

PROPERTY, SOCIAL JUSTICE AND CITIZENSHIP: PROPERTY LAW IN POST-APARTHEID SOUTH AFRICA

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1 Introduction

This article examines the question whether property law can and should foster democratic forms of governance, advance social justice, promote citizenship and build sustainable and supportive communities.¹ The question is particularly relevant in post-apartheid South Africa, since apartheid land law worked in exactly the opposite direction. “Grand apartheid”² undermined what would normally be considered democratic forms of governance and citizenship because it institutionalised discriminatory and socially divisive and destructive agricultural and urban land use policies and management systems, thereby causing or exacerbating overcrowding, social displacement and economic marginalisation.³ At the same time, the discriminatory land-use and – management laws and practices of “petty apartheid” systematically destroyed any possibility of fostering social justice, good citizenship and

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² This term is used to describe the macro level of apartheid land law, which designated specific areas of the country as so-called “homelands” for specific Black African tribal or national groups. Four of these “homelands” became “independent” and exercised a measure of self-rule prior to 1994, i.e. Transkei, Bophuthatswana, Venda and Ciskei (so-called “TBVC countries”). Grand apartheid is usually contrasted with “petty apartheid”, which refers to the reservation of residential areas as well as public and private facilities within “white” South Africa for exclusive use and occupation by certain race groups. See in general Van der Walt “Towards the Development of Post-Apartheid Land Law: An Exploratory Survey” 1990 (23) *De Jure* 1-45 and sources referred to there.

³ Several contributions in Cross & Haines (eds) *Towards Freehold: Options for Land and Development in South Africa's Black Rural Areas* (1988) discuss the disastrous effects of the so-called agricultural “betterment” schemes and similar land practices and the link between apartheid land law and overcrowding. In urban areas, the establishment of separate “townships” for Black, Coloured and Indian residents (like Soweto, an acronym for “South Western Townships”, an area southwest of Johannesburg reserved for urban residential use by Blacks) outside the white urban areas resulted in overcrowding, bad urban planning, immense transport problems and high levels of pollution. See the sources referred to in n 4 below.

the building of sustainable and supportive communities.⁴ The advent of the post-1994 democratic dispensation in South Africa and the concomitant constitutional directives to eradicate the legacy of apartheid and to promote the values of human dignity, equality and freedom⁵ present a felicitous opportunity to ask whether the post-1994 political, constitutional and social dispensation can reverse the legacy of apartheid by, among other things, fostering democratic forms of governance and citizenship and advancing social justice and the building of sustainable and supportive communities.

It would be impossible to undertake a full analysis of all the aspects involved in this question in an article of limited scope. A comprehensive analysis would require discussion of issues such as the tension between security of vested property interests, economic development and post-apartheid land reform,⁶ the implications for effective land reform of promoting economic development;⁷ restitution of dispossessed property as a prerequisite for promoting social

⁴ One merely needs to reflect upon the destruction of rural communities through the migrant labour system on the one hand and overcrowding on the other; see in this regard Van der Merwe "Not Slavery but a Gentle Stimulus: Labour-Inducing Legislation in the South African Republic" 1989 *TSAR* 353; as well as the contributions in Cross & Haines (eds) *Towards Freehold*. Another vivid example is the forced removals (3,5 million people between 1960 and 1983) that were intended to "clean up" and consolidate racially segregated areas; these mass evictions destroyed established and vibrant urban communities like District Six (Cape Town) and Sophiatown (Johannesburg) and left millions of Black South Africans displaced and homeless. See in general Schoombie "Group Areas Legislation – The Political Control of Ownership and Occupation of Land" 1985 *Acta Juridica* 77; Platzky & Walker *The Surplus People: Forced Removals in South Africa* (1985). More specifically on the destruction of District Six and Sophiatown see Mattera *Memory is the Weapon* (1987); Rassool *District Six: Lest we Forget – Recapturing Subjugated Histories of Cape Town (1897-1956)* (2000); Themba *Requiem for Sophiatown* (2006). A more subtle but no less destructive process was the legal redefinition of segregated land rights under apartheid that left Black land users and occupiers open to arbitrary evictions and forced removals; see in this regard Van der Walt 1990 *De Jure* 1-45; Van der Walt "Property Rights and Hierarchies of Power: A Critical Evaluation of Land-Reform Policy in South Africa" 1999 (64) *Koers* 259 and sources referred to there.

⁵ Constitution of the Republic of South Africa, 1996 ss 1, 7(1), read with ss 8(3), 39. In the so-called 'post-amble' of the interim 1993 Constitution the obligation to transform South African society and its laws, as an integral part of the new democratic dispensation, was made even clearer. As far as property law is concerned, the obligation to transform is embodied in s 25; see the discussion below.

⁶ The link between economic development and security is often claimed but has not yet been demonstrated adequately in the literature. An example of the argument in favour of such a link was forwarded by the (white) agricultural society, Agri SA, claiming that the state's land reform interventions in private landownership caused uncertainty and affected the economy unfavourably, especially in terms of labour and food security: Bosman "Grondteikens Moet Ander Doelwitte in Ag Neem" *Landbouweekblad* (2005-11-11) 106. This argument relies on what Alexander *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* (2006) 24 *et seq* calls "the formalist trap", described at 24 as "the assumption or claim that without constitutional protection, property rights are unlikely to enjoy the degree of security and stability that is necessary for a properly functioning liberal democracy as well as for an efficient free market economy." Alexander argues, with reference to Canada and India, that constitutional entrenchment of property is not a requirement for a liberal democracy or for an efficient free market economy. See further Bhorat & Kanbur (eds) *Poverty and Policy in Post-Apartheid South Africa* (2006).

⁷ It is sometimes assumed that the two goals are mutually exclusive, but it has been argued that the constitutional protection of property can simultaneously promote a transformative agenda: see Van der Walt *Constitutional Property Law* (2005) 22-42; Van der Walt "Dancing with Codes – Protecting, Developing, Limiting and Deconstructing Property Rights in the Constitutional State" 2001 *SALJ* 258; Van der Walt "Striving for the Better Interpretation – A Critical Reflection on the Constitutional Court's *Harksen* and *FNB* Decisions on the Property Clause" 2004 *SALJ* 854. The latter argument was accepted by the Constitutional Court in *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 14-23. See further Alexander & Skąpska (eds) *A Fourth Way. Privatization, Property, and the Emergence of New Market Economy* (1994).

justice;⁸ promoting security of tenure against eviction and the implications for housing policy;⁹ promoting access to land and housing and the implications for individual autonomy, private investment and economic development;¹⁰ the apparent conflict between communal tenure and promotion of equality and democratic governance in land-use policy;¹¹ building supportive communities and promoting citizenship in view of concerns about personal security and

⁸ In South African land reform law, restitution is a limited process whereby specific property that was dispossessed under apartheid laws and practices is restored to the affected individuals, families or communities. The process is authorised by s 25(7) of the 1996 Constitution and regulated by the Restitution of Land Rights Act 22 of 1994. The original deadline for completing all restitution claims was 30 April 1998; in terms of policy decisions all claims had to be processed and dealt with by 31 December 2005 (subsequently extended to 31 December 2008). In July 2006 the Land Claims Commission had settled 89 percent of the claims that had been lodged before the final cut-off date – the remaining 11 percent were expected to be completed by 2008. Of the 79 696 claims received, 71 645 were settled; 6 975 of the remaining claims were in rural areas where conflicting claims and negotiations involving large and often partially dispersed groups complicated the process. Most of the urban claimants preferred financial compensation, for which R1,2 billion was allocated by the state. See <http://www.businessday.co.za/PrintFriendly.aspx?ID=BD4A226973> (accessed 11-01-2007). Even early in 2003, when less than half of the current number of claims had been settled (36 686), more than 80 000 households (almost 450 000 individuals) had benefited from the more than 500 000 hectares that had been restored up to then. See the report of the Land Claims Commission *Land Restitution in South Africa: Our Achievements and Challenges* (26 May 2003) 4 Table 2.4 at http://land.pwv.gov.za/restitution/LAND%20RESTITUTION%20IN%20SOUTH%20AFRICA%20-%2020-05-03_doc (accessed 25-01-2007). Restitution is a problem outside of South Africa as well; see eg Pogany *Righting Wrongs in Eastern Europe* (1997) 227; Teitel *Transitional Justice* (2000) 310.

⁹ In South African land reform law, tenure reform is authorised by s 25(6) of the Constitution. Given the role that evictions and forced removals played in apartheid land law, security of tenure in the post-apartheid context obviously means security from arbitrary eviction. Legislation now secures the land rights and interests of labour tenants, other lawful occupiers of rural land, urban rental tenants, communal land holders and users, informal and beneficial land users and even unlawful occupiers of land. The relevant land reform laws are respectively the Land Reform (Labour Tenants) Act 3 of 1996, the Extension of Security of Tenure Act 62 of 1997, the Rental Housing Act 50 of 1999, the Communal Property Associations Act 28 of 1996 and the Communal Land Rights Act 11 of 2004, the Interim Protection of Informal Land Rights Act 31 of 1996, and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. For a discussion of these statutes see Van der Walt *Constitutional Property Law* 284-398 and sources cited there. Security of tenure, especially in the residential sphere, is a problem elsewhere as well; see Fox *Conceptualising Home: Theories, Laws and Policies* (2007) 568.

¹⁰ Promotion of access to land and housing is authorised by ss 25(5) and 26 of the Constitution. Within its budgetary and institutional restrictions, the new government has set redistribution targets for itself. The prime objective is to upgrade all informal settlements in the country by 2015, which means building a further 500 000 houses per annum from 2008: see *Business Report* (2007-01-29) available at <http://www.busrep.co.za/> (accessed 29-01-2007). By September 2006 some 2 243 612 houses had already been completed: <http://www.housing.gov.za/> (accessed 29-01-2007). According to Xundu & Boyle “State Fears Protests over Lack of Delivery” *SA Sunday Times* (2007-01-28) 10, the completed houses provided housing for some 8,4 million people, leaving about 2,4 million households living in informal settlements. Of these, 800 000 are on approved subsidy lists, waiting for their houses to be completed. As far as agricultural land is concerned, the aim of the Land Redistribution for Agricultural Development sub-programme is to redistribute 30% of agricultural land by 2014: <http://land.pwv.gov.za/redistribution/lrad.htm> (accessed 05-02-2007). For an overview see McLean “Housing” in Chaskalson, Klaaren, Roux, Stein & Woolman (eds) *Constitutional Law of South Africa* 2 ed (2006) Ch 55.

¹¹ The Constitution commits the State to three principles that affect communal land holding, viz recognition and development of customary law and traditional leadership (ss 39(2)-(3), 211-212); equality and non-discrimination (s 9); and security of tenure (ss 25(6), 25(9)). The problems surrounding reform of communal land holding include security of tenure and arbitrary eviction (management and governance); gender discrimination and equality; economic and sustainable use; and others. Significant legislative interventions include the Communal Property Associations Act 28 of 1996 (enables especially restitution of land to groups and communities within an updated and constitutionally “sanitised” communal context) and the Communal Land Rights Act 11 of 2004 (intended to improve security of tenure of individuals and communities who hold or use or occupy land communally); on both statutes see Van der Walt *Constitutional Property Law* 284-398.

the growth of privately secured residential developments;¹² transforming the common law of property;¹³ dismantling the apartheid land hierarchies that are seen as a structural cause of inequality and poverty;¹⁴ and many others. I chose to discuss just three examples from recent legislation and case law that highlight areas where it can be asked whether property law can promote the political, constitutional and social transformation processes that are required in the aftermath of apartheid and that are the focus of this article. Two of the examples I selected are from what is sometimes described as “pure” private law, where it is often claimed that property relationships and transactions are adequately regulated by private law, with no need or room for interference from the state. The third example derives from post-apartheid land reform law, which is generally (and arguably erroneously) regarded as part of public rather than private law.

2 Sale of residential property to satisfy a debt

When a South African home owner defaults on her bond payments, the creditor (usually a bank) would approach the courts for default judgment against the debtor, simultaneously asking for an ancillary order to declare the mortgaged property executable.¹⁵ This attachment and execution practice existed and has been applied, more or less without controversy, for a number of years. In 2001 a case occurred where the execution procedure of the Magistrates’ Courts Act 32 of 1944¹⁶ was used to levy execution against the owners of low-cost houses acquired through a state housing programme. The

¹² Because of popular perceptions that criminal threats to personal security and exposure to violent crime are increasing, the development of enclosed urban residential areas has become popular in South African cities recently. See South African Human Rights Commission *Report on the Issue of Road Closures, Security Booms and Related Measures* (10 March 2005) <http://www.sahrc.org.za/Publications.htm> (accessed 05-11-2005). It has been argued that this development impoverishes public space and undermines good citizenship and the building of communities: Van der Walt “Enclosed Property and Public Streets” 2006 *SA Public Law* 3 (three further articles from a seminar on enclosed housing estates are included in the same issue of *SA Public Law*). The issue is also problematic in the USA; see Alexander “The Publicness of Private Land Use Controls” 1999 (3) *Edinburgh LR* 176; Alexander “Dilemmas of Group Autonomy: Residential Associations and Community” 1989 (75) *Cornell LR* 1.

¹³ It has been said that the 1996 South African Constitution is a post-liberal document that authorises and requires social and legal transformation: see Klare “Legal Culture and Transformative Constitutionalism” 1998 *SAJHR* 146. On this basis it can be argued that the Constitution authorises and requires transformation of the South African Roman-Dutch tradition; see ss 8(3), 39(2) of the Constitution, compare further Van der Walt “Property Theory and the Transformation of Property Law” in Cooke (ed) *Modern Studies in Property Law* (2005) 361; Van der Walt “Transformative Constitutionalism and the Development of South African Property Law I” 2005 *TSAR* 655, Van der Walt “Transformative Constitutionalism and the Development of South African Property Law II” 2006 *TSAR* 1; Van der Walt “Legal History, Legal Culture and Transformation in a Constitutional Democracy” 2006 (12) *Fundamina* 1.

¹⁴ It has been said that apartheid land established hierarchies of rights that made it possible to privilege white land rights over Black occupation interests: Van der Walt 1999 *Koers* 259. The implication is that transformation has to dismantle these hierarchies. This argument was cited with approval by the Constitutional Court in *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 23.

¹⁵ In accordance with s 27A of the Supreme Court Act 59 of 1959, together with rule 31(5) of the Uniform Rules of Court. A similar procedure exists for proceedings in the magistrates’ courts: ss 66(1)(a) and 67 of the Magistrates’ Courts Act 32 of 1944. The Minister of Justice can limit the jurisdiction of the magistrates’ courts with reference to the amount involved; in terms of *Government Gazette* 16318 of 1995-05-01 the amount now stands at R100 000, but the parties can agree to the jurisdiction of the magistrates’ court when higher amounts are in dispute (s 45).

¹⁶ See n 15 above.

execution procedure was implemented in this particular instance to satisfy relatively minor debts that were not secured by bonds or related to acquisition of the property (“extraneous debts”).¹⁷ Sale in execution of the houses in question would have resulted in eviction of the indigent debtors and loss of their houses but, more importantly, having lost the houses they would not have been eligible for state housing again. The sale in execution was opposed and the matter ended up in the Constitutional Court, resulting in one of that Court’s most fascinating decisions: *Jaftha v Schoeman; Van Rooyen v Stoltz*.¹⁸ The matter was decided on the basis of section 26, the right to housing provision in the 1996 Constitution.

Section 26 of the Constitution provides that everyone has the right to have access to adequate housing; that the state must take reasonable legislative and other steps, within its available resources, to achieve the progressive realisation of that right; and that no one may be evicted from their home without a court order made after considering all the relevant circumstances.¹⁹ In *Jaftha* the Constitutional Court decided that sale in execution of residential property as allowed for in the Magistrates’ Courts Act imposed a limitation upon the affected owners’ right of access to housing and that such a limitation could only be justified²⁰ if the execution process was accompanied by proper “judicial oversight”.²¹ Since such oversight was not provided for in the Act, the Court read a suitable provision into the Act²² to make it clear that execution of residential property and eviction should not take place without a court having considered the justification of the procedure in view of all the circumstances.

Jaftha dealt with a case where the debt was not secured by a bond and under the circumstances it was reasonably easy to conclude that execution and eviction would be unjustifiable, particularly because the execution procedure was obviously being abused. However, in subsequent cases the question arose whether the established practice of obtaining summary judgment and execution was still possible in “normal” cases, where a bank issues summons against borrowers who default on repayment of loans

¹⁷ The original debts were cash loans made to buy food from local shops; they varied between R250 and R500

¹⁸ 2005 2 SA 140 (CC)

¹⁹ On the interpretation of this provision see Van der Walt *Constitutional Property Law* 354-369; McLean “Housing” in *Constitutional Law* Ch 55

²⁰ In terms of s 36(1), which provides that the rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose. On this provision see Woolman & Botha “Limitations” in *Constitutional Law* Ch 34

²¹ The term “judicial oversight” indicates that the warrant of execution may not, as the practice was, simply be issued by a clerk of a magistrates’ court or the registrar of the High Court without consideration of the possible limitation of s 26(1) rights by the execution. It can only be granted by a court after considering the justifiability of the limitation in view of all the circumstances; see the *Jaftha* case para 60

²² “Reading in” is one of the options that South African courts can resort to if legislation is found to fall short of constitutional requirements, particularly when the relevant provisions are in some way inadequate to allow interpretation in conformity with the Constitution (the other options being “reading down” when the provisions are overbroad, severance or, in extreme cases, declaring the provisions unconstitutional and invalid). See Du Plessis *Re-interpretation of Statutes* 2 ed (2002) 142; De Ville *Constitutional and Statutory Interpretation* (2000) 139-140

secured by mortgage bonds. In a number of instances the High Courts concluded or assumed that *Jaftha* had set higher standards for execution against residential property, even in “normal” cases,²³ and the creditors applying for execution were therefore required to show (by sufficient and suitable allegations in the writ of execution) that the execution would be justified under sections 26 and 36 of the Constitution, taking into account all the circumstances, including the effect of execution and eviction upon the defaulting debtor and his or her family. Other courts interpreted the effect of *Jaftha* differently and routine execution practice consequently became controversial because of uncertainty as to what must be alleged to justify an order for execution.

The main issue, namely whether *Jaftha* should apply to the “normal” procedure of summary judgment and execution for a loan secured by a mortgage bond and, if it should, whether the procedures for sale in execution in the Magistrates’ Courts Act and in the High Court Rules protected the interests of homeowners sufficiently to satisfy the requirements of section 26 of the Constitution, was eventually placed before the Supreme Court of Appeal in *Standard Bank of South Africa Ltd v Saunderson*.²⁴ The Court underlined the value and commercial importance of mortgage bonds²⁵ and pointed out that the problems highlighted in *Jaftha* did not necessarily apply

²³ *Standard Bank of South Africa Ltd v Snyders and Eight Similar Cases* 2005 5 SA 610 (C); *Nedbank Ltd v Mortinson* 2005 6 SA 462 (T). The deputy judge president of the Cape High Court issued an instruction that proceedings in instances like this should not be disposed of by the registrar but should be enrolled for hearing in open court. The Cape High Court granted judgment for the outstanding debt but declined to declare the mortgaged property executable, reasoning that the summonses were deficient in that they lacked allegations to show that an order for execution would be constitutionally permissible in accordance with *Jaftha*: *Standard Bank v Snyders* paras 23-25. In *Nedbank v Mortinson* para 33 the Johannesburg High Court held that these applications should be heard in open court, adding that writs of execution should contain a note drawing judgment debtors’ attention to the provisions of rule 31(5)(d). Rule 45(1) was amended by an order to read into that rule the words “and a court, after consideration of all relevant circumstances, has authorized execution against the immovable property”. Similar instructions were issued in the Natal High Court. In *Campus Law Clinic (University of KwaZulu-Natal Durban) v Standard Bank of South Africa Ltd* 2006 6 BCLR 669 (CC) para 14 the Constitutional Court pointed out the differences between the reactions of the Cape and the Johannesburg High Courts: in *Nedbank Ltd v Mortinson* the Johannesburg High Court (a) did not hold that the summons needed to contain allegations in relation to s 26 of the Constitution, whereas the Cape High Court in *Standard Bank v Snyders* did; (b) the Johannesburg Court held that it would be appropriate for the registrar to grant an order for execution against immovable property in certain circumstances, whereas the Cape Court made no such finding; and (c) the Johannesburg High Court held that rule 45(1) was unconstitutional and remedied it by reading certain words into the rule, whereas the Cape High Court made no such finding.

²⁴ 2006 2 SA 264 (SCA). In a sequel to the *Saunderson* case, the Campus Law Clinic of the University of KwaZulu-Natal (Durban) approached the Constitutional Court with an application for leave to appeal against the Supreme Court of Appeal decision (n 23). The Constitutional Court recognised that the situation was now uncertain and that there is a public interest in the question regarding the circumstances in which a creditor might execute against mortgaged property and the procedure to be followed before the execution is permitted; it also accepted that the question raises an important constitutional issue as reflected in the *Jaftha* case. However, it was not in the interests of justice to grant leave for appeal in this instance because many of the matters raised in the application go to the question of the constitutionality of s 27A of the Supreme Court Act and rule 31 of the Uniform Rules of Court; matters that were not raised in either the High Court or the Supreme Court of Appeal in the *Saunderson* case. For much the same reason, allowing the application for direct access to the Constitutional Court would imply placing it in the position as court of first and last instance, which is not favoured by the Court. Hence the alternative application for direct access was also dismissed.

²⁵ *Standard Bank of South Africa Ltd v Saunderson* 2006 2 SA 264 (SCA) paras 2-3.

to “normal” sales in execution according to the High Court Rules.²⁶ The mere fact that the property to be executed was residential is not enough to conclude that an infringement of section 26(1) will necessarily follow; therefore a sale in execution should normally, where there is no indication or allegation of abuse of court procedure, be allowed to proceed against a home specially bonded for the debt sought to be recovered.²⁷ However, despite the Supreme Court of Appeal’s rather cautious and restrictive reading of the effect of the *Jaftha* decision, it is significant that the High Courts nevertheless appear extremely vigilant to ensure that defaulting debtors are not evicted in contravention of the section 26(3) principle. The care taken by the High Courts to ensure that defaulting debtors are alerted to the potential infringement of their section 26 rights must be applauded; it demonstrates the awareness of potential constitutional implications that one would expect of the courts in dealing with even seemingly mundane, everyday matters in the constitutional dispensation.²⁸

The *Saunderson* decision obviously has enormous implications for the economy, but it also shows that what seems like a purely technical issue, namely attachment and execution practice, cannot be restricted to its (admittedly important) procedural or economic considerations, because it also affects the efficacy of the government’s land and housing programmes. It is therefore also pertinent to the question whether property can help foster democratic forms of governance, advance social justice, promote citizenship and build sustainable and supportive communities. Despite the potentially negative economic impact that stricter judicial control over sale in execution could have in “normal” mortgage situations, it is important that the Constitutional Court’s decision in *Jaftha* should not be marginalized or played down. *Jaftha* established the significant constitutional principle

²⁶ *Standard Bank of South Africa Ltd v Saunderson* 2006 2 SA 264 (SCA) paras 8-9: the debt in *Saunderson* was a home loan secured by a mortgage bond; in *Jaftha* it was an unrelated (extraneous) and unsecured debt. Furthermore, the execution procedure in s 66(1) of the Magistrates’ Courts Act differs from that prescribed in High Court rule 31.

²⁷ Paras 20, 19. In suitable cases the defendant can show that an order for execution will infringe s 26(1) rights, but a bank could not be expected to justify the grant of such an order in advance. The Court nevertheless laid down a rule of practice requiring that a summons in which an order for execution of immovable property is sought should inform the defendant that her right of access to adequate housing might be implicated: para 25. The practice direction was set out in para 27: “The summons initiating action in which a plaintiff claims relief that embraces an order declaring immovable property executable shall, from the date of this judgment [15 December 2005], inform the defendant as follows: ‘The defendant’s attention is drawn to s 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for execution will infringe that right it is incumbent on the defendant to place information supporting that claim before the Court.’” In *ABSA Bank Ltd v Xonti* 2006 5 SA 289 (C) the procedural safeguard was extended even further, the Cape High Court holding that the execution process should be instituted by notice of motion, as the substantive consideration of all the circumstances that is required cannot be dispensed with in terms of rule 6(11) notice procedure.

²⁸ Various High Courts adopted a practice to ensure that defaulting debtors are alerted to the potential infringement of their s 26(3) rights; see n 23 and n 27 above. In *Menqa v Markom* 2008 2 SA 120 (SCA) the Supreme Court of Appeal decided that the *Jaftha* principles apply to sales in execution that occurred prior to *Jaftha*, because no order had been made (in terms of s 172(1)(b)(i) of the Constitution) in that case to restrict the retrospective functioning of the declaration of invalidity. In addition, the Court held that s 70 of the Magistrates’ Courts Act does not apply to (and thus cannot save) a sale in execution that was null and void for having breached the judgment debtor’s constitutional rights. Accordingly, title cannot be transferred to further purchasers, even if they buy for value and in good faith.

that court procedures that have been established to facilitate “normal” commercial processes may not be abused to exploit or exacerbate the economic and social weakness and marginality of the poor, especially when doing so has a negative impact on state efforts to alleviate homelessness,²⁹ but this should not create the false impression that judicial oversight is required only in these extreme situations. It is therefore gratifying to note that the courts are careful post *Jaftha* not to restrict the effects of the decision unduly: even whilst acknowledging the importance of protecting commercial interests the courts remain alert to the possibility that section 26(1) rights might be threatened by execution procedures. The balance between the two sets of interests is then established by expecting that potentially negatively affected homeowners should raise and prove the existence of a threat to their section 26 rights, whereupon the courts must consider the justification of allowing execution in view of all the circumstances.

In an exhaustive recent study Lorna Fox³⁰ has indicated that the tension between “the commercial interest in property as capital, or as an investment asset” and “the home interests of occupiers”, which is the issue at the heart of the *Jaftha* decision, is also relevant outside of post-apartheid South Africa. Fox argues that, whereas the English legislature has stepped in to protect residential occupiers against arbitrary eviction by their landlords, protection against eviction by a secured creditor is not necessarily equally strong. This may be attributable to the fact that “the occupier’s *home* interest is not regarded as sufficiently strong to outweigh the creditor’s commercial claim to be paid, usually by realising the capital value of the property”,³¹ primarily because property theory lacks a suitable “organising framework” within which a convincing argument in support of that interest can be made. Mirroring the transformative perspective of South African post-apartheid land reform and housing policy quite strikingly, without referring to it, Fox suggests that:

“[G]reater recognition of the occupier’s home interest is not going to result in disregarding the creditor’s interest but, at most, in striking a different balance between the claims, perhaps by requiring that the creditor is, in certain circumstances, required to suffer a delay in the enforcement of his legal rights over property.”³²

This is exactly the result that judicial oversight and contextual leniency very often has had in important eviction cases decided under section 26(3)

²⁹ It is clear that the “normal” execution processes (aimed at foreclosure on home loans secured by a special mortgage bond) were cynically abused by the creditors and perhaps by their legal representatives in the specific facts of the *Jaftha* case; the Constitutional Court referred allegations about unprofessional conduct to the Law Society for investigation: *Jaftha* para 65. The abuse of legal process that was highlighted by *Jaftha* is not restricted to unsecured debts, although the nature of the debt and the existence of a mortgage bond is a factor to be taken into account in terms of the judicial oversight imposed by the decision. Theoretically, predatory lending practices could be relevant in future cases where the debt has been secured by a mortgage bond.

³⁰ Fox *Conceptualising Home: Theories, Laws and Policies* 33-78

³¹ 75-76

³² 96

of the South African Constitution and the anti-eviction provisions in the land reform legislation: not necessarily permanently to prevent eviction but at least temporarily to delay it to ensure that prescribed procedures are followed and that the effect of eviction for affected families is just and constitutionally justifiable, considering all the circumstances.³³

Such an alternative balancing of commercial investment interests and occupiers' home interests in residential property can play a large part in developing property rules and practices that advance social justice, promote citizenship and build sustainable and supportive communities. In the context of English law – the same holds for South African law and probably also for European Union law – Fox argues convincingly that this requires the development of a new “organising framework” in property theory; in fact, she has done much to inspire and direct the required theoretical development. In South African post-apartheid land reform and housing law the issues are largely similar, although the historical and constitutional context arguably makes it easier to justify and conceptualise the necessary changes. Interestingly, the Human Rights Act 1998 (together with other related recent developments in English law) is having the effect of making comparative study of English and South African law rewarding, particularly in the area of what Fox would perhaps refer to as “home interest” law.

3 Compensation for improvements by lessees

The question whether lessees of residential urban land have a compensation claim, secured by a lien, for improvements they made to the land during the currency of the lease has been in dispute in South African law for a long time. Improvements made with the consent of the landowner are not the problem; the question is whether the tenant can claim compensation for improvements made without the owner's consent. Since the decision of the then Appellate Division of the Supreme Court in *Van Wezel v Van Wezel's Trustee*³⁴ it was widely (albeit not uniformly) accepted that the Dutch *Placaeten* of 1658 and 1696³⁵ applied to both rural and urban

³³ See eg *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 5 SA 3 (CC); *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 ZACC 1 (19 February 2008) The latter decision is particularly important because it imposes a duty on local authorities and unlawful occupiers to engage with each other in good faith and seriously before approaching the court for an eviction order

³⁴ 1924 AD 409 416

³⁵ The *Placaeten* (like the *Politieke Ordonnantie* referred to in n 37 below) were statutes of the Dutch province of Holland, in this case to regulate the landlord-tenant relationship; they formed part of the Roman-Dutch law that was received as the basis of early South African law The *Placaeten* were one of the most important forms of legislation issued by the Dutch provinces during the 17th and 18th centuries, and were collected in the 10 volume Cau & Scheltus (eds) *Groot Plakkaat Boek* (1658-1796); see Hahlo & Kahn *The South African Legal System and its Background* (1968) 544

land and that the prohibitions in those ancient laws prevented lessees in both cases from claiming compensation for improvements made without the permission of the landowner.³⁶ In an extensive historical and doctrinal analysis Sonnekus recently concluded that the *Placaeten* indeed applied to urban as well as rural land and that the established practice was therefore correct.³⁷ However, the Supreme Court of Appeal subsequently³⁸ held that the *Placaeten* did not apply to urban land, thereby contradicting Sonnekus and overturning what was widely regarded as the established position.³⁹ In the Court's view, the hypothesis that the *Placaeten* also applied to urban

³⁶ This position was recently confirmed in *Syfreets Participation Bonds Managers Ltd v Estate and Co-op Wine Distributors (Pty) Ltd* 1989 1 SA 106 (W); *Palabora Mining Co Ltd v Coetzer* 1993 3 SA 306 (T); *Business Aviation Corporation (Pty) Ltd v Rand Airport Holdings (Pty) Ltd* 2006 2 SA 95 (W). In the latter case (para 13) the Johannesburg High Court pointed out that, while academic opinion on the issue was divided, the weight of judicial authority favours the view that the *Placaeten* applied to both urban and rural tenements. In any event, the Court considered itself bound by the Appellate Division's decision in *Van Wezel v Van Wezel's Trustee* 1924 AD 409 416. It should be noted that the distinction between urban and rural land is significant in both Roman and modern South African law, but for different reasons and obviously under very different circumstances. Under apartheid, rural land was all land not included (by legislation) in the jurisdiction of a local authority; this was changed by the Local Government: Municipal Systems Act 32 of 2000 and the Local Government: Municipal Structures Act 117 of 1998, according to which all land now falls under the jurisdiction of a local authority. In the context of landlord and tenant law the racial aspect plays a large role in modern South African law, *inter alia* because Black tenancy was much rarer on agricultural land than on urban land. Protective legislation was always aimed largely at urban lessees; urban tenancy is still regulated separately by the Rental Housing Act 50 of 1999, while lawful occupation of rural land is regulated by the Extension of Security of Tenure Act 62 of 1997. The separation is partly due to different use and occupation patterns in rural and urban areas, and partly a legacy of the apartheid tradition, according to which Black occupiers of rural land enjoyed either customary-type land rights on Black land or limited occupation rights as farm labourers on white land, whereas a form of westernised occupation rights was recognised in favour of tenants in the urban areas.

³⁷ Sonnekus "Huurders, Eiegeregtigde Huurverlenging Verpak as Retensieregte en Plakkate – Oeroud en tog Modern" 2006 *TSAR* 32. Like the Supreme Court of Appeal (see the discussion below), Sonnekus accepts the continued relevance and authority of the *Placaeten* for current South African law as a given. Sonnekus recognizes that reliance upon *De Beers Consolidated Mines v London and SA Exploration Co* (1893) 10 SC 359 is weakened by the fact that the Court's remarks about the applicability of the *Placaeten* to urban leases were *obiter*; he also points out (as the Supreme Court of Appeal did in *Business Aviation Corporation (Pty) Ltd v Rand Airport Holdings (Pty) Ltd* 2006 6 SA 605 (SCA)) that Van der Keessel's position in *Theses Selectae* is balanced out by the more restrictive view that he adopted in the *Praelectiones (ad Grotium)* (Sonnekus 2006 *TSAR* 50). He also recognizes that the Privy Council did not in fact confirm the decision in *De Beers* on an interpretation of the common law (Sonnekus 2006 *TSAR* 51). However, he finds a strong argument in favour of wide application of the *Placaeten* in a source that is ignored by most (academic and judicial) commentators, namely aa 31-34 of the *Politieke Ordonnantie* of 1 April 1580 (Sonnekus 2006 *TSAR* 39-40). As he points out, the *Politieke Ordonnantie* is an important source of South African common law and, whereas the wording of the *Placaeten* may have given rise to different interpretations, a 33 of the *Politieke Ordonnantie* (repeated in the introductions of the 1658 and 1696 *Placaeten*) makes it clear that the restrictions applied to lessees of all immovable property (Sonnekus 2006 *TSAR* 44, 47). Moreover, unlike the Supreme Court of Appeal, Sonnekus finds evidence in the early sources that the legislative intention behind the restrictions on compensation was to rectify a problem that occurred on both rural and urban land (Sonnekus 2006 *TSAR* 47).

³⁸ Without the benefit of Sonnekus' article in print; the publication date of the relevant issue of the journal and the date of the decision coincided almost perfectly.

³⁹ *Business Aviation Corporation (Pty) Ltd v Rand Airport Holdings (Pty) Ltd* 2006 6 SA 605 (SCA).

leases was wrong in law⁴⁰ and it could not be upheld on the basis of established practice either, since it was not in fact backed up by unbroken or uniform practice.⁴¹ The Supreme Court of Appeal thus established that the *Placaeten* do not apply to urban land, which means that urban lessees can in principle claim compensation for improvements made without the consent of the landowner – and exercise a lien to enforce their claim – without the restrictions imposed by the *Placaeten*. As Sonnekus indicates, this means that urban landowners are at least in principle exposed to burdensome compensation claims – backed up by liens – for improvements to their property that they neither authorised nor wanted. It therefore becomes important for landlords of urban residential property to ensure that compensation claims and liens for unauthorised improvements are clearly excluded in the lease.

Again, this may look like a purely technical issue relating to private land use rights that derives from and should be settled by private law; in this case the law pertaining to urban residential rental contracts. However, besides the obvious significance of the doctrinal and practical issues, this debate is interesting for an analysis of property rules and practices that promote social justice, good citizenship, and sustainable and supportive communities, because the rules involved and the divergent interpretations of them have always been aimed at establishing or reinforcing a certain view of social justice. Historically, the *Placaeten* of 1658 and 1696 are usually said to have been enacted to counter malpractices by lessees who abused the availability of a lien, based on an enrichment claim for improvements to the rental property, to prevent landowners from evicting them, particularly in instances where the landlord might have been unable to pay compensation for expensive improvements that she did not want.⁴² The *Placaeten*

⁴⁰ Paras 6-35 The decision in *De Beers Consolidated Mines v London and SA Exploration Co* (1893) 10 SC 359 (and its “confirmation” by the Privy Council), later confirmed in *Van Wezel v Van Wezel’s Trustee* 1924 AD 409 416, became the main authority for favouring the wider applicability of the *Placaeten* (and also for the decision in the case *a quo*); see n 37 above. However, the Supreme Court of Appeal regarded the two reasons offered for including urban leases under these rules unconvincing. First, the Supreme Court of Appeal argued, this finding in *De Beers* was *obiter* because the issue for determination in *De Beers* turned on the lease agreement and not the common law. Second, the fairness argument was unconvincing because it was clear from the sources that the abuse that the *Placaeten* sought to counter (extensive improvement of agricultural land, with the result that the owner would be unable to compensate the former lessee for the improvements and hence be unable to reclaim possession) was unheard of in urban leases (where similar improvements were less likely). Third, the Supreme Court of Appeal found the *De Beers* interpretation of Van der Keessel’s position in *Theses Selectae* on the applicability of the *Placaeten* unconvincing because of the restrictive view that he adopted in the *Praelectiones (ad Grotium)*, where he stated clearly that the *Placaeten* applied to agricultural land. Finally, the Supreme Court of Appeal rejected the view that the approach in *De Beers* was subsequently confirmed on appeal to the Privy Council, since the Privy Council also decided the matter on the interpretation of the contract and did not express a view on South African common law. Since the statement in *Van Wezel* about the applicability of the *Placaeten* to urban leases was also *obiter*, the only real Appellate Division- or Supreme Court of Appeal-level authority on the point is in fact *Spies v Lombard* 1950 3 SA 469 (A) 484C-D, where it was said clearly that the *Placaeten* applied to rural leases only.

⁴¹ *Business Aviation Corporation (Pty) Ltd v Rand Airport Holdings (Pty) Ltd* 2006 6 SA 605 (SCA) para 45. According to the decision in *Webster v Ellison* 1911 AD 73 92, misinterpretations of the common law can only be allowed to stand, once the error has been discovered, if the previous usage based on error can be described as a uniform and unbroken tradition. In the current situation, the Supreme Court of Appeal argued, such a uniform and unbroken line never existed, and hence it cannot be said that it is widely accepted that the *Placaeten* apply to urban leases.

⁴² This is known as enforced enrichment (*aufgedrängte Bereicherung*) in German law; see Westermann, Gursky & Eickmann *Westermann Sachenrecht* 7 ed (1998) 447; Baur & Stürner *Baur Sachenrecht* 17 ed (1999) 638.

therefore, in an effort to curb the abuses, restricted claims for compensation to improvements that were effected with the (prior or subsequent) consent of the landowner and required lessees to vacate the property before instituting such claims. It also abolished any lien or right of retention with regard to such claims, providing instead that the lessee who made the improvements could remove them before termination of the lease, provided that removal did not damage the rental property.⁴³ In other words, both the rules existing before the *Placaeten* and the amendments brought about by them can be seen as social engineering mechanisms aimed at changing the relationship between two classes of property holders, namely those with investments and home interests respectively (in Fox's terminology), according to a specific socio-political goal (namely to prevent poor landowners from being held at ransom by shrewd lessees). It can therefore be argued that when reconsidering the scope and effect of these rules and amendments we should pay attention to the current status of the groups involved, the relationship between them and the socio-political goals that inspired the change brought about by the *Placaeten*.

In Western European legal systems this problem is now regulated by codification or dedicated legislation which, by and large, confirms the general principles embodied in the *Placaeten*, namely that lessees must have the landlord's consent for any but the most trivial improvements; that they may remove such improvements before the end of the term provided they do not damage the property; and that compensation for improvements not removed is restricted to instances covered by consent and mutual agreement.⁴⁴ Liens for compensation claims are either excluded or restricted to a few carefully circumscribed instances. Generally speaking, the statutory restrictions imposed by (for instance) Dutch and German law apply also (perhaps even primarily) to urban leases, which means that the regime considered most suitable for urban rental properties by modern Western European legislatures resembles the practice that was assumed to have existed in South Africa prior to *Business Aviation Corporation*⁴⁵ and propagated by Sonnekus, as opposed to the regime that applies in South Africa according to the Supreme Court of Appeal decision. Given these resemblances, it is tempting to conclude that the arrangement by which both rural and urban lessees are generally discouraged from making improvements to the land without the consent or permission

⁴³ On the historical background see in general Cooper *Landlord and Tenant* 2 ed (1994) 328 *et seq*

⁴⁴ Compare a 7:215 *BW* (Dutch Civil Code): without written consent of the lessor (which may not be withheld unreasonably), the lessee may only make minor or small changes or improvements (that can be removed easily without significant cost or damage and that would not affect the rental potential of the property) to the property; such minor improvements and improvements made with consent may be removed during the term of the lease. In German law the tenant may also only make minor improvements (which can be removed without damage) without permission and, apart from improvements to rectify a material defect in the lease property, for which the lessee has both a right of removal and a compensation claim (§ 536a *BGB* (German Civil Code)); compensation is possible only if improvements have been authorised by the landlord. This construction is based on the absence of a compensation duty (§ 951 *BGB*) whenever the landowner has a right to demand removal of the improvements (§§ 1002, 1004 *BGB*); see Baur & Stürner *Baur Sachenrecht* 638. Similar rules apply in common law, albeit that the focus is on the tenant's right to remove attached movables and there is no question of a compensation claim for improvements that were not removed in time; compare Gray & Gray *Elements of Land Law* 4 ed (2005) 1 84-1 86; Ziff *Principles of Property Law* 4 ed (2006) 104-105

⁴⁵ *Business Aviation Corporation (Pty) Ltd v Rand Airport Holdings (Pty) Ltd* 2006 6 SA 605 (SCA)

of the landlord is the best possible regime for regulating improvements by lessees. In other words, Sonnekus is correct and the Supreme Court of Appeal wrong. However, such a general conclusion needs to be qualified.

It is true that the South African law and practice in this area are now out of sync with other modern systems, which is problematic in itself. What makes it worse is that the decision in *Business Aviation Corporation*, which brought about this state of affairs, does not seem to offer any particular policy or socio-political argument to justify the current position – the only justification seems to be a specific interpretation of the sources or legal tradition. It is curious that the Supreme Court of Appeal should think that the current legal position in South Africa should still depend purely on the correct doctrinal interpretation of Roman-Dutch laws, such as those promulgated in the *Placaeten*; it is even more curious to argue that current interpretations should be compared with the social conditions prevailing when the *Placaeten* were promulgated for the Netherlands more than 300 years ago.⁴⁶ Obviously, such a formalistic reliance upon a law promulgated more than three centuries ago in a different country on a distant continent cannot be supported abstractly, especially if one considers that the policy or socio-political arguments pertaining to this matter seem to support the opposite view, as demonstrated by modern legislation in other jurisdictions. At the very least a more overtly socio-political, policy-conscious analysis of the South African situation is called for.

However, having said that, one cannot simply conclude that the approach propagated by Sonnekus is to be preferred to the position of the Supreme Court of Appeal either. The landlord-tenant legislation adopted (and developed) in Western European legal systems since the end of World War I was introduced specifically to alleviate the post-war housing shortage and concomitant socio-economic problems, in other words with a particular socio-political goal in mind. In terms of post-war social-democratic housing policy, the aim of landlord-tenant law was to establish a fair balance between the interests of society, private landlords and tenants, with particular attention for the generally weak and marginalised position of tenants who cannot afford to acquire access to housing under open market conditions.⁴⁷ Modern Western European legislators opted, under these generally reformist, tenant-friendly circumstances, for a restrictive set of rules that protects landowners against

⁴⁶ In line with the earlier decision of the then Appellate Division of the Supreme Court in *Spies v Lombard* 1950 3 SA 469 (A) 484C-D, the rules derived from the *Placaeten*, including the rules that restricted the lessee's claim for compensation and abolished the right of retention, have become part of South African common law; see *Business Aviation Corporation (Pty) Ltd v Rand Airport Holdings (Pty) Ltd* 2006 6 SA 605 (SCA) para 10

⁴⁷ I am using very broad brush strokes here without much substantiation, but see the discussion of German Federal Constitutional Court decisions on social tenancy legislation in Van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 135-139. It is true that the general tenant-friendly tendency in Western European law of the middle of the 20th century has been reversed to a certain extent by legislation since the 1980s; see eg Bright *Landlord and Tenant Law in Context* (2007) 595, who points out that almost 90% of new private rented lettings available to the public are shorthold tenancies, which means that a very significant percentage of tenants in the private sector are excluded from substantive statutory protections. Moreover, in *Harrow London Borough Council v Qazi* [2004] 1 AC 983; *Kay v London Borough of Lambeth*; *Leeds City Council v Price* [2006] UKHL 10, the House of Lords was unwilling to interfere with policy decisions embodied in housing legislation and therefore refused to embark on an independent balancing exercise in individual cases.

compensation claims for improvements.⁴⁸ Sonnekus did not support his admittedly similar approach with an appeal to the same policy reasons – like the Supreme Court of Appeal, he relied mostly on what he saw as the better interpretation of the historical sources. Sonnekus argues that the *Placaeten* were originally intended to combat abuses by deceitful and fraudulent lessees; that the intention was to protect the landowner against such abuses; and that the result was – and still is – fair, because the restrictions left enough room for lessees with a genuine claim for compensation (for improvements made with the landowner's consent). He proposes that the *Placaeten* and their effects should be regarded as legitimate state interferences in the private landlord-tenant relationship because they still deliver a balanced and just result.

This argument is unconvincing because it ignores context, simply assuming that the original justification for the restrictions (the original power relationship between landlord and tenant, which made it possible for tenants to abuse landlords' legal and financial situation) still holds, which is arguably not the case. If anything, the original power relationship between landlord and tenant that gave birth to the restrictions in the *Placaeten* was probably reversed (at least as far as urban tenancies are concerned) by the time of the Industrial Revolution. Many tenants are nowadays poor and more vulnerable to abuse from landlords, especially in urban settings, and above all in South Africa, where the weakness of tenancy has been exacerbated by apartheid laws and practices. In the absence of modern codification or legislation, the ancient laws have to be interpreted and applied with greater sensitivity for social, economic and political context, even if one agrees with Sonnekus (like most modern Western European legislators do) that the restrictions should apply to urban residential leases. The legal position that Sonnekus pleads for (retention of the restrictions) seems sound and in line with tendencies in most modern systems, but his argument in support of this position is doctrinally just as formalistic and politically just as questionable as that of the Supreme Court of Appeal, which decided in favour of the opposite position with the same disregard for social context but on the basis of a different interpretation of historical authority.

In a nutshell, therefore, one could probably support Sonnekus rather than the Supreme Court of Appeal as far as the choice of a legal regime is concerned, but neither is convincing as far as the reasons for their respective positions are concerned. More and better socio-political and policy-conscious research and argument is required to substantiate the choice between the two positions in the current South African context.

Moreover, it may be necessary to reconsider the seemingly strong arguments in favour of restrictions on compensation claims altogether, at least in the land reform context. The question whether the fraught relationship

⁴⁸ I am specifically not making any historical claims here; it is possible that the codified versions of German (1900) and Dutch (1938 and 1992) law imposed these restrictions and that post-World War II amendments and legislation merely retained the traditional situation. My argument is that this would have to be regarded as a conscious decision in view of the fundamental changes that were made to landlord-tenant laws in the postwar period; it cannot be equated with the Supreme Court of Appeal's – or Sonnekus' – argument that the South African situation should remain the same despite large-scale social and economic reforms.

between landlord and tenant should still be regulated by a seemingly quaint and outdated legal tradition acquires special poignancy in view of the history of apartheid land law. The abuses to which lessees and other socially and economically weak occupiers of residential land were subjected under apartheid land law require extraordinary care when reconsidering or reconfirming the respective legal positions of landowners and residential tenants in the post-1994 land reform era.⁴⁹ Although land reform was not at stake in any of the recent South African improvement cases, it is possible to construe a land reform-sensitive argument concerning the social fairness of the restrictions imposed by the *Placaeten*. Without going into too much detail, two examples may be cited of considerations that might arise if the problem of compensation for unauthorised improvements to rental property were ever reconsidered in a land reform context. In fact, the considerations I have in mind might make it necessary to consider the suitability of the *Placaeten* even in rural areas.

The first example is the distinction, made in modern German law, between improvements made for the pleasure and luxury of the tenant *versus* improvements made to rectify shortcomings in the rental property not attended to by the landlord.⁵⁰ A moment's contemplation should indicate that the two situations are different and that a compensation claim (and possibly a lien) should be more readily available in the second case than in the first. Many apartheid tenancies, especially where the local or provincial authority was the landlord, would have involved renting either a bare piece of land or a very rudimentary structure, which would make it much easier to argue in favour of allowing even unauthorised improvements by the tenant to make the property (more, or even barely) habitable. With reference to the particular facts and the historical context, the question would then be whether this distinction is relevant in a particular land reform compensation case, but to my knowledge it has never been raised in the context of the *Placaeten* before.

The second consideration that might require rethinking the compensation issue and the relationship between landlord and tenant in a land reform setting is illustrated by a recent decision of the High Court of Ireland. In *John E Shirley v AO Gorman*⁵¹ the High Court had to scrutinise the Landlord and

⁴⁹ This statement can be justified in terms of the 1996 Constitution. According to s 8(3):

“In applying the provisions of the Bill of Rights to natural and juristic persons in terms of subsection (2), a court –

(a) in order to give effect to a right in the Bill, must apply, or where necessary, develop, the common law to the extent that legislation does not give effect to that right; and
 (b) may develop rules of the common law to limit the right, provided the limitation is in accordance with section 36(1)”;

and s 39(2):

“When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”

See further the Constitutional Court's approach in *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC), where it was said that ss 25 and 26 had to be interpreted together, with due regard for both the historical and the constitutional context, when adjudicating a conflict between a landowner and an occupier

⁵⁰ See n 44

⁵¹ [2006] IEHC 27. Compare the decision of the European Court of Human Rights in *James v United Kingdom* [1986] 8 EHRR 123, which concerned a similar set of circumstances; see further the US Supreme Court decision in *Hawaii Housing Authority v Midkiff* 467 US 229 (1984)

Tenant (Amendment) Act 1984, which provides a mechanism whereby tenants who qualify can acquire the fee simple interest by paying the landlord a prescribed percentage of the current value of the lease (as defined in the Act). The Court decided that the transfers authorised by the Act are not instances of compulsory acquisition. However, they are justified by the social justice principle of reforming the landlord-tenant relationship, partly by abolishing ancient “pyramid” interests of landlords who see their property interest purely as an income stream and who are not responsible for the maintenance or upkeep of the property; and partly by securing the investment of long-standing tenants who have either built any or most structures on the property in the first place or improved them beyond recognition and who might in any event be entitled to a reversionary lease under older social tenancy legislation.⁵² This means that certain landlord-tenant relationships have evolved in such a way that the landlord retains nothing more than an investment interest in the income stream from the tenancy, whereas the tenant has made all or the majority of the improvements that constitute the current character and value of the property and therefore holds much more than a contractual use right. The Irish legislature, like the English legislature, simplified land tenure by unifying those two interests in the hands of the tenant; the Irish High Court considered this a constitutionally justified implementation of the social justice principle.

This kind of development is not new to civil law systems either; similar “shifts in landownership” have been described and justified in Roman-Dutch law, referring to post-feudal instances where the interest of the landlord (symbolised in what eventually becomes a largely token rent) has become negligible or purely symbolic, while the interest of the actual user of the land has acquired the characteristics of ownership in all but form.⁵³ In the chequered history of Roman-Dutch land law, ownership has therefore sometimes been allowed to shift from the titular owner to the *de facto* user; the Irish case demonstrates that similar shifts are still considered necessary and justified in other legal systems. The question should be: should we acknowledge that (at least some) apartheid land users have acquired all the characteristic entitlements of ownership through their investment in the property and the duration of their occupation, so that a shift in landownership from landlord to tenant has taken place, and could this have any effect on the land reform process as it has hitherto been conceived? The issue has particular interest in cases where a state authority held ownership title of the land because of the management of tribal or “Black” land under apartheid legislation and practices, while the actual users and occupiers of the land went about their business as if nothing

⁵² Interestingly, the reforms are not limited to residential or agricultural tenancies or designed to benefit poor, socially weak or marginalised tenants, although the Court decided that the statutory scheme nevertheless forms part of a larger “continuum of legislation all of which was designed in different ways to improve ... the position of tenants”: see *John E Shirley v AO Gorman* [2006] IEHC 27, 42. Significant tenant-friendly legislative initiatives of the post-war period have been reversed to a certain extent by developments since the 1980s; see n 46 above.

⁵³ See Van Iterson “Beschouwingen over Rolverwisseling of Eigendomsverschuiving” in *Verslagen en Mededelingen van de Vereniging tot Uitgave van het Oud-Vaderlands Recht* (1971) 13 no 3, 407.

had changed since time immemorial.⁵⁴ By considering the resurrection of the notion of shifts in landownership, new and exciting possibilities could perhaps be created for promoting change and reform in land law that could support – rather than frustrate – citizenship, social justice and community.

In this regard it is again useful to consider the point made by Lorna Fox with reference to the tension between the home interest of occupiers and the investment interest of creditors: developing property rules and practices so as to foster citizenship, social justice and the building of sustainable and supportive communities might very well require reconsideration of the balance to be struck between the investment interests of landlords and the home interests of tenants, but conceptualising the correct balance requires development of a suitable theoretical framework.⁵⁵ I return to this aspect in the concluding section.

4 Gravesites on private agricultural land

My third example concerns public or constitutional law and land reform in a more obvious and direct fashion and is perhaps more uniquely South African than the first two. During the first decade of post-apartheid land reform, tension between white owners and Black occupiers⁵⁶ of agricultural land was one of the most intractable problems confronting policy makers and judges alike. Apart from occupation rights and security of tenure, perhaps the most controversial issue was the question whether occupiers of private farmland (farm workers or former farm workers) have burial rights, in accordance with customary law and practice, for themselves and family members on the farm where they live or work. This problem becomes particularly fraught when the farm owner refuses permission for a burial, which was often the case when the family no longer lived or worked on the farm or when the deceased was a family member who did not work or live on the farm.

The Extension of Security of Tenure Act 62 of 1997, which regulates the occupation rights of occupiers who reside on the land with the owner's permission (which includes most farm workers or agricultural labourers), gave farm workers a right to visit and maintain family graves on the land,⁵⁷ but originally this did not include the right to bury occupiers or their family members on

⁵⁴ There is evidence that land rights regimes introduced to African countries by colonial authorities have been ignored wholesale by the actual occupiers and users of the land; see Mattei "Socialist and Non-Socialist Approaches to Land Law: Continuity and Change in Somalia and other African States" 1990 (16) *Rev of Socialist Law* 17. At the same time, there are empirical indications that Black South African land users, at least in the rural areas (but the same probably holds true in urban areas), ignored the restrictions of the land rights regime imposed upon them by apartheid and created their own "informal freehold" system that ran counter to both the official customary land rights regime and the superimposed Roman-Dutch legal system; see Cross "Freehold in the 'Homelands': What are the Real Constraints?" in Cross & Haines (eds) *Towards Freehold: Options for Land and Development in South Africa's Black Rural Areas* (1988) 342.

⁵⁵ Fox *Conceptualising Home: Theories, Laws and Policies*

⁵⁶ Especially farm labourers and former farm labourers. The issues between farm owners and farm labourers are familiar to foreign lawyers working in the general area of labour-related tenancies, eg whether former labourers whose labour contracts have been terminated lose their right to occupy residential property on the farm; whether family members of workers who have been dismissed or who have died or have become unable to continue working because of old age or illness lose their occupation rights; etc.

⁵⁷ S 6(4)

the land. Various High Courts held that, without sufficiently clear legislative authority, enforcement of such a burial right against the owner's wishes and without her consent would bring about too much of an encroachment on the right of the landowner for the courts to read such a right into the Act by way of extensive interpretation. Consequently, it was assumed that occupiers and their family members could not be buried without the landowner's permission and that the landowner could withhold permission as one of the privileges of ownership.⁵⁸

In 2001 the Act was amended by inserting a provision that now allows burial of occupiers and their family members on the land in accordance with the occupiers' religious and cultural beliefs, provided that an established practice exists in that the landowner previously routinely gave permission for burials.⁵⁹ The occupier enjoys this right in balance with the rights of the owner and subject to reasonable conditions that may be imposed by the owner or person in charge.⁶⁰ The constitutional validity of this new provision was attacked in *Nhlabati v Fick*,⁶¹ the landowner arguing that section 6(2)(dA) was unconstitutional because it violated the protection of the landowner's right in section 25 of the Constitution.⁶² The Land Claims Court rejected the property argument, concluding that section 6(2)(dA) did not authorize an arbitrary deprivation of property because it struck the required balance between the rights of the landowner and the rights of the occupiers.

The Land Claims Court considered this argument against the background of the Constitutional Court decision in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*.⁶³ In view of the analysis of the phrase "arbitrary deprivation" in *FNB*⁶⁴ the Court decided that section 6(2)(dA) does not authorise arbitrary appropriation (deprivation)⁶⁵ of a grave, because the right to appropriate a grave must be balanced with the right of the owner, which means that the right of the owner could in certain circumstances conceivably outweigh the right to a grave.⁶⁶ Furthermore, the Court consid-

⁵⁸ *Serole v Pienaar* 2000 1 SA 328 (LCC); *Bührmann v Nkosi* 2000 1 SA 145 (T); the latter confirmed in *Nkosi v Bührmann* 2002 1 SA 372 (SCA). See Van der Walt "Property Rights v Religious Rights: *Bührmann v Nkosi*" 2002 *Stell LR* 394; Roux "Pro-Poor Court, Anti-Poor Outcomes: Explaining the Performance of the South African Land Claims Court" 2004 *SAJHR* 511 527-530

⁵⁹ "Established practice" is defined in s 1 as a practice in terms of which the owner or person in charge of the land or her predecessor in title routinely gave permission to people living on the land to bury deceased members of their family on that land in accordance with their religion or cultural belief

⁶⁰ S 6(2)(dA) as amended by the Land Affairs General Amendment Act 51 of 2001

⁶¹ 2003 7 BCLR 806 (LCC); see Van der Walt *Constitutional Property Law* 325-326, 344 *et seq*

⁶² Another ground for the application was the allegation that the new section intruded upon a functional area of exclusive provincial legislative competence

⁶³ 2002 4 SA 768 (CC)

⁶⁴ The *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) methodology requires the court to consider the possibility of unconstitutional deprivation first, raising the issue of unconstitutional expropriation only if there is no such deprivation or if it could be justified under s 36

⁶⁵ In the South African context (s 25(1)) this term refers to what is sometimes called regulatory restrictions on the use of property. In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) the Constitutional Court's approach was that deprivations constitute a wide category that includes both uncompensated regulatory restrictions and compensated expropriations or compulsory acquisitions

⁶⁶ *Nhlabati v Fick* 2003 7 BCLR 806 (LCC) para 31

ered the facts that an occupier has the right to establish a grave only if there is an established practice of giving permission for burials, which presupposes some kind of pre-existing consensus between the landowner and the occupiers about burials;⁶⁷ that the establishment of the grave would in most cases constitute a relatively minor intrusion into the landowner's property rights,⁶⁸ and that the right to bury an occupier or a family member according to section 6(2)(dA) was enacted to fulfil the state's constitutional mandate to provide occupiers legally secure tenure. Considering the importance of the religious or cultural beliefs of many occupiers regarding burial of family members close to their residence, the constitutional mandate would in most cases be sufficient to justify the deprivation of some incidents of ownership.⁶⁹

Again in line with the *FNB* approach, the Court next considered the possibility that section 6(2)(dA) might constitute or authorise an uncompensated and hence unconstitutional expropriation of property. In its earlier *Serole* decision⁷⁰ the Land Claims Court stated that the granting of a right to establish a grave as of right would amount to the granting of a servitude, which would amount to a *de facto* expropriation without compensation. In *Nhlabati v Fick* the Court again considered this argument and its implications for the constitutional validity of section 6(2)(dA), without deciding that the section indeed amounted to such an expropriation.⁷¹ The Court pointed out that statutory permission for what amounts to an expropriation of a right could either imply that compensation was due or that the absence of compensation was justifiable under section 36 of the Constitution. It concluded that the statutory obligation of a landowner to allow an occupier to appropriate a gravesite on her land without compensation would be reasonable and justifiable as meant in section 36, even in the absence of compensation, having regard to the following circumstances: the right does not constitute a major intrusion on the landowner's property rights; the right is subject to balancing with the landowner's property rights and may sometimes be subject to them; the right exists only where there is an established past practice with regard to grave sites; and the right will enable occupiers to comply with religious or cultural beliefs that form an important part of their security of tenure, and giving statutory recognition to their security of tenure is in accordance with the constitutional mandate.⁷² Accordingly, even if one accepted that section 6(2)(dA) authorised expropriation of grave sites without compensation, which on the face of it is in conflict with section 25 of the Constitution, this result would be reasonable and justifi-

⁶⁷ Para 31 It is not required that the owner must have allowed the occupier or family involved in a specific dispute to bury their family members in the past – the question is merely whether burials of occupiers took place in the past or not. Moreover, it is the owner of the land in the abstract sense that is involved and not the specific owner at the time of a particular dispute; a practice would also be established if previous owners or other persons in charge of the farm allowed burials

⁶⁸ Para 31

⁶⁹ Para 31

⁷⁰ See *Serole v Pienaar* 2000 1 SA 328 (LCC) para 16 (335D). *Serole* was decided by Gildenhuys J, who was again one of the judges in *Nhlabati v Fick* 2003 7 BCLR 806 (LCC)

⁷¹ *Nhlabati v Fick* 2003 7 BCLR 806 (LCC) paras 32-35

⁷² Para 35

able under section 36 of the Constitution. The constitutional challenge against section 6(2)(dA) was consequently dismissed.

The Court's assumption (without deciding the issue) that the establishment of a grave site in terms of section 6(2)(dA) of the Act could constitute an expropriation of a servitude without compensation may be debatable, but the interesting aspect of the decision is that the Court decided the constitutional challenge with reference to the social context and the reform-oriented nature of the Act, instead of simply dealing with the matter against the background of the presumed inviolability of the common law right of ownership. The decision that section 6(2)(dA) would be justified even if it established an expropriation of private land without compensation was a courageous one that reflects the Court's thorough appreciation of the full implications of the Constitution's transformative ideals; in this regard *Nhlabati* may be said to develop land law in a way that has the potential to promote citizenship, social justice and the building of sustainable and supporting communities.

5 Concluding remarks

There are probably quite a few countries, including (but by no means restricted to) new or emerging democracies, where politicians, lawyers and civil society leaders alike hope that property, among other institutions and practices, can foster democratic forms of governance, advance social justice, promote citizenship, build sustainable and supportive communities, and enhance stewardship of the global environment and its natural resources. Perhaps the hope that property would play a particularly significant role in this regard is based on the fact that property either played a large part in destroying or suppressing these social goods in the past or at least demonstrated their absence most glaringly by upholding and entrenching the divide between rich and poor, powerful and powerless. South Africa is one country for which both these statements are true.

I selected the examples I discuss above for at least two reasons. First, the last example from case law on the right to a burial on privately owned agricultural land exemplifies what one might describe as good practice in current reform-driven adjudication on transformative constitutionalism.⁷³ Both the legislation involved (section 6(2)(dA) of the amended Extension of Security of Tenure Act) and the decision of the Land Claims Court in *Nhlabati v Fick* demonstrate the kind of context-sensitive and Constitution-conscious reaction to existing law and the need for meaningful reform that is required to confront the legacy of apartheid and create space for the advancement of social justice and the promotion of citizenship and community. I would argue that much of the affective and attitudinal characteristics demonstrated by legislature and court in this example would bear scrutiny and consideration in other jurisdic-

⁷³ The phrase is from Klare 1998 *SAJHR* 146, an enormously influential critique of South African legal culture and assessment of the possibilities for realising the transformative goals set out in the 1996 Constitution

tions where development of these or similar social values and goods might also be in demand.

My first two examples were selected for a different purpose. Neither of them is obviously or directly relevant to the promotion of citizenship or community and, apart from the *Jaftha* decision of the Constitutional Court, neither demonstrates any particularly hopeful indication of good practice that could guide property lawyers in making their contribution towards these goals. In that sense my conclusion from these examples – and my purpose in including them here – is what probably also inspired Lorna Fox when she lamented the absence of a suitable “organising framework” in property theory with which a convincing argument could be made, when necessary, in support of the occupier’s home interest as against the creditor’s commercial claim to realise the capital value of the property.⁷⁴

It appears problematic that public law (including constitutional law, human rights law, administrative law and related fields) has already produced (or at least started producing) the kind of theory that Fox refers to, but so far not enough has been done in the areas of private and commercial law. Even worse, the “hard core” of private law doctrine is often considered free of this kind of “mushy” socio-political theorising. As a result, property law in particular is often still dominated by facile and outdated notions of absolute ownership or the overarching economic importance of security of title, which usually results in falling back into what Gregory Alexander refers to as “the formalist trap”.⁷⁵ Opportunities to consider and debate possible reforms or changes in what may otherwise look like purely technical legal regimes are lost in the process. The traditional argument that Sonnekus offers in support of restrictions imposed on compensation claims against the landlord for unauthorised improvements⁷⁶ demonstrates the problem quite nicely: Sonnekus argues, primarily for doctrinal reasons, in favour of restrictions that are also favoured by most current Western European systems, albeit for functional rather than traditional reasons. Moreover, the modern statutory instruments that imposed these restrictions did so consciously, within a tenant-friendly regime that is certainly not primarily informed, as Sonnekus’ argument is, by the hierarchical supremacy of individual ownership. This proves that context-sensitive and reform-friendly analysis is not necessarily or fundamentally opposed to individual ownership or that it would always produce outcomes against the owner.⁷⁷ However, when room is left for further reflection on what may seem like a straightforward, purely technical doctrinal matter, historical and

⁷⁴ Fox *Conceptualising Home: Theories, Laws and Policies* 12 See the discussion in the first example above

⁷⁵ Alexander *The Global Debate over Constitutional Property: Lessons for American Takings Jurisprudence* 24 *et seq* describes this trap as “the assumption or claim that without constitutional protection, property rights are unlikely to enjoy the degree of security and stability that is necessary for a properly functioning liberal democracy as well as for an efficient free market economy”

⁷⁶ See the discussion of the second example above

⁷⁷ The same conclusion was reached in a very important South African Constitutional Court decision on eviction, namely *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC), where it was said that considering the justifiability of granting an eviction order against the backdrop of all the relevant circumstances does not mean that eviction is rendered impossible, even when the evictees have no access to alternative accommodation

context-sensitive analysis suggests that there may be reasons why the seemingly rational and fair regime preferred by Sonnekus and the modern Western European legislators could be inappropriate in land reform contexts, at least some of the time. In such a context, the required balance between sustainable economic development, building of supportive communities and social justice might be different than in contemporary Western European or even other developing jurisdictions. Nevertheless, even then it might prove valuable to consider and evaluate the merit of policy choices made during the postwar housing crisis in Western Europe.

Fox is certainly correct when she says that we need a suitable “organising framework” in property theory with which a convincing argument could be made, when necessary, in support of non-ownership or non-property “home” interests and against firmly established and traditionally revered and prized ownership or real rights. At a time when context-sensitive decisions to that effect are clearly required by the demands of social justice, citizenship and community, this is indeed a serious shortcoming that deserves our urgent and dedicated attention. Property theorists can only make a contribution to this debate if they can succeed in creating room for critical reflection even in the seemingly most politics-neutral dark corners of private law doctrine and tradition.⁷⁸

SUMMARY

The article examines the ability of property to advance social justice, promote citizenship and build sustainable and supportive communities, particularly in post-apartheid South Africa. Under the apartheid system property law was one of the mechanisms that undermined social justice and citizenship, but the 1996 Constitution requires that the law be developed in a way that would promote the constitutional goals of freedom, equality and human dignity. The article investigates three recent examples from legislation and case law, two from private law and one from land reform, in which the law arguably was or could have been developed so as to reverse the legacy of apartheid and promote social justice and citizenship, in line with the transformative goals of the Constitution. The examples involve judicial scrutiny of attachment and sale in execution of residential property; compensation for improvements to immovable property made by a lessee without the permission of the landlord; and the establishment of graves and burial sites on agricultural land without the permission of the landowner. The conclusion points out that these examples demonstrate wide-ranging possibilities for context-sensitive and constitution-conscious development of existing law that can create space for the advancement of social justice and the promotion of citizenship and community, even in what might initially appear to be politically neutral and narrow doctrinal disputes.

⁷⁸ I hope to develop the theoretical foundations and the arguments raised here further in *Property in the Margins* (forthcoming, Hart Publishing, Oxford)