's intention, it became apparent that what the seller projects to the *bona fide* purchaser is a façade of authority to transfer ownership and a façade of the intention to transfer ownership since her subjective intention is to deceive the *bona fide* purchaser. However, the chapter showed that a façade of intention to transfer ownership is not enough for purposes of satisfying the transfer requirement of derivative acquisition of ownership. Both the Supreme Court of Appeal's dictum in *Oriental Products* and academic authors' attempts to remedy the absence of

[28] See chapter 3, section 3 3 1 above.

[29] See chapter 3, section 3 3 3 above.

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an actual real agreement in the estoppel scenario with a form of constructive intention was shown to fail to satisfy the property law requirements in this regard. This is because constructive intention does not qualify for the real agreement that is required for acquisition of ownership by a derivative mode. It requires clear, actual intention for ownership to pass from one person to another. In addition, the argument was made that allowing a constructive intention to satisfy the requirement of the real agreement, would blur the line between the derivative and original modes of acquisition of ownership. Therefore, chapter 3 demonstrated that the derivative mode of acquisition of ownership is arguably not the appropriate category for the acquisition of ownership that possibly could result from a successful estoppel defence.[30]

7 2 2 3 Practical considerations

The part of chapter 3, which focussed on tentatively determining how estoppel should be developed, allowed valuable conclusions to be made about practical questions concerning the acquisition of ownership in the context of estoppel. The issues considered were: whether estoppel in its defence form should be accepted to have acquisition of ownership as a consequence as suggested in the *Oriental Products* case or whether a new self-standing mode of acquisition should preferably be developed that is subject to the requirements of estoppel but which operates independently from the defence of estoppel; and at what moment ownership would vest in the purchaser.

The chapter showed that allowing estoppel in its defence form to result in acquisition of ownership will not suffice, since it remains questionable whether it is wise and at all possible to ascribe the consequence of ownership acquisition to a defence. It is therefore perhaps necessary to develop estoppel as a self-standing mode of acquisition, possibly under the name of equitable acquisition. The current requirements of estoppel as a defence should arguably function as the requirements for the new mode of acquisition. Regarding the question of when equitable acquisition will result in the vesting of ownership in the *bona fide* purchaser, the chapter showed that it might be wise to allow for the vesting of ownership only at the moment a court order confirms that the requirements of the new mode of acquisition have been met. The implication being that equitable acquisition will operate much like acquisition by way of

[30] See chapter 3, section 3 3 2 above.

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prescription. Ownership will only vest once the court order confirms the right when it is satisfied that the requirements have been met.[31]

Considering the above regarding the original and derivative modes of acquisition, the main conclusion that can be drawn from chapter 3 is evident: the scope and consequences of the mode of original acquisition of ownership in South African law are more suitable to accommodate a new self-standing mode of acquisition based on estoppel than the derivative mode. The absence of a real agreement between the seller and the estoppel raiser renders it impossible for ownership acquired in the context of estoppel to fit the mould of derivative acquisition. Original acquisition seems more plausible because the requirements of estoppel are not subject to the cooperation of the predecessor in title and do not result in undue termination of limited real rights that could lead to constitutional concerns. In addition, the chapter also showed that estoppel should arguably be developed by way of the creation of a new mode of original acquisition of ownership as opposed to allowing estoppel in its defence form to result in ownership acquisition. Furthermore, it became evident that it would be wise to allow equitable acquisition to operate similarly to prescription as far as the moment of vesting of ownership is concerned. Finally, the chapter indicated that the new mode of acquisition should arguably be subject to compliance with the requirements of estoppel before the acquisition of ownership is confirmed as a means of narrowing the circumstances in which a purchaser would succeed with claiming acquisition by way of the newly created original mode of acquisition.

A practical example of how the new mode of acquisition of ownership would operate can be described as follows. In terms of movable property, where B, a motorbike repairer who also happens to sell motorbikes, has a lien over the motorbike that belongs to A, and sells the motorbike to C under the circumstances that would ordinarily give rise to a successful estoppel defence, C will be able to claim ownership over the bike on the basis of equitable acquisition. C will be entitled to approach the court for an order confirming her ownership over the bike and she will be able to refute A's vindicatory action against her by showing that she acquired ownership if A institutes vindication proceedings against her. Importantly, for C to obtain an order from the court confirming her ownership, she will have to satisfy the court that she meets the traditional requirements of estoppel. Once she does so, the court will make an order

[31] See chapter 3, section 3 4 above.

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that she acquired ownership over the motorbike in terms of equitable acquisition. The ownership that vests in C will not be burdened with the lien since the lien would have extinguished when the lienholder gave up physical control over the motorbike voluntarily. However, if there was a special notarial bond registered over the motorbike, C's ownership that she acquired through equitable acquisition will be subject to the special notarial bond.

In terms of immovable property, where a *bona fide* purchaser, C, purchased an office building (commercial immovable property) in circumstances that would ordinarily give rise to a successful estoppel defence and it later becomes known to her that the seller never had authority to sell the property to her, she may approach the court for an order confirming her ownership on the basis of equitable acquisition. She will, however, have to satisfy the court that the requirements traditionally associated with estoppel are complied with. Only if she succeeds, will the court order vest ownership over the immovable property in her based on the new mode of acquisition. However, where the initial owner, A, institutes vindicatory proceedings to recover the property from C before C could approach the court herself, C can refute A's *rei vindicatio* by disprove the ownership of A. To do this, C will show that she can satisfy the requirements of equitable acquisition which shows that she is the owner of the property and not A. In both these instances, ownership over the commercial immovable property will vest in the purchaser. If the commercial immovable property was burdened with limited real rights before ownership over the property vested in C, such limited real rights will continue to exist over the property. In other words, where the property was burdened with a mortgage bond in favour of a bank, the mortgage bond will continue to exist, eventhough the property now has a new owner, who is unrelated to the principal debt.

With this clear finding that the principles of property law regarding acquisition of ownership, specifically original acquisition of ownership, can easily accommodate equitable acquisition, one of the questions that remained was what impeded the development of the estoppel scenario into a mode of acquisition of ownership? As a first step to answering this question, chapter 4 purported to provide a comparative analysis to determine how foreign jurisdictions with similar constructs regulate the conflicting interests at play between the *bona fide* purchaser and owner. Moreover, the comparative analysis of constructs that are similar to estoppel may be able to shed

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more light on the use of a defence such as estoppel as a mode of acquisition, if such development is at all possible.

7 2 3 Comparative analysis

The aim of chapter 4 was to determine how selected foreign jurisdictions regulate the consequences of constructs comparable to estoppel to establish whether it might be viable and justifiable to implement the same in the South African context when thinking about the development of estoppel. For this purpose, Scottish and English law were investigated, precisely because a cursory analysis indicated that these foreign jurisdictions have constructs, which are comparable to the doctrine of estoppel by representation. The focus of the chapter was on the scope of the owner's right to vindicate, the scope of the similar constructs, and most importantly, the consequences ordinarily ascribed to these constructs in these foreign jurisdictions vis-à-vis that of the estoppel scenario in South African law.

7 2 3 1 Comparable constructs in Scottish law

The first part of chapter 4 dealt with the constructs found in Scottish law and showed that the scope of the owner's right to vindicate in Scottish law is as extensive as the right to vindicate that exists in South African law Both are based on the general rule, *nemo dat quod non habet* (no one can transfer more rights than he has in the property).[32] Interestingly, the chapter revealed that the extensive right to vindicate is limited in circumstances similar to that, which would give rise to a successful estoppel defence in South African law. In Scottish law, specifically, when dealing with movable property, this limitation is brought about by section 21(1) of the Sale of Goods Act 1979 ("SGA"), which was promulgated to protect the interest of *bona fide* purchasers. Section 21(1) seems to encapsulate the doctrine of personal bar, a common law defence aimed at protecting parties from the inconsistent behaviour of the right holder. The doctrine of personal bar has requirements similar to that of estoppel. What became apparent in the chapter is that section 21(1) of the SGA, although not identical to the common law estoppel construct of South Africa, would cover the circumstances that

[32] See chapter 4, section 4 2 1 above.

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would ordinarily give rise to a successful estoppel defence in the South African context. Consequently, the consequences drawn form the application of personal bar and by implication section 21(1) in Scottish law, may provide a template for the formulation of the consequences of a successful estoppel defence in South Africa.[33]

A closer look into how Scottish law regulates the consequences of a successful personal bar defence by way of section 21(1) of the SGA, however, showed that it is also uncertain which consequences result from personal bar in common law. This uncertainty exists even though there is relative certainty regarding the consequences of section 21(1) of the SGA as a legislative provision. The same arguments raised against the recognition of ownership acquisition as a result of estoppel in South African law is raised by Scottish scholars about the doctrine of personal bar. The main concern is that the personal nature of the personal bar doctrine limits the effect of the doctrine to the relationship between the right holder who is barred from asserting her rights and the successful personal bar raiser. The doctrine, therefore, cannot have real effect and as a result, ownership can never be acquired in terms thereof. It should be noted that in the South African context, there is no mention of the personal versus the real nature of the estoppel doctrine. The assertion that estoppel can only suspend the owner's *rei vindicatio* can, however, be argued to endorse the idea of the personal nature of the doctrine.[34]

The chapter also demonstrated that scholars in favour of ascribing acquisition consequences to the doctrine of personal bar argue that the failure of the right holder to rebut the presumption of ownership that exists in favour of the personal bar raiser as the possessor, keeps the presumption in place. The practical consequences of this failure imply that the possessor is the owner. Unfortunately, this argument cannot be made in the South African context, because there is arguably a difference between the presumption of ownership and the right of ownership. Significantly, the chapter showed that although there is no uniformity regarding the consequences of personal bar, there is relative certainty amongst scholars that where a *bona fide* purchaser successfully proves the requirements of personal bar to satisfy section 21(1), the consequences should be that the *bona fide* purchaser becomes the owner of the movable property. It is, however, noteworthy that this position has not been confirmed in case law. The

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[33] See chapter 4, section 4 2 2 above.

[34] See chapter 4, section 4 2 2 above.

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argument made in support of the acquisition of ownership in terms of section 21(1) is that the provision is a statutory measure through which authorisation is statutorily given for ownership to be acquired, even though the doctrine of personal bar, which provides content to the section, is a common law construct. What is apparent from this finding is that although section 21(1) of the SGA is a construct that can be compared to estoppel because it covers the same scenarios, the argument that is made in favour of a *bona fide* purchaser acquiring ownership at the instance of successful reliance on section 21(1) cannot be made in the South African context. This is because estoppel in South African law does not constitute a statutory measure; it is a common law defence. There is no statutory authority for the acquisition of ownership by way of the successful estoppel raiser in South African law.[35]

Moreover, the chapter showed that section 21(1) only applies to sales by non-owners of movables to *bona fide* purchasers and not to the sale of immovable property. In the context of immovable property, the positive registration system would result in the acquisition of ownership by the *bona fide* purchaser. In other words, where the purchaser was mistakenly registered as the owner in the registry, the purchaser would acquire indefeasible title due to registration and not due to any construct that is comparable to estoppel by representation that exists in the South African context. Accordingly, the Scottish position pertaining to immovable property in this sphere is not comparable to the South African position.[36]

7 2 3 2 Comparable constructs in English law

The second part of chapter 4 considered English law, in particular, the scope of the right to recover in English law, the limitations placed on the right to recover in the circumstances identical to that which would ordinarily give rise to an estoppel in South African law, and the specific consequences ascribed to such limitations. In terms of the scope of the owner's right to vindicate in English law, there are fundamental conceptual differences between the English law concept of the right to recover and that which exists in South African law. It was demonstrated that both the concept of ownership and the actions available to owners in the English context are not identical to those

[35] See chapter 4, section 4 2 2 above.

[36] See chapter 4, section 4 2 3 above.

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that exist in South African law. In this regard, English law has neither a unitary concept of ownership nor a unitary action to reclaim lost possession. Title holders are regarded as owners, and tort claims are instituted to recover lost possession. Nonetheless, similarities exist between the relevant English law concepts, rights and remedies and those found in South African law.[37]

The chapter showed that section 3(2) of the Torts (Interference with Goods) Act 1977 provides title holders with proceedings to reclaim lost possession of goods. However, as is the case in Scottish law, section 21(1) of the SGA would be available to *bona fide* purchasers for value to rely on for protection against the title holder's tort claim. In English law, section 21(1) of the SGA also entrenches the general rule that the title holder can claim back lost possession but provides an exception to this rule which is known to codify the doctrine of estoppel in English law. From a comparative perspective, it became clear that the English law estoppels (estoppel by representation and estoppel by negligence) are not identical to estoppel by representation in South African law because both English law estoppels are much narrower in their respective definitions of a representation and both estoppels do not have negligence as a requirement. .[38]

In *Eastern Distributors Ltd v Goldring*[39] it was settled that where section 21(1) is relied upon by a *bona fide* purchaser, and such purchaser successfully proves the requirements of estoppel, the purchaser forthwith acquires title to the property in terms of section 21(1). Interestingly, the description of the consequences of section 21(1) of the SGA showed that before the *Eastern Distributors* case, many arguments were raised against acquisition of ownership. For instance, the argument was made that estoppel does not affect the legal position and rights of the parties and can, therefore, not result in ownership acquisition an argument which is often made by South African scholars in support of the stance that estoppel does not result in the acquisition of ownership.[40]

However, since the authority for the acquisition of ownership in terms of section 21(1) of the SGA in England exists, it is clear that like the Scottish law regarding the

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[37] See chapter 4, section 4 3 1 above.

[38] See chapter 4, section 4 3 2 above.

[39] [1957] 2 QB 600.

[40] See chapter 4, section 4 3 2 above.

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ownership acquisition consequence of section 21(1) over movables, these constructs are not in their entirety comparable to the position in South African law. The reasoning for the acquisition of ownership in the estoppel scenario in both these jurisdictions stems from the legislative authority afforded to the sections and not from common law constructs, which are comparable to estoppel in South African law. Consequently, the same rationale cannot be applied in the South African context to argue for the acquisition of ownership as a result of a successful estoppel defence, since estoppel is a common law defence in South African law and not a creature of statute.[41]

In English law, the sale by non-owners of immovable property would generally not reach the registration stage due to the conveyancing process that should safeguard against such transactions. However, in the unlikely situation that such safeguards fail, it seems that the positive nature of the registration system protects the newly registered owner, meaning the *bona fide* purchaser will be protected, rather than the previously registered owner. Chapter 4 further revealed that the positive registration system in English law provides registered parties indefeasible title, much like in the Scottish context. This is different from the South African negative registration system where registration only creates a rebuttable presumption that the registered party is the owner of the property and that the registry is in principle subject to the true legal state of affairs. In English law, registration guarantees title. The titleholder who was deregistered as a result of a non-owner succeeding to sell and register property into the name of the *bona fide* purchaser can apply for alteration of the inscription in the registry in terms of rule 3 of the Civil Procedure Rules of 1998. If the rule 3 alteration application is successful and is followed by a possessory claim, the purchaser will have proprietary estoppel at her disposal. What became apparent in this chapter is that where a purchaser in these circumstances succeeds with proprietary estoppel, the purchaser could obtain a secured interest in the property that trumps that of the so-called titleholder. In this regard, the court may in terms of its equitable discretion grant the purchaser a registered equity over the property, which would override the title of the registered owner in terms of the Land Registration Act 2002, much like a registered limited real right would in South African law.[42]

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[41] See chapter 4, section 4 3 2 above.

[42] See chapter 4, section 4 3 3 above.

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Considering the above, the chapter demonstrated that the point of departure of the English legal system, is to protect the *bona fide* purchaser's interest over immovable property. However, the initial protection awarded to the *bona fide* purchaser is provided for by a construct that is not similar to estoppel. The law that instead protects the *bona fide* purchaser's interest is the positive registration system. However, where the deregistered titleholder manages to alter the registry, an estoppel-like construct, namely proprietary estoppel is available to the purchaser and could provide the purchaser with substantive protection either by way of compensation or by way of a registered equity, which would override the title of the registered title holder. In this way, it became apparent that the protection afforded to *bona fide* purchasers of immovable property for value after registration is more substantial than that which is afforded to *bona fide* purchasers in South African law where estoppel is successfully raised. Notably, the South African case of *Oriental Products*, with its unique facts where, registration in the name of the purchaser took place subsequent to the sale of the property, indicated that if a *bona fide* purchaser succeeds with estoppel in these perculiar circumstances, she will remain registered as owner in the deeds registry. What this essentially means for the legal position of *bona fide* purchasers who purchased immovable property under circumstances similar to *Oriental Products* is uncertain, especially given the negative nature of the South African registration system that although it does not guarantee rights it has a publicity function.[43]

As a result, the chapter revealed that the way in which these foreign jurisdictions with similar constructs regulate the circumstances that would give rise to a successful estoppel defence in South African law, are comparable in the context of movable property, but different when it comes to immovable property. Interestingly, the consequences ascribed to both movable and immovable property in these jurisdictions are different from that which is ascribed to the estoppel scenario in South African law. However, despite the differences, the statutory regulation of movables in both Scottish and English law prompted the question: to what extent sales of movables by non-owners can be regulated in South African law in legislation such as the Consumer Protection Act 68 of 2009. In addition, the manner in which the infrequent occurrence of sales and registration of immovable property from a non-owner into the name of a *bona fide* purchaser for value is regulated by proprietary estoppel and the Land

[43] See chapter 4, section 4 3 3 above.

Registration Act in England, raises the question whether it might be possible to do the same in the South African context? However, if these possibilities are to be explored further, the glaring differences between the South African and English legal system on the nature of rights, the concept of ownership and possession as well as the registration system must be kept in mind.[44]

Both these suggestions, however, assume that it might not be viable to recognise the acquisition of ownership through the development of estoppel. Therefore, although these foreign constructs seem like workable alternatives for the regulation of the *bona fide* purchaser problem in South African law, the question remains whether estoppel in South African law might be able to adequately regulate the situation if developed at common law, before looking to reform by way of legislation. As a result, chapter 5 of the dissertation considered whether legitimate policy reasons might exist in favour of the development of the common law of estoppel to recognise the acquisition of ownership consequence.

7 2 4 Policy analysis

Chapter 5 sought to determine whether sufficient policy reason could be found for the proposed development of a new self-standing mode of acquisition of ownership based on the estoppel defence. This specific aim stemmed from the question whether it is more acceptable from a policy perspective, to develop estoppel into a self-standing mode of acquisition of ownership in South African law rather than maintaining the existing consequences of estoppel as a defence.

7 2 4 1 The bona fide *purchaser problem*

In line with the above-mentioned aim, the first part of chapter 5 contextualised the conflict of interest that exists between the owner and the *bona fide* purchaser in the circumstances that would result in estoppel being successfully raised. In this regard, the chapter revealed that out of three possible approaches to the so-called *bona fide* purchaser problem, the South African approach accords most closely with the intermediary approach, known as the limited vindication approach. The limited

[44] See chapter 4, section 4 3 3 above.

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vindication approach constitutes a compromise between the two extremes of absolute protection of the owner on the one hand, and the absolute protection of the *bona fide* purchaser, on the other hand. In this sense, the limited vindication approach allows the presumed owner to institute proceedings for the recovery of the property that the purchaser bought *bona fide* and for value. However, the *bona fide* purchaser is not without protection. In certain circumstances, the law would provide the *bona fide* purchaser with a legal construct to refute the recovery claim of the presumed owner. Strikingly, it was shown that the South African version of the limited vindication approach is less liberal than the approach followed by other foreign jurisdictions such as England and Scotland that also follow the intermediary approach. This observation results from the fact that estoppel is the legal construct in South African law that is meant to protect the *bona fide* purchaser against the owner's recovery claim. Since the consequences of estoppel at common law (before *Oriental Products*) do not entail loss and acquisition of ownership, but instead only suspends the owner's right to vindicate, it constitutes a less liberal version of the limited vindication approach.[45]

7 2 4 2 Justifications in favour of equitable acquisition

Considering the above finding, chapter 5 turned to investigate the favourability of the less liberal intermediary approach that is encapsulated in the estoppel defence and its consequences, especially since scholars have indicated that estoppel results in several legal anomalies. These anomalies involve the owner's entitlements to sell, lease or encumber the property being curtailed along with her entitlement to vindicate the property; and the uncertainty as to what hedged possession allows the *bona fide* purchaser to do with the property.

To investigate these anomalies, the chapter analysed the legal position of the parties after the *bona fide* purchaser succeeds with estoppel to determine if the suspected anomalies do indeed arise. If it were found that estoppel indeed gives rise to legal anomalies, such finding would support reconsidering how the *bona fide* purchaser problem is regulated in South African law. In other words, further reflection on the possible development of a new mode of acquisition of ownership based on estoppel would arguably be merited. The chapter confirmed that estoppel indeed

[45] See chapter 5, section 5 2 1 above.

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brings about the anomalies referred to by scholars. The analysis of the owner's legal position after estoppel is successfully raised against the owner's *rei vindicatio* revealed that the owner indeed becomes a bare owner. This is because most of her entitlements in the property become unenforceable due to her right to vindicate being suspended for an indefinite period. Nonetheless, she still carries the risk of liability in certain circumstances because she remains owner of the property. However, the chapter also exposed some further anomalies, regarding the remedies available to the parties, not pointed out in scholarly works.[46] There are arguably no real, delictual and enrichment remedies that the owner would be able to succeed with against the *bona fide* purchaser of the property, although she might have delictual remedies against the fraudulent seller.[47] Since the fraudulent seller would usually be untraceable or insolvent in these situations, it is questionable whether the delictual remedies are of any real value to the owner.

The chapter further exposed that the *bona fide* purchaser's legal position is also problematic. Since possession and holdership are unsettled legal constructs in South African law, the exact legal status of the *bona fide* purchaser remains unclear and cannot be determined with certainty. Nonetheless, an attempt was made to analyse the remedies that the *bona fide* purchaser would have after succeeding with estoppel. It was submitted that it might be possible to ascribe to the purchaser the legal status of an unlawful possessor. The chapter demonstrated that if this legal status of unlawful possessor is assigned to a successful estoppel raiser, a few, if any possessory remedies would likely be available to her. The only remedies that would arguably be available to a successful estoppel raiser to protect her possession are the *mandament van spolie* and the general delictual remedy, the *actio legis Aquiliae*. However, whether the purchaser would be able to succeed with these remedies would depend on the circumstances in which the infringement occurred. Accordingly, the chapter showed that the legal position of both the owner and the successful estoppel raiser, after a successful estoppel defence, would be problematic.

The anomalous nature of the traditional consequences of estoppel at common law has caused scholars to advocate for the development of the law in this regard. It was shown that if the *bona fide* purchaser is allowed to acquire ownership under the

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[46] See chapter 5, section 5 2 2 above.

[47] See chapter 5, section 5 2 2 1 above.

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circumstances where she is able to satisfy the requirements of estoppel, the identified anomalies would cease to exist. Furthermore, the chapter also showed that where the proposed development takes place and a purchaser acquires ownership by way of equitable acquisition, the predecessor would not be without remedies. The chapter revealed that the predecessor would likely succeed with delictual remedies against the fraudulent seller and would possibly also have an enrichment claim against the new owner. However, since the development would entail the loss of ownership, a right that is protected jealously in South African law, it is expected that these anomalies on their own would probably not provide strong enough justification for the proposed development.[48]

It was due to the above findings that chapter 5 analysed policy reasons of law and economics, equity and fairness. The aim was to determine whether further justifications, beyond the legal anomalies identified earlier, can be found in favour of the development of estoppel into a self-standing mode of original acquisition. The economic approach to law showed that both the least cost avoider and the interest of trade and commerce measures favoured the development of a new mode of acquisition of ownership based on estoppel, rather than maintaining the current common law position regarding the consequences of estoppel. In this regard, the chapter revealed that the mere suspension of the owner's right to vindicate that results from estoppel does not give rise to the most efficient allocation of resources. What emanated from the chapter is that a new mode of original acquisition of ownership that is based on estoppel would result in the most efficient allocation of resources. The analysis of the least cost avoider measure showed that a new mode of original acquisition of ownership that is based on estoppel would arguably ensure that fewer resources are wasted on search and information expenses compared to those wasted under the existing common law position. Also, the interest of trade and commerce analysis favoured the development of a new mode of original acquisition of ownership subject to the existing requirements of estoppel. The analysis revealed that trade and commerce would be protected and promoted more under such a rule than under the uncertainties currently caused by the estoppel defence. Consequently, the chapter made it clear that the economics approach to law provides grounds for the proposed development of the common law. However, since the economics approach to law is

[48] See chapter 5, section 5 2 2 1 above.

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often criticised for not taking into account considerations of fairness and equity due to its exclusive focus on transaction costs, the chapter also had to probe considerations of equity and fairness to determine whether these standards support the law and economics position that favours the proposed development.[49]

The analysis of equity and fairness highlighted that since estoppel is a doctrine of equity, it is meant to ensure equitable outcomes in legal disputes that would otherwise have resulted in unfair outcomes. It also indicated that equity doctrines have the inherent ability to evolve and develop in response to the needs and priorities of society and the search for an appropriate equitable solution required in the legal system. In this regard, the investigation into the effectiveness of estoppel in ensuring equitable results showed that estoppel as a defence has constrictions, which results in it not being able to do equity justice. This is especially so when one has regard to the legal anomalies outlined earlier. Consequently, the fact that estoppel has shortcomings that hinder equity should arguably trigger the ability of estoppel to evolve into a more equitable construct that can ensure greater equitable outcomes. Since the mode of acquisition proposed will not merely do away with the anomalies caused by a successful estoppel defence, but will also ensure optimal allocation of resources, equity and fairness would support the proposed development. The chapter, therefore, showed that equity and fairness arguably provide grounds for allowing estoppel as a defence to evolve into a new mode of original acquisition of ownership.[50]

In addition, chapter 5 showed that the risk principle and the presence of the element of negligence might aid in determining what would constitute equitable and fair outcomes regarding the *bona fide* purchaser problem. In this regard, the chapter indicated that the risk principle requires that the owner who creates the risk that others might be misled to their detriment, should carry the loss rather than the *bona fide* purchaser who did not create the risk. It was therefore submitted that the risk principle justifies protecting the *bona fide* purchaser rather than the owner, which arguably provides further support for the development of a self-standing mode of acquisition of ownership that will ensure that the risk of loss and the subsequent loss of ownership are ascribed to the owner.[51]

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[49] See chapter 5, section 5 3 1 above.

[50] See chapter 5, section 5 3 2 1 above.

[51] See chapter 5, section 5 3 2 2 above.

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The analysis of the negligence requirement as further indicator of equity and fairness also showed that the addition of negligence constitutes disproportionate protection of the owner's interest, even in a jurisdiction that jealously protects ownership. This submission was shown to be supported by the fact that the suspension of the owner's right to vindicate is purportedly justified by all the other requirements of estoppel which assist with showing risk creation on the part of the owner. As negligence is a requirement beyond risk creation by the owner, the argument that the risk of detriment is increased by negligence was made. This increase should then favour stronger protection for the purchaser beyond the problematic hedged possession that is ordinarily ascribed to the purchaser under the estoppel defence pre-*Oriental Products*. As a result, these indicators of equity and fairness (the risk principle and negligence) arguably also justify the development of a new mode of acquisition as opposed to continuing with the defence of estoppel for the regulation of the *bona fide* purchaser problem in South African law.[52]

It can therefore be said that apart from the legal anomalies caused by estoppel, strong policy reasons exist in favour of the development of the common law to accommodate a new mode of original acquisition of ownership in the context of estoppel. However, an argument for the development of the law cannot solely be made based on sound policy reasons. Development that would infringe on any provision in the Constitution of the Republic of South Africa, 1996 is not allowed, even where strong policy reasons for such development exist. Therefore, the question arose whether the proposed developed position, namely acquisition of ownership, is in line with the Constitution, specifically section 25. In the instance where development does not take place, it is also necessary to determine whether the position at common law accords with the Constitution. This was considered in chapter 6.

7 2 5 Constitutional analysis

The aim of chapter 6 was to determine the constitutional validity of the existing common law position regarding the consequences of estoppel and the proposed new mode of original acquisition, namely equitable acquisition. In this regard, it should be noted that the constitutional analysis of the existing common law position entailed both the pre-

[52] See chapter 5, section 5 3 2 3 above.

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Oriental Products judicial interpretation and the post-*Oriental Products* judicial interpretation of the consequences of estoppel. In addition, chapter 6 specifically considered the proposed development of the common law.

The set of questions laid down in the authoritative *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*[53] case and their development in subsequent Constitutional Court cases were applied to the existing common law position (in both its interpretations) and the proposed development thereof, respectively.[54] The first question of the *FNB* set of questions that was applied to the two positions was the question whether the interests at stake qualify as property for purposes of the property clause. The chapter revealed that the interests affected by the respective legal constructs, namely the right to vindicate and ownership had been recognised as constitutional property in preceding court cases. Accordingly, it was shown that it is very likely that such interests would qualify as property for purposes of section 25(1) of the Constitution in the context of the existing and proposed common law positions regarding the consequences of estoppel.[55]

The chapter, therefore, moved on to the second *FNB* question, namely whether the existing common law position (the pre-*Oriental Products* case's interpretation of the consequences of estoppel and the post-*Oriental Products* case's interpretation of the consequences of estoppel) and the proposed new mode of original acquisition causes deprivation of the identified property interests. In this regard, it was necessary to apply both the wide *FNB* interpretation of the deprivation question as well as the narrower concept that developed after *FNB* to the respective consequences under scrutiny. The analysis showed that both existing common law positions regarding the consequences of estoppel constitute deprivations. Since the owner is not able to recover the property from the successful estoppel raiser under the pre-*Oriental Products* case's interpretation of the consequences of estoppel, it became evident in the chapter that this inability to recover affects the use, enjoyment and exploitation of the property as required by the wide *FNB* concept of deprivations. The pre-*Oriental Products* case's consequences of estoppel also seemed to satisfy the narrow concept

[53] 2002 (4) SA 768 (CC).

[54] See chapter 6, section 6 1 above.

[55] See chapter 6, section 6 2 1 above.

as the suspension of the *rei vindicatio* in these circumstances affects the operation of some of the other entitlements of the owner and continues for an indefinite period. For this reason, the interference would arguably be substantial and legally relevant enough to establish a deprivation under the narrow understanding of deprivations.[56]

Also, the impact of the post-*Oriental Products* case's interpretation of the consequences of estoppel and the proposed new mode of original acquisition, namely termination of ownership was found to satisfy the wide *and* narrow concept of deprivation because the termination of ownership in both circumstances entails at least interference with a recognised right, namely ownership, thereby satisfying the wide definition of deprivation. The permanent termination of ownership would undoubtedly also amount to a substantial and legally relevant interference under the narrower concept.[57]

Considering the above, namely that the existing common law position (pre and post-*Oriental Products*) as well as the proposed development of the common law in this regard, would arguably constitute deprivations of property, the third question in terms of the *FNB* set of questions was considered. This question is whether the identified deprivations comply with the requirements set out in section 25(1) of the Constitution. Section 25(1) dictates that deprivation should be in terms of law of general application and should not result in an arbitrary deprivation. The chapter revealed that the deprivations caused by the respective legal constructs and their various interpretations have the common law as law of general application. Estoppel is a common law doctrine, and the proposed mode of acquisition would have to be developed to form part of the original modes of acquisition of ownership recognised at common law. However, just because law of general application can be identified, does not mean that the law of general application requirement is complied with. The question that had to be asked was whether the identified laws indeed authorise the deprivations. The chapter indicated that the pre-*Oriental Products* case's interpretation of the consequences of estoppel is authorised since it is based on the traditional view of the scope of estoppel, which only provides for the suspension of the owner's entitlements, due to it only operating as a limitation on the owner's right to vindicate.[58] Significantly,

[56] See chapter 6, section 6 2 2 above.

[57] See chapter 6, section 6 2 2 above.

[58] See chapter 6, section 6 2 3 above.

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the authorisation for the post-*Oriental Products* case's interpretation of the consequences of estoppel, which is that a successful estoppel defence results in compulsory loss of ownership, could not be found in the common law of estoppel. This was the case because the current common law of estoppel only suspends the *rei vindicatio* and does not explicitly authorise termination of ownership. Accordingly, the chapter revealed that the common law of estoppel arguably does not authorise the post-*Oriental Products* judicial interpretation of the consequences of estoppel. Apparently the deprivation caused by such interpretation would likely be invalid and unconstitutional for not being authorised by law of general application.[59]

The chapter went on to show that the proposed new mode of original acquisition of ownership would arguably be able to satisfy the authorisation requirement of section 25(1) of the Constitution. If estoppel were to evolve and develop into a self-standing mode of original acquisition of ownership, the new common law mode of acquisition would specifically be developed to provide for acquisition of ownership. Therefore, the compulsory loss of ownership that would ensue in these circumstances would indeed be authorised by law of general application.[60]

After establishing that the pre-*Oriental Products* and the proposed new mode of original acquisition of ownership are likely authorised by law of general application as expressly required by section 25(1) of the Constitution, the investigation turned to the arbitrariness of the two surviving positions. The chapter disclosed that in terms of the procedural arbitrariness leg of the arbitrariness test, there is no indication that these positions would be problematic from the perspective of procedural arbitrariness. The main reason for this is that in terms of both positions, the affected parties are furnished with enough recourse and judicial oversight to protect their affected property interests.[61]

Concerning the substantive leg of the arbitrariness test, the chapter indicated that substantive arbitrariness concerns the question of whether there is enough justification for the identified deprivations. Whether enough justification exists can be determined by way of a rationality test or proportionality test depending on the severity of the deprivations. The chapter demonstrated that the proportionality inquiry would likely find

[59] See chapter 6, section 6 2 3 above.

[60] See chapter 6, section 6 2 3 above.

[61] See chapter 6, section 6 2 3 above.

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application in terms of both deprivations under scrutiny. This seemed to be the most appropriate test to apply, considering that both deprivations under scrutiny seemed severe when having regard to the nature of the property affected and extent of the deprivation. The deprivation caused by the pre-*Oriental Product* case's interpretation of the consequences of estoppel arguably results in the indefinite suspension of the owner's right to recover. This, in turn, automatically also impacts on various other ownership entitlements. Furthermore, the fact that the suspension of these entitlements would probably be in place for an indefinite period supported the finding that the deprivation would likely be classified as severe. Likewise, the deprivation that would arguably ensue due to the proposed mode of original acquisition would also be severe. This is because the property affected constitutes ownership, which is the most complete real right, and because the period of deprivation is permanent in nature. As a result, the chapter showed that the appropriate test to determine substantive arbitrariness under both deprivations was the proportionality test and not the rationality test.[62]

Furthermore, it was shown that the deprivation of property resulting from the pre-*Oriental Product's* interpretation of a successful estoppel defence is unlikely to amount to an arbitrary deprivation. In this regard, the proportionality analysis demonstrated that a close relationship could be identified between the purpose of the deprivation, the means employed, the person affected, and the property affected. Accordingly, the chapter showed that the pre-*Oriental Product's* position would not infringe section 25(1) of the Constitution. The deprivation caused by the suspension of the right to vindicate after a court finds that estoppel has successfully been raised, was found to be sufficiently justified. This conclusion was based on reasons of equity and fairness where the risk principle indicated what would be fair in these circumstances.[63]

Equally, the deprivation that would result from the development of a new mode of original acquisition of ownership also showed enough justification for the identified deprivation. In this regard, the policy reasons of equity and fairness (as encapsulated in the risk principle), together with law and economics considerations favoured acquisition of ownership as opposed to maintaining the traditional common law position regarding the consequences of estoppel. Moreover, the fact that the owner who loses

[62] See chapter 6, section 6 2 3 above.

[63] See chapter 6, section 6 2 3 above.

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ownership due to equitable acquisition is not without remedies against the fraudulent seller and even against the acquirer also seemed to mitigate the loss suffered by the owner. A close link can arguably be found between the means employed and the ends sought, namely acquisition of ownership in favour of the purchaser. This would ensure equitable outcomes that would purportedly eliminate the legal anomalies and uncertainties that result from estoppel. It will likely also ensure that the risk of loss falls on the party who created the risk of misleading and who is the least cost avoider. Because the owner of the property created the risk of prejudice in a culpable manner and because such owner would usually be the party in the dispute that can carry the loss most efficiently, a close link was found to exist between the aims of the deprivation and the person affected. Moreover, the aim of the deprivation, the extent of the deprivation and the nature of the property also proved to be closely linked to each other for purposes of showing proportionality. This was made plain in that achieving an equitable outcome that safeguards most efficient allocation of resources, and that ensures that the person who created the risk of misleading carries the risk of loss in the interest of fairness would not be possible without the proposed compulsory loss of ownership. In light of this, the chapter indicated that it would purportedly be possible to argue that the proposed new mode of acquisition of ownership would not result in arbitrary deprivation of property. This means that if this development were to take place, it would likely not result in an infringement of section 25(1) of the Constitution.[64]

These findings are valuable since a complete section 25(1) analysis of the pre and post-*Oriental Products* case's interpretation of the consequences of a successful estoppel defence and the proposed mode of acquisition has not as of yet been done.[65] It shows that estoppel in its defence form cannot result in the acquisition of ownership since such a result does not comply with section 25(1) and would, therefore, in all likelihood be contrary to the Constitution. Notably, the section 25 analysis of the pre-*Oriental Products* case's interpretation of the consequences of estoppel that entails suspension of the *rei vindicatio* survived constitutional muster. However, the uncertainty that exists regarding whether the *Oriental Products* judgment indeed changed the common law position, could result in the consequences of estoppel at common law being viewed as unconstitutional while the uncertainty persists. This

[64] See chapter 6, section 6 2 3 above.

[65] See chapter 1, section 1 3 above.

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means that development of the law to provide for certainty in this regard is required for constitutional purposes and not merely for reasons of policy. If development of the common law takes place to create the proposed original mode of equitable acquisition, the constitutional analysis showed that such development would ostensibly be in line with the Constitution. This would be the case if the new mode of acquisition is subject to the requirements that a defendant would ordinarily have to satisfy when relying on estoppel and is subject to a court order confirming compliance with the requirements. Evidently, these findings support the view that acquisition of ownership by way of the proposed new original mode is desirable and perhaps also constitutionally required in the context that would traditionally only give rise to a successful estoppel defence. However, the development of the proposed mode of acquisition would have to involve a deliberate and clear conversion of estoppel from its current defence form to the proposed original mode of equitable acquisition.

7 3 Final remarks

This study set out to determine and analyse the consequences ascribed to the situation where a *bona fide* purchaser successfully raised estoppel against the *rei vindicatio*. In light of recent case law and early academic commentary, issues around the consequences of a successful estoppel defence called for clarification, and perhaps even the development of the law, in this regard. These issues included the following: the true scope of the consequences of estoppel; development of the common law to recognise a self-standing mode of acquisition of ownership in the estoppel scenario; the exact category of acquisition that could accommodate acquisition in the context of estoppel; and most importantly, whether the proposed development would be constitutionally compliant.

The study showed that the consequences traditionally attributed to estoppel at common law entail the suspension of the owner's *rei vindicatio* and leads to the successful estoppel raiser having hedged possession over the property. However, for many years academics have been arguing for the development of the consequences ascribed to estoppel to allow for the acquisition of ownership. More recently, remarks made in the Supreme Court of Appeal judgment, *Oriental Products*, have muddied the common law position even more, since the *dicta* of the court caused uncertainty around the consequences of a successful estoppel defence. The uncertainty pertains to

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whether the traditional position of suspension and hedged possession subsequent to the *Oriental Products* case may result in compulsory loss and acquisition of ownership.

These findings encouraged investigation into the possible development of the common law in this regard. The study showed that if development ought to take place by way of recognising a self-standing mode of acquisition of ownership based on estoppel, the most suitable category for the acquisition would be an original, rather than a derivative mode of acquisition of ownership.

Furthermore, the study also revealed that due to the interplay between estoppel as a common law construct and the *rei vindicatio* as a civil law construct being unique to the South African legal system, direct comparisons in foreign jurisdictions were difficult to make. In this regard, Scottish and English law came the closest to having comparable constructs. Yet, the differences between the constructs that regulate sales by non-owners of movable and immovable property in these jurisdictions respectively made it impractical to argue for the implementation or consideration of how these jurisdictions go about dealing with the consequences of these constructs. Especially because the focus of the study was on determining whether the common law can be developed and not aimed at considering whether legislative interventions may be more appropriate. However, it might certainly be easier to regulate the *bona fide* purchaser problem by way of legislation than waiting for the courts to develop the common law in this regard.

Moreover, the chapter demonstrated that there are strong policy reasons that prefer and justify the development of a new and self-standing mode of original acquisition of ownership in the context of estoppel, as opposed to the uncertain traditional position. Notably, the study discovered that it would be problematic from a constitutional perspective to maintain the post-*Oriental Product'*s version of the consequences of estoppel. It became evident that if acquisition of ownership is the desired consequences in the estoppel situation, the courts should instead develop a new and self-standing mode of original acquisition to regulate the *bona fide* purchaser problem in South Africa. It would arguably be unconstitutional to allow the defence of estoppel to have ownership acquisition consequences. This finding in itself promotes the development of the consequences of estoppel in terms of section 8(3) of the Constitution. This constitutional provision requires that if any law infringes on a right in the Bill of Rights, in this case, section 25(1) of the Constitution, such law must be developed for purposes of bringing it in line with the Constitution.

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Also, the chapter indicated that there are strong policy reasons that prefer and justify the development of a new and self-standing mode of original acquisition of ownership in the context of estoppel. This finding showed that the development of the common law in this regard would arguably reflect the modern-day priorities of society. Since development in favour of the acquisition of ownership seemed more favourable in terms of policy reasons, the question turned to whether the proposed development of the common law would not infringe on section 25(1) of the Constitution. In this regard, the section 25 analysis of the proposed development showed that the deprivation that would be caused by the termination of ownership in this regard would be justified in terms of a strict proportionality analysis. This means that the development of the common law would purportedly pass constitutional muster and present a sensible route to take to ensure constitutional compliance.

Overall, the analysis completed in this study showed that it might not only be time to reconsider the consequences of estoppel in light of anomalies created by the common law position and strong policy reasons favouring development but that such development is indeed mandated due to the current uncertain traditional position being inconsistent with the Constitution, specifically section 25(1). The position after *Oriental Products* is not sustainable from a practical, policy *and* constitutional perspective. Development of a new self-standing mode of acquisition of ownership that entails the requirements of estoppel arguably provides a more sensible solution that can finally settle the old debate around the consequences of a successful estoppel defence.

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