(RE)DEFINING THE CONTOURS OF OWNERSHIP: MOVING BEYOND WHITE PICKET FENCES

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1 Introduction: Ownership as a white picket fence

White-picket-fence-syndrome is colloquially understood as a state of mind where people blindly hold on to the idea of their perfect lifestyle, regardless of the inevitable life factors that renders it impossible.[2] It is the illusion of happiness, where things look good on the outside but there is a thunderstorm on the inside. Sara Stender, an integrated business consultant and social entrepreneur, explains the white-picket-fence-syndrome as the perception that

> "[t]he lawn is manicured, the house is freshly painted, and there might even be children's laughter in the distance. The Facebook page is in order, with all the right photos and engaging discussions, and our daily routine is representative of a balanced (jam-packed) life. We are 'keeping up' and 'getting through the day'."[3]

The proverbial white picket fence from which this syndrome purportedly derives, symbolises the dream of the ideal middle-class lifestyle, with a large home, peaceful living environment, a private yard and two point four children in the home. Although most people would now admit that the dream is changing, in many respects there is still a powerful drive in society towards attaining this dream. Considering some aspects of our daily lives, we all, to a certain extent, suffer from white-picket-fence-syndrome. Our persistent yearning for boxes that we can tick, or place people in, is essentially a manifestation of our need to gravitate towards the ideal of the white picket fence. Lawyers are probably most prone to admit that they have a natural inclination towards a tick-box approach. It is in this respect that Joseph William Singer explains that

> "[p]rotection against change is something for which most human beings, at least in part, yearn. It is a staple of our daily lives that we welcome change that we want, and fiercely resist change that we do not want."[4]

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[2] C Hageman "White picket fence syndrome by Cris Hageman" (26-03-2015) *Colide* <http://wecollide net/white-picket-fence-syndrome-by-cris-hageman/> (accessed 11-06-2018)

[3] SD Stender "White picket fence syndrome and brown fat" (08-06-2015) *Sarastender* <https://sarastender com/2015/06/08/white-picket-fence-syndrome-and-brown-fat/> (accessed 11-06-2018)

[4] J Singer *The edges of the field* (2000) 42

Therefore, it is difficult for most human beings to comprehend and explain why change is required. In South Africa, the manifestation of white-picket-fence-syndrome arguably takes on a different dimension; one where identity is potentially undermined, and integrity sometimes compromised, for the attainment of the perfect lifestyle associated with a white picket fence. It becomes difficult for us to comprehend anything else but the white picket fence as the ideal lifestyle that we should all aspire to; and any change in thinking about this perfect way of life becomes difficult, if not impossible, to accommodate outside of what we know and have become accustomed to. It has, however, become increasingly necessary to consider whether our understanding of what exactly the "white picket fence" is, is in fact the same. In a metaphorical sense, and more directly applicable to the topic at hand, it becomes necessary to ask what ownership as a white picket fence looks like, and whether that description of ownership is an accurate reflection of the notion within the new constitutional dispensation in South Africa.

The idea of owning property in modern times comes with a very idealistic view of what ownership offers the holder of the right. Ownership is very often depicted, sometimes even subconsciously, as a white picket fence in the sense that it defines the boundary between us and them.[5] It is evidently the veto right that trumps any other lesser right so that we find it easier to see certain degrees of access, use and sharing as exceptions, qualifications, and caveats to our general understanding of ownership. However, it is important to consider whether what has ordinarily been termed exceptions, qualifications and caveats to the notion of ownership, may in fact require a *redefining* of the contours of ownership. This point is not novel. Many property theorists have contributed substantially to the debates around a changed idea of ownership in modern times.[6] My contribution in this article is to simply add to the discussion where I think that there are a number of examples in property law that have evolved to show the same type of thinking regarding the redefining of the contours of ownership.

For purposes of the article, I have divided the reflection into three main parts. First, I would like to start exploring the idea of ownership as a white picket fence. I believe that this will set the platform for a particular stance that today still dominates our common understanding of ownership. I would then like to provide some examples and show how it calls for a redefining of the contours of ownership into a transformed notion of ownership in modern South African law. In the final part of the article, I will conclude with some

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5 For the South African law on mutual boundaries, party walls, and fences, see AJ van der Walt *The law of neighbours* (2010) ch 2; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's The law of property* 5 ed (2006) 129

6 See for instance DP Visser "The 'absoluteness' of ownership: The South African common law in perspective" (1985) *Acta Juridica* 39 39-52; P Birks "The Roman law concept of dominium and the idea of absolute ownership" (1985) *Acta Juridica* 1 1-38; AJ van der Walt & DG Kleyn "Duplex dominium: The history and significance of the concept of divided ownership" in DP Visser (ed) *Essays on the history of law* (1989) 213 213-214; AJ van der Walt & P Dhliwayo "The notion of absolute and exclusive ownership: A doctrinal analysis" (2017) 134 *SALJ* 32 32-52; P Dhliwayo *A constitutional analysis of access rights that limit landowners' right to exclude* LLD dissertation Stellenbosch University (2015); AJ van der Walt "Sharing servitudes" (2015) *European Property LJ* 162 200

thoughts on what may be important for property law scholars taking this notion of ownership further.

2 Defining ownership as a white picket fence: Questioning the goalpost

The most commonly held perception of ownership is the idea that ownership gives the holder of the right the unfettered, absolute power to trump any other right or interest that may confront ownership.[7] From a number of judgments handed down in the new constitutional dispensation dealing with different aspects of property law, it has become evident that the argument in favour of ownership as a "trump" has to a large extent become untenable.[8] Nonetheless, there are various contexts within which the idea of ownership as a trump has been advanced. Most notably, and indeed the first situation where I would like to highlight this view of ownership as a trump, is visible in the context of the owner's right to vindicate his property using the powerful *rei vindicatio* remedy.[9] The *rei vindicatio* (or vindicatory action) is described in South African law as a real remedy because it seeks to prevent interferences with ownership, or inhibit breaches of certain entitlements that are inherent in ownership.[10] The rationale behind the remedy is encapsulated in the idea that no-one may be deprived of physical control of their property without their consent. The *rei vindicatio* therefore serves as an important tool to enforce the owner's relatively strong right against the world and it is therefore not surprising that the court in *Chetty v Naidoo*[11] held that "[i]f there be [any] doubt whether there is an existing right enforceable against the owner, *the right of ownership must prevail*".[12] Van der Walt explains this theoretical starting point as follows:

> "[T]he protection afforded by this [vindicatory] action 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 will most likely be upheld in the absence of good reason for not doing so. …The 'normality assumption' that the owner is entitled to possession unless the occupier could raise and prove a valid defence, usually based on agreement with the owner, formed part of the Roman-Dutch law and was deemed unexceptional in early South African law, and it still forms the point of departure in private law." [13]

The "normality assumption" as coined by Van der Walt underpins the idea that the protection afforded by the *rei vindicatio* is considered the "normal state of affairs" and the *rei vindicatio* should therefore be awarded unless there is good reason not to do so. The use of the *rei vindicatio* in the context

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7 Visser (1985) *Acta Juridica* 39-52; Birks (1985) *Acta Juridica* 1-38; Van der Walt & Kleyn "Duplex dominium: The history and significance of the concept of divided ownership" in *Essays on the history of law* 213-214

8 See, eg, *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) Some more specific examples are provided in the sections that follow

9 ZT Boggenpoel *Property remedies* (2017) 38-90

10 CG van der Merwe *Sakereg* 2 ed (1989) 346

11 1974 3 SA 13 (A)

12 Para 23 [emphasis added]

13 AJ van der Walt "Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land-reform legislation" (2002) *TSAR* 254 257-258

of immovable property usually took place in the preconstitutional period in the form of an eviction order.[14] A tool like "[e]viction, is [therefore seen as] a powerful legal instrument: a remedy with which a landowner can enforce her superior right to exclusive possession against almost any occupier".[15] In the preconstitutional period, the owner's right to demand eviction was further strengthened by the legislation that was applicable to deal effectively and swiftly with evictions.[16] Muller explains that the

> "common-law right to evict was reinforced through legislation in order to ensure the stability and security of individual owners through the exercise of arbitrary and discriminatory state power".[17]

Singer and Underkuffler have called this the presumptive power of ownership, which is a central feature of the right to evict.[18] Dyal-Chand similarly points out that the consequence of this type of approach to ownership and the (relatively strong) right to be free from interference with that ownership (or the *ius negandi*),[19] is that the main role of property law (and the remedies used to enforce property rights) is to protect owners from non-owners.[20] Remedies used to protect ownership are therefore primarily based on the right of exclusion.[21] Badenhorst et al[22] argue that this exclusionary approach shows how ownership is seen as the pinnacle of all rights within a hierarchy of rights, which essentially points to a hierarchical approach to landownership and other rights to land.

Although this theoretical starting-point seems to have formed the basis for understanding the protection of ownership of property in the preconstitutional era, this approach is increasingly coming under scrutiny because it fails to provide acceptable solutions in the context of land-reform legislation.[23] It has become clear in the constitutional dispensation that the landscape for the protection of ownership has changed considerably. It may have been possible before the enactment of the Constitution of the Republic of South Africa, 1996 ("Constitution") for the owner of land to use the *rei vindicatio* against anyone who unlawfully occupied the property and use thereof usually took the form

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14 Boggenpoel *Property remedies* 46

15 AJ van der Walt "Housing rights in the intersection between expropriation and eviction law" in L Fox O'Mahony & JA Sweeney (eds) *The idea of home in law: Displacement and dispossession* (2011) 55 55 See also TW Merrill "Property and the right to exclude" (1998) 77 *Nebraska LR* 730 733, where Merrill contends that "rights associated with property [are essentially based on the right to exclude and] require some institutional structure that stands ready to enforce these rights"

16 See *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 8-13 See also JM Pienaar *Land Reform* (2014) 662-667; G Muller "The legal-historical context of urban forced evictions in South Africa" (2013) 19 *Fundamina* 367 367-396

17 Muller (2013) *Fundamina* 369, 395

18 JW Singer *Entitlement: The paradoxes of property* (2000) 3; LS Underkuffler *The idea of property: Its meaning and power* (2003) 65-70 See also Van der Walt "Housing rights in the intersection between expropriation and eviction law" in *The idea of home in law* 55; AJ van der Walt *Property in the margins* (2009) 39, 59

19 Badenhorst et al *Silberberg & Schoeman's The law of property* 93

20 R Dyal-Chand "Sharing the cathedral" (2013) 46 *Connecticut LR* 647 651

21 651 See also Merrill (1998) *Nebraska LR* 736 Merrill argues that the right to exclude is the *sine qua non* of what constitutes property He asserts that "[w]ithout the right to exclude, there is no property"

22 Badenhorst et al *Silberberg & Schoeman's The law of property* 65

23 65

of an eviction order.[24] The default position in the case of the owner's right to evict before the enactment of the Constitution can be explained as follows:

> "In private law, ownership of land is generally protected strongly and the owner can evict unwanted occupiers fairly easily, at least in principle. This strong and straightforward right to evict is said to be based on a central incident of ownership, namely the owner's right to undisturbed and exclusive possession of her property, and it kicks in whenever someone occupies the property against the owner's will or without her permission."[25]

However, the final Constitution has played a significant role in the extent to which the *rei vindicatio* is applied in the context of eviction. Sachs J in *Port Elizabeth Municipality v Various Occupiers* ("*Port Elizabeth Municipality*")[26] explains this change as follows:

> "In sum, the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. … The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case."[27]

It is therefore clear that the Constitution mandates a normative break in the way in which evictions take place in the constitutional dispensation.[28] Consequently, Pienaar explains that the current approach to unlawful occupation and eviction is that

> "[t]he 'contravention paradigm', which was founded on private ownership rights and controls and powers of government, had [in terms of the constitutional intervention] been replaced by a human rights paradigm".[29]

Liebenberg also shows that the new normative framework underpinned by the Constitution requires a new paradigm within which evictions are to take place.[30] More specifically, it is accepted that section 26(3) of the Constitution has had a significant impact on the use of the *rei vindicatio* in the context of immovable residential property.[31]

The new normative framework is required on two levels. On a procedural level, Constitutional Court ("CC") decisions that prescribe the manner in

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24 *Chetty v Naidoo* 1974 3 SA 13 (A)

25 Van der Walt *Property in the margins* 53–54

26 2005 1 SA 217 (CC)

27 Para 23

28 See for instance *Jaftha v Schoeman; Van Rooyen v Stolz* 2005 2 SA 140 (CC) para 29

29 Pienaar *Land Reform* 668

30 S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 311–316

31 Section 26 of the Constitution provides that:

> "(1) Everyone has a right to have access to adequate housing (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all relevant circumstances No legislation may permit arbitrary evictions"

See also *Ndlovu v Ngcobo; Bekker v Jika* 2003 1 SA 113 (SCA) para 20, where the court held that "buildings or structures that do not perform the function of a form of dwelling or shelter for humans [like commercial properties] do not fall under PIE and since juristic persons do not have dwellings, their unlawful occupation is similarly not protected by PIE"

which evictions should take place in light of the Constitution sustain the new eviction paradigm[32] (or human rights paradigm).[33] On a substantive level, the legislative and constitutional framework aims to incorporate the owner's right to exclude (which section 25 of the Constitution strengthens) and the interests of the unlawful occupiers not to be unlawfully evicted (as buttressed in section 26(3)).[34] This may include a number of substantive considerations that certainly did not feature in eviction jurisprudence in the preconstitutional era. For instance, the recognition of the "home" as a substantive interest presumably worthy of constitutional protection, the rights and needs of vulnerable people, the provision of alternative accommodation and meaningful engagement as a participatory mechanism to ensure that all interests are adequately considered before an eviction takes place. Courts have, for the most part, accepted and confirmed this new constitutional standard pertaining to evictions, and its impact on a landowner's ability to demand an eviction order.[35] The result is a substantial mind shift when it comes to the owner's ability to vindicate his property by way of eviction. It certainly was not an easy mind shift to make in the constitutional dispensation. It is therefore not startling that the court in *Betta Eiendomme (Pty) Ltd v Ekple-Epoh*[36] concluded that:

> "The right of ownership as recognised before the Constitution has not been affected by the Constitution … No necessity arises to restrict rights of an owner against an illegal occupier to 'promote the values that underlie' the Constitution or to 'promote the spirit, purport and objects of the Bill of Rights' (sections 39(1) and 39(2)). If the Legislature in the Constitution or elsewhere intended a change in law

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32 Liebenberg *Socio-economic rights* 338

33 Pienaar *Land Reform* 668 Some examples include: *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC); *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) There are also other dimensions to the procedural requirement in s 26, for instance meaningful engagement, joinder and notice The CC has adopted its jurisprudence on meaningful engagement For further commentary on the remedy of meaningful engagement, see L Chenwi "A new approach to remedies in socio-economic rights adjudication: *Occupiers of 51 Olivia Road and others v City of Johannesburg and others*" (2009) 2 *CCR* 371-393; B Ray "Proceduralisation's triumph and engagement's promise in socio-economic rights litigation" (2011) 27 *SAJHR* 107-126; G Muller "Conceptualising 'meaningful engagement' as a deliberative democratic partnership" (2011) 22 *Stell LR* 742-758; L Chenwi "'Meaning engagement' in the realisation of socio-economic rights: The South African experience" (2011) 26 *SAPL* 128-156; S Liebenberg "Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'" (2012) 12 *African Human Rights LJ* 1-29; S van der Berg "Meaningful engagement: Proceduralising socio-economic rights further or infusing administrative law with substance" (2013) 29 *SAJHR* 376-398; S Liebenberg "Participatory approaches to socio-economic rights adjudication: Tentative lessons from South African evictions law" (2014) 32 *Nordic Journal of HR* 312-330 319 For further commentary on the requirement of notice, see G Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African Law* LLD dissertation Stellenbosch University (2011) 114-145; SB Radebe *The protection of the right of access to adequate housing by the South African Constitutional Court* LLM thesis Stellenbosch University (2013) 134, 139-140 For further commentary on the requirement of joinder, see G Muller & S Liebenberg "Developing the law of joinder in the context of evictions of people from their homes" (2013) 29 *SAJHR* 554-570

34 See the Preamble to the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

35 For contrasting views, see *Emfuleni Local Municipality v Builders Advancement Services CC* 2010 4 SA 133 (GSJ); *Marlboro Crisis Committee v City of Johannesburg* ZAGPJHC 07-10-2012 case no 29978/12 See also A Walters "A balancing act between owners and occupants: Is PIE constitutional?" (2013) 22 *De Rebus* 22 22-25, in which the author expressed scepticism about PIE's constitutionality See also J Scott "The precarious position of a landowner vis-à-vis unlawful occupiers: Common-law remedies to the rescue?" (2018) *TSAR* 158 158-176

36 2000 4 SA 468 (W)

> or in equity, it should have made itself clear. Ownership still carries within it the right to possession. Similar to the inflatable ball, ownership still reflates to its full content as and when any burden such as the rights created by tenancy falls away."[37]

A statement like this in the early days of constitutional democracy created the impression that the Constitution did not in fact have the far-reaching implications on ownership as anticipated.[38] Although this may have traditionally been the case, the commencement of the Constitution changed matters markedly, for two reasons in particular: first, it enabled the promulgation of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("PIE"), thereby impacting immediately on an owner's right to evict by abolishing the common-law *rei vindicatio* when PIE is applicable;[39] and secondly, it provided for a right not to be evicted arbitrarily, thereby also enabling a human rights dimension linked to access to housing, in terms of section 26(3) of the Constitution. Consequently, the protection of immovable property, including homes and dwellings, has been changed irrevocably.[40] There is only one system of law dealing with eviction from homes: PIE, as interpreted and applied within the context of sections 25 and 26, respectively.[41] In this regard, it should be noted that substantive considerations did not feature in the application of the *rei vindicatio* to effect evictions in the preconstitutional era and are far removed from our traditional understanding of ownership as the unfettered ability to demand vacant possession of property. This, in my view, indicates a fundamental deviation from the idea of ownership as a white picket fence.

The second context that arguably shows the fact that ownership does not automatically secure a veto right in favour of the owner, is in the area of

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37 Para 475

38 Some examples of courts questioning the relationship between the common law, PIE and s 26(3) of the Constitution include: *ABSA Bank Ltd v Amod* 1999 2 All SA 423 (W); *Brisley v Drotsky* 2002 4 SA 1 (SCA); *Ndlovu v Ngcobo; Bekker v Jika* 2003 1 SA 113 (SCA)

39 Section 4(1) of PIE See also *Ndlovu v Ngcobo and Bekker v Jika* 2003 1 SA 113 (SCA) In this regard, PIE is applicable when unlawful occupation occurs where no consent was granted as well as where consent was granted, but was revoked at a later stage, thereby constituting holding-over cases See Pienaar *Land Reform* 702-714 for an exposition of the scope of PIE

40 Although this is true there are still indications in many judgments that do not apply PIE or where a defence against eviction cannot be upheld because the s 26(3) right not to be evicted from your "home" does not give rise to a substantive right See for instance, C Cloete & ZT Boggenpoel "Re-evaluating the court system in PIE eviction cases" (2018) 135 *SALJ* 432-446; *Motswagae v Rustenburg Local Municipality* 2013 2 SA 613 (CC); *Daniels v Scribante* 2017 4 SA 341 (CC)

41 For an argument in favour of a single system of law, see *Pharmaceutical Manufacturers Association of South Africa: In re Ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC) para 44; AJ van der Walt *Property and Constitution* (2012) 35-39 See also AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77 77-128; ZT Boggenpoel "Does method really matter? Reconsidering the role of common law remedies in the eviction paradigm" (2014) 25 *Stell LR* 72 72-98; AJ van der Walt "The modest systemic status of property rights" (2014) 1 *Journal for Law, Property and Society* 15 15-106 The same argument has also been made by Muller in the context of the National Building Regulations and Building Standards Act 103 of 1977, the Disaster Management Act 57 of 2002 and PIE G Muller "Evicting unlawful occupiers for health and safety reasons in post-apartheid South Africa" (2015) 132 *SALJ* 616-638, 637 argues that:

> "PIE should be the starting point for evicting unlawful occupiers for health and safety reasons The rights and needs of the people who stand to be evicted should be central to the question of whether it is just and equitable to evict the unlawful occupiers"

building encroachments.[42] In terms of the South African common law, a landowner affected by an encroaching structure erected by his neighbour can approach a court and seek an order for removal of the encroachment.[43] This is traditionally said to be the default remedy in the case of encroachment by building.[44] The basis for the common-law remedy of removal is the right to be free from any interference with the use and enjoyment of your property – a fundamental and key incident of ownership.[45] Milton describes this as follows:

> "The right of an owner to demand removal would, in theory, seem to be absolute for he is vindicating the freedom of his property from unlawful interference."[46]

Similarly, Van der Merwe and Cilliers reiterate that

> "[t]he right to insist on the removal of the encroachment is consistent with the concept of ownership, which is potentially the most extensive real right which a person can have in respect of an object, whether movable or immovable."[47]

Therefore, a landowner is entitled, upon becoming aware of the encroachment, to demand removal thereof. The rule seems, at first glance, reasonably straightforward and unproblematic. However, the contours of ownership in this context, in other words the exceptions, qualifications, and caveats applicable in dealing with the aftermath of an encroaching building, are delicate and not as clear cut.[48] For one, the decisions of *Rand Waterraad v Bothma*[49] and *Trustees, Brian Lackey Trust v Annandale*[50] show that a court has the discretion to award compensation instead of removal on the basis of considerations of justice and equity, deliberately allowing an encroacher to continue encroaching against the affected landowner's wishes.[51] In some instances courts have even, in terms of this discretion, ordered that the

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42 Z Temmers *Building encroachments and compulsory transfer of ownership* LLD dissertation Stellenbosch University (2010) 169-176

43 Van der Merwe *Sakereg* 201; Badenhorst et al *Silberberg & Schoeman's The law of property* 121-127 The remedy of removal has its historical origins in Roman law See D 9 2 29 1; JRL Milton "The law of neighbours in South Africa" (1969) *Acta Juridica* 123 237

44 Van der Merwe *Sakereg* 202; Badenhorst et al *Silberberg & Schoeman's The law of property* 121; Milton (1969) *Acta Juridica* 237; CG van der Merwe & JB Cilliers "The 'year and a day rule' in South African law: Do our courts have a discretion to order damages instead of removal in the case of structural encroachments on neighbouring land?" (1994) 57 *THRHR* 587 588 See further *Pike v Hamilton* 1853-1856 2 Searle 191 196, 198, 200; *Van Boom v Visser* 1904 21 SC 360 361; *Stark v Broomberg* 1904 CTR 135 137

45 Milton (1969) *Acta Juridica* 241; Van der Merwe & Cilliers (1994) *THRHR* 588; Van der Merwe *Sakereg* 201; *Wade v Paruk* 1904 25 NLR 219 225; *Smith v Basson* 1979 1 SA 559 (W) 560

46 Milton (1969) *Acta Juridica* 241

47 Van der Merwe & Cilliers (1994) *THRHR* 588

48 ZT Boggenpoel "The discretion of courts in encroachment disputes [Discussion of *Phillips v South African National Parks Board* (4035/07) [2010] ZAECGHC 27 (22 April 2010)]" (2012) 23 *Stell LR* 253 253-264; ZT Boggenpoel "Creating a servitude to solve an encroachment dispute: A solution or creating another problem" (2013) 16 *PELJ/PER* 454 454-484

49 1997 3 SA 120 (O) The court confirmed in the context of encroachments that courts must always endeavour to harmonise the neighbouring owners' property interests when it seeks to solve encroachment disputes See *Rand Waterraad v Bothma* 1997 3 SA 120 (O) 133

50 2004 3 SA 281 (C) para 40 Here, the court highlighted that the aim of neighbour law is to achieve harmony in the relationship between neighbours when conflict arises between the respective owners' interests

51 *Rand Waterraad v Bothma* 1997 3 SA 120 (O) 130; *Trustees, Brian Lackey Trust v Annandale* 2004 3 SA 281 (C) paras 17-31; *Phillips v South African National Parks Board* ZAECGHC 22-04-2010 case no 4035/07 para 21

encroached-upon land should be transferred to the encroacher, forcing the affected landowner to give up his property against his will.[52] Apart from the fact that there is no authority at common law that authorises the transfer of ownership in this regard, this result generally has far-reaching implications.[53]

In more recent cases courts have even gone as far as compelling the landowner to accept the registration of a servitude over the encroached-upon area in favour of the encroacher.[54] In *Roseveare v Katmer, Katmer v Roseveare*[55] the court ordered that a servitude should be created in favour of the encroacher in respect of the portion of the land affected by the encroachment.[56] In an unreported judgment decided in the same year, the South Gauteng High Court in *Fedgroup Participation Bond Managers (Pty) Ltd v Trustee of the Capital Property Trust Collective Investment Scheme in Property*[57] again assumed that the discretion to deny removal of the encroachment includes the power to order transfer of the encroached-upon land. This decision seems to even provide authority for the proposition that an encroacher can bring an independent cause of action claiming transfer of the encroachment area. Therefore, it would not only be the affected landowner who would have a cause of action in the context of encroaching buildings, but the encroacher could specifically approach the court seeking to have the encroachment remain in place against payment of compensation.

All the outcomes in the encroachment cases where the court left the encroachment intact, place major inroads on the idea of ownership as a veto right. It is important to begin to identify when it is, or should be, acceptable for courts to exercise the discretion in favour of leaving the encroachment in place, basically nullifying the owner's ability to demand removal. In this regard, it is crucial to detect trends in the courts' reasoning for and against removal of the encroachment, specifically because leaving the encroachment in place makes such a considerable inroad into the ownership right of the affected landowner. Arguably, this area of property law points towards a (re) defining of the contours of ownership in favour of considerations of justice and equity. One could of course criticise some of these judgments on the basis that the courts simply misconstrued its discretion and overreached the authority it has in this context.[58] However, that does not undermine the fact that it is no longer possible to teach the law regulating building encroachments on the basis of a simple ownership as trump theoretical approach. There are a

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[52] Van der Walt *The law of neighbours* 196; ZT Boggenpoel "Compulsory transfer of encroached-upon land: A constitutional analysis" (2013) 76 *THRHR* 313 314 See also *Phillips v South African National Parks Board* ZAECGHC 22-04-2010 case no 4035/07 para 9

[53] ZT Boggenpoel "The decision to order transfer of encroached-upon land: A constitutional analysis" (2013) 76 *THRHR* 1 1-15

[54] *Roseveare v Katmer, Katmer v Roseveare* ZAGPJHC 28-02-2013 case no 2010/44337, 2010/41862 See further Boggenpoel (2013) *PELJ/PER* 454-484

[55] ZAGPJHC 28-02-2013 case no 2010/44337, 2010/41862

[56] Para 24

[57] 2015 5 SA 290 (SCA) For criticism of this decision, see ZT Boggenpoel "The ambit of the discretion of courts in the case of encroachments: *Fedgroup Participation Bond Managers (Pty) Ltd v Trustee of the Capital Property Trust Collective Investment Scheme in Property*" (2015) 132 *SALJ* 5 5-15

[58] Boggenpoel (2012) *Stell LR* 253-264; Boggenpoel (2013) *PELJ/PER* 454-484; Boggenpoel (2013) *THRHR* 1-15

number of cases in which one can say with a degree of certainty that an owner is justifiably unable to demand removal of an encroachment. This makes it necessary to accommodate a type of thinking that deviates from the rationale of ownership always winning, as the default seems to suggest. White-picket-fence thinking about ownership in this context, quite literally, does not help.

The third notable situation in which the idea of ownership as a trump has been discredited, can be illustrated with the recognition of a number of cases. The cases show that in instances where ownership comes up against another right, which presumably deserves protection in the particular context, ownership will not summarily, as a theoretical starting point, be able to trump the other right. In these examples, the owner usually consents to the granting of ownership entitlements to another, but the law attaches more consequences than the owner initially anticipated.[59] This calls into question the idea of ownership as the mother right.

Within Western society, ownership is generally considered the mother right because it is a substantial ingredient of the patrimonial rights that make up a legal subject's entire state of assets. Sonnekus explains that ownership is seen as the mother right of all real rights in terms of the common law.[60] Van der Merwe takes this analogy of the mother right further and points out that ownership is seen as the mother right since it is the core of all other rights, so that rights like limited real rights are always seen as "daughter rights" because they stem from ownership.[61] Ownership as the mother right implies that limited real rights – that are registered over the property – are temporary and dependent upon the existence of the mother right. Moreover, once the mother right is extinguished, all limited real rights are presumably also extinguished.[62] This is because limited real rights can only exist if the mother right exists.[63] The reference to ownership as the mother right[64] from which all other rights flow has very significant implications for the way in which one approaches the relationship between the mother right and the daughter rights. Very importantly, it presumably implies a certain level of superiority that the mother right has *vis-à-vis* the daughter right.[65] Although this may be true theoretically, it is interesting to see how the examples mentioned shortly tell a different story.

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59 P Dhliwayo "Consensual use rights that limit the landowner's right to exclude on the basis of the sharing model" (2017) 80 *THRHR* 565 565-585

60 JC Sonnekus "Abandonnering van eiendomsreg op grond en aanspreeklikheid vir grondbelasting" (2004) *TSAR* 747-757

61 Van der Merwe *Sakereg* 175

62 JC Sonnekus "*Sub hasta*-veilings en die onderskeid tussen oorspronklike en afgeleide wyses van regsverkryging" (2008) *TSAR* 696 697 See further ZT Boggenpoel & JM Pienaar "Mother rights and daughter rights: The relationship between ownership and *habitatio* in the eviction context" in E Schlemmer & PH O'Brien (eds) *JC Sonnekus Festchrift* (2017) 321 321-332 This statement that all limited real rights are extinguished automatically when the mother right is extinguished can be qualified in some cases For instance, when the state expropriates land, it must separately or in addition also expropriate servitudes to obtain the land free of restrictions See AJ van der Walt *The law of servitudes* (2016) 545-546

63 Sonnekus (2008) *TSAR* 698

64 Van der Merwe *Sakereg* 175; Sonnekus (2004) *TSAR* 747

65 Boggenpoel & Pienaar "Mother rights and daughter rights" in *JC Sonnekus Festchrift* 321-332

In *Hendricks v Hendricks* ("*Hendricks HC*")[66] for instance, the court had to consider whether a holder of the right of *habitatio* could, in terms of the PIE Act, evict the owner of property over which the *habitatio* exists.[67] The appellant demanded that the respondents (as owners) vacate the property because their occupation was unlawful. As a result of the first respondent's failure to vacate, the appellant sought an eviction order in terms of the PIE Act.[68] This application was dismissed by the court *a quo*. On appeal, the court assumed that the appellant had the necessary *locus standi* to bring an application for eviction, even though the appellant was *only* the holder of the right of habitation. In other words, it was accepted that the holder of a right of habitation can institute eviction proceedings in terms of the PIE Act. The only issue that the court had to decide upon was whether the holder of the servitude "can [even] evict the owner of property over which such [a] right exists".[69] The appellant argued that

> "a holder of [a] habitation right not only is entitled to the free use of the property which she can enforce by *rei vindicatio* if it is unlawfully taken away or interfered with but may also evict the owner because … the habitation right trumps ownership."[70]

The court *a quo* in *Hendricks* concluded that not one of the cases relied upon by the appellant supported her contention that the right of habitation trumps the right of ownership and that the holder of the right of habitation can consequently evict the owner of the property.[71] The application was therefore dismissed. The Supreme Court of Appeal ("SCA"), on the other hand, reasoned that the lower courts misconceived the nature of the right of habitation, especially the right of the owner *vis-à-vis* the right of the *habitatio*-holder, thereby allowing the right-holder to evict the owner.

Hendricks v Hendricks ("*Hendricks SCA*")[72] raises important questions about the right of an owner *vis-à-vis* the holder of a limited real right – more specifically a right of *habitatio* – in relation to the property. Regarding the approach to ownership, it shows that ownership will not automatically trump other rights, in other words: it puts into question whether there is necessarily still a built-in hierarchical preference in favour of ownership in this context. From a theoretical perspective, the decision implicitly reiterates that the notion of ownership as an exclusive and absolute right is contested, and ownership is in fact inherently limited, especially if an owner decides to grant a limited real right in relation to the property.[73] Furthermore, since ownership is inherently limited by the granting of a limited real right, the ability of the daughter right

66 ZAWCHC 02-06-2014 case no 191/13
67 Para 3
68 Para 2
69 Para 6
70 Para 7 The appellant relied in this regard on two judgments, namely *Galant v Mahonga* 1922 EDL 69 ("*Galant*") and *Kidson v Jimspeed Enterprises CC* 2009 5 SA 246 (GNP) ("*Kidson*") In *Galant* it was held that the plaintiff who holds a personal servitude of *habitatio* can claim the *rei vindicatio* to recover the right against the owner of the land In *Kidson* the court found that the land was the object of the right to habitation and not the building (or house) erected on the land Therefore, if the house is destroyed there is still the possibility that the right of *habitatio* will revive
71 *Hendricks v Hendricks* ZAWCHC 02-06-2014 case no 191/13 para 9
72 *Hendricks v Hendricks* 2016 1 SA 511 (SCA)
73 Van der Merwe *Sakereg* 176-177; Badenhorst et al *Silberberg & Schoeman's The law of property* 95

to trump the mother right when the holder of the *habitatio* is able to evict the owner, seems theoretically sound. It is within this context that the decision of *Hendricks* makes an important contribution to the theoretical understanding of ownership.

The Magistrate's Court and the Western Cape High Court held that the right of habitation cannot trump ownership and therefore the holder of the right cannot evict an owner. The SCA, on the other hand, reasoned that the lower courts misconceived the nature of the right of habitation, especially the right of the owner *vis-à-vis* the right of the *habitatio*-holder. The difference in the respective courts' approach to ownership is striking. Although these consequences may be apparent, even obvious, from the outcome in this decision, they do highlight a particular approach to the notion of ownership that does not always seem to be obvious from academic literature. The normative point that the SCA once again emphasised is that the notion of ownership assumes certain inherent limitations. As ownership does not automatically "trump" habitation, it also negates an inherent hierarchical approach. In other words, ownership is not the apex right and is therefore not unlimited and absolute.[74]

Interestingly, a similar scenario arose again recently in the judgment of *Sturdy v Pirezenthal* ("*Sturdy*").[75] In *Sturdy*, the court had to consider whether the applicant (as a *usufructuary*) could bring an application to evict the first respondent (the owner of the property) and his tenants in terms of the PIE Act.[76] The court held – in a similar fashion to the *Hendricks* decision – that on the facts and relevant circumstances in the case, it would be just and equitable for the first respondent and his tenants to vacate the property.[77]

Van der Walt and Dhliwayo make a strong argument that what is portrayed in the literature about the notion of ownership as absolute, is in fact fundamentally different to the way in which courts adjudicate disputes between owners and non-owners when it comes to access rights.[78] They present their argument by providing the contrasting views of ownership in South African literature and the case law on ownership[79] and argue that

> "the outcome in any property dispute about access is likely to be determined by the paradigmatic strength of the right to exclude, unless non-owners (with a weaker right) can show why their lesser access rights should prevail, for instance because the law clearly and legitimately imposes limitations on the landowner's right to exclude them."[80]

The *Hendricks* and *Sturdy* decisions may be good examples of what Van der Walt and Dhliwayo mean when questioning the paradigmatic strength of

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74 Van der Merwe *Sakereg* 175; Van der Walt & Dhliwayo (2017) *SALJ* 32 32-52; Dhliwayo *A constitutional analysis of access rights*; Van der Walt (2015) *European Property LJ* 162 200

75 ZAECPEHC 27-02-2018 case no 2147/15

76 *Sturdy v Pirezenthal* ZAECPEHC 27-02-2018 case no 2147/15

77 Para 25

78 Van der Walt & Dhliwayo (2017) *SALJ* 32-52

79 37:

> "It is therefore significant that in South African law, abstract definitions of ownership are more likely to be encountered in the academic literature, whereas case law tends to highlight historical and social context rather than conceptual notions of ownership "

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the right to exclude. The judgments set out the proper relationship between the owner of property and the holder of a limited real right. More specifically, the decisions provide authority for the fact that not only is the owner of property barred from interfering with the exercise of the limited real right, he or she is also prevented from occupying the property against the consent of the rights-holder. If the owner therefore proceeds to occupy the property against the consent of the holder of the right, eviction of the owner is possible. From a theoretical perspective, these cases therefore essentially prove that not only is ownership not absolute, but a weaker (or daughter) right is able to prevail, depending on the particular circumstances.[81]

There are also other contexts within which this idea of ownership as trump is challenged. For instance, in cases where other constitutional rights are at stake. The outcome of the CC decision of *Daniels v Scribante* ("*Daniels*")[82] in 2017 is arguably an example of how the nature and concept of ownership of property must be understood and explained within a historical context that requires "honest and deep recognition of past injustice[s]"[83] and a deep sense of acceptance of the mandate for constitutional change. In *Daniels* the CC allowed Ms Daniels the opportunity to effect improvements to a dwelling belonging to the owner without such owner's consent. Arguably, a justified question in light of the *Daniels* case is: Where is ownership of property if someone else is allowed to effect improvements to a dwelling belonging to the owner without the owner's consent? More specifically, what does the judgment tell us about the place of property law in the constitutional dispensation? It was clear that the court in *Daniels* was not focussed so much on placing "property" or "ownership" at the heart of the decision of whether Ms Daniels could make improvements to the occupied property. If the decision was primarily a property case, where a discussion of ownership was allowed to dominate the question about the limits of what an occupier can do in relation to the owner's property, the outcome of the case may have been very different. It can be argued that the case is an embodiment of a particular theoretical approach to property law, one which places property law at the fringes. On a theoretical level, the judgment (especially Froneman J's judgment) certainly forces one to engage with a number of important questions about the nature and scope of ownership within a particular legal system in light of the constitutional mandate to heal the divisions of the past, and to establish a society based on human dignity, equality and freedom. The case highlights very pertinently that the very essence of ownership, in the sense of what an owner can (or cannot) do in relation to property, is challenged if one of these aforementioned rights or values is at stake.

Froneman J observed in *Daniels* that ownership has a social dimension to it that cannot be ignored. He referred to this aspect of property law as the "social boundedness of property", which recognises that ownership in a very

[81] Van der Merwe *Sakereg* 175; Van der Walt & Dhliwayo (2017) *SALJ* 32-52

[82] See specifically, ZT Boggenpoel & BV Slade "Where is property? Some thoughts on the theoretical implications of Daniels v Scribante" (2020) *CCR* (forthcoming)

[83] Para 115 per Froneman J

real sense perpetuates existing inequalities to the extent that it stands in the way of transformation.[84] A direct correlation therefore exists between the vantage point from which ownership is viewed and the social relationship that ownership either encourages, or perhaps more importantly, discourages. The owner's point of departure as far as this matter was concerned pivoted, according to Froneman J, on the absolutist idea of ownership of property, one that cannot fully be sustained in the South African context.[85] Such a viewpoint is often used to avoid the consequences of constitutional values and Froneman J attempted to debunk the absolutist notion of ownership. He did so by placing the particular context within which such a notion was appropriate and reasoned that this way of thinking of ownership ultimately endorses a hierarchical approach to property law. Consequently ownership is seen as the pinnacle of all rights, and all other rights are subordinate to ownership.[86] Froneman J then proceeded to highlight why such an approach to (or conception of) ownership is not feasible under the Constitution with reference to the seminal case of *Port Elizabeth Municipality*.[87] In *Port Elizabeth Municipality*, the court stressed the specific role that courts play in ensuring that opposing claims are balanced out in a just manner, based on the interests involved in the specific case and the facts present in the particular matter. Froneman J relied on the work of André van der Walt to show that absolutism of property and hierarchy of rights in effect perpetuate existing inequalities to the extent that it stands in the way of transformation.[88] Thinking about the social dimension of ownership requires rectifying historical injustices, but also looking forward to ensure that occupiers are able to live a dignified life irrespective of the race of the particular occupier or the owner.

Froneman J pointed out that Madlanga J's judgment in essence shows that the protection of ownership cannot be accepted without recognising the injustices of the past. An ahistorical explanation of ownership, devoid of recognition of historical injustice, cannot be supported because that would entrench the inhumane indignity with which Ms Daniels has had to live over the past sixteen years.[89] On the basis of the reasoning set out above, the court ordered that improvements be effected to the dwelling to bring the home to a habitable state. Ownership was therefore not the deciding factor in the determination of whether the occupier could bring the dwelling to a habitable state, and it was also not allowed to dominate the discussion where another constitutional right was at stake.

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84 Para 135

85 Para 133

86 Para 134

87 2005 1 SA 217 (CC)

88 Van der Walt & Dhliwayo (2017) *SALJ* 34; AJ van der Walt "Transformative constitutionalism and the development of South African Property law (Part 2)" (2006) *TSAR* 1-31; AJ van der Walt "Resisting orthodoxy – Again: Thoughts on the development of post-apartheid South African law" (2002) 17 *SAPL* 258-278; AJ van der Walt "Tradition on trial: A critical analysis of the civil-law tradition in South African Property law" (1995) 11 S*AJHR* 169-206

89 *Daniels v Scribante* 2017 4 SA 341 (CC) para 143

3 The way forward: Rethinking the white picket fences

Property law is generally regarded as a field of law that aims at playing a stabilising role in society[90] and, for the most part, the discipline is fundamentally structured around this stability.[91] Much of what is therefore done in property law is targeted at achieving stability and upholding the *status quo*.[92] Nonetheless, the dichotomy between continuity and change in the context of property law, shows, in Henk Botha's words, different "angles of approaches" when it comes to resolving property disputes.[93] The tension between keeping what was and embracing what could be is still an ongoing conundrum in modern South African law. Property law is certainly one area of the law where substantial changes have taken place over the course of the last 25 years and it is important to begin to navigate the changes and determine how they will translate into the law as is reflected in 2019. In this regard, it is vital to begin to find theoretical frameworks that can help guide one into reconceptualising a new vocabulary for property law, so that we can begin to think differently about what such a new vocabulary might entail.[94]

In this article, I hope to have illuminated some of my thoughts about the dichotomy between change and continuity, and I hope to have done so around a changed perspective of the notion of ownership. It remains vital to develop property law in a coherent and structured manner, in a way that is appropriate for a (new) constitutional order. Arguably, in the context of property law, and ownership of property more specifically, it requires that we be honest with ourselves – and for those of us who teach property law, with our students – about how the idea of ownership has changed in the democratic South Africa.

Very recently, in the decision of *Jordaan v City of Tshwane Metropolitan Municipality; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited; Ekurhuleni Metropolitan Municipality v Livanos* [95] the CC emphasised that:

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[90] EM Peñalver & SK Katyal "Property outlaws" (2007) 155 *University of Pennsylvania LR* 1095 1097

[91] 1133 Van der Merwe explains that because real rights are absolute, the remedies aimed at protecting the right are extensive See Van der Merwe *Sakereg* 12: "*Omdat saaklike regte absoluut is, is die remedies waarmee dit beskerm word, omvattend* "

[92] Peñalver & Katyal (2007) *University of Pennsylvania LR* 1097 Property remedies (both possessory and vindicatory remedies) are also essentially geared towards preventing self-help (or "*eierigting*"), to ensure that individuals do not take the law into their own hands Therefore, whether the remedy seeks to uphold a property rule (by restoring control of the property) or a liability rule (by replacing restoration of control with compensation), property law intervenes to prevent anyone from effecting self-help without due process through the courts

[93] This phrase is used by André van der Walt in his development of the subsidiarity principles that aim to indicate the point of departure that should be used when deciding which source of law to turn to when a dispute arises For the use of the phrase in this context, see Van der Walt *Property and Constitution* 37 However, the term comes from a novel by NS Ndebele *The cry of Winnie Mandela* (2003) 81-82; and was first used in the context of law by Henk Botha in H Botha "Refusal, Post-apartheid Constitutionalism" in K van Marle (ed) *Refusal, transition and post-apartheid law* (2009) 29 34

[94] Boggenpoel (2014) *Stell LR* 72-98; DM Davis "Where is the map to guide common-law development?" (2014) 25 *Stell LR* 3 3-14; ZT Boggenpoel "Can the journey affect the destination? A single system of law approach to property remedies" (2016) 32 *SAJHR* 71 71-86

[95] 2017 6 SA 287 (CC)

> "The notion that owning property comes with burdens for the public good is not outlandish. This Court has increasingly emphasised the constitutional limitations on private property as well as the constitutional vision that property utilization must conduce to the public good."[96]

Therefore, the new contours of ownership are continuously being defined by jurisprudence dealing with a number of different aspects. It is important that we translate these changes and implications into a vocabulary that we can understand and explain. We have a responsibility to the discipline to do so in a principled manner, but we also have a responsibility to do so in a socially just manner. Whether that means that we should be giving white picket fences to everybody to ensure equitable distribution to all, is a debate for another day; after all, who are we to deny those advantages to a part of society that was never allowed the possibility of owning the white picket fence in the first place? My contribution in this article is more modest: Perhaps the white picket fence is not as glorious as we make it out to be. Perhaps there are fundamental differences in our understanding of what the white picket fence entails, which needs to be openly discussed and ironed out. Only then – I would submit – can we have an honest reflection about whether the white picket fence should still be the goalpost.

SUMMARY

Ownership is often viewed as superior in the sense that all other rights or interests are seen as subordinate to ownership. It is often viewed in this light because it is a substantial ingredient of the patrimonial rights that make up a legal subject's entire state of assets. Ownership is also sometimes seen as the mother right because all other rights purportedly derive from ownership. This article attempts to challenge this view by relying on a number of examples that point towards a *redefining* of the contours of ownership. The owner's inability to use the *rei vindicatio* in some instances, his failure to be able to demand removal of an encroaching structure and the ability of other (sometimes constitutional) rights to prevent the enforcement of ownership, arguably calls for a different, changed perspective of ownership in the new constitutional dispensation. It is on this basis that this article questions whether what has always been deemed exceptions, qualifications and caveats to our general understanding of ownership, should in fact point towards a redefining of the contours of ownership.

[96] Para 51