

Ownership right in current south african law

[Law](#), [Contract Law](#)



Ownership as a whole is the most complete right a legal subject can have in relation to an object, and as such, no one has more rights in relation to a thing or object than an owner does. The assertions made by the well known Constitutional Court judge seem to suggest otherwise, as he believes that the current iteration of the common law view of property still carries vast remnants of the Apartheid past, further suggesting the authoritarian traits of the latter still persist. This is undoubtedly a strong assertion to make, and it is only through a consideration of the historical and current features of ownership, as well as the various statutes observed throughout the times, can an informed assessment be made. However, as far as the perspective of the aforementioned judge is concerned, I would disagree with his stance and suggest that there is absolutely no need to reform the current interpretation of the common law. This is due to the understanding that in current South African law, the right to ownership does give you certain entitlements, and although they are the most comprehensive rights one may possess, they are hardly absolute due to the various pre-requisites of our law that pose limitations. These limitations do seek to protect the interests of society, owners and other parties regardless of what the judge believes.

The Black Land Act 27 of 1913 was instituted as a means to identify “black land” and reserve for the use and enjoyment of black people only. Section 1(1) of this Act states that black people could reserve a right to procuring land only if the land was owned by another person. It effectively meant black people could not have any entitlements over any land outside of the sub 10% they were entitled to. It guaranteed dispossession and destitution of the black population. The Group Areas Act of 1950 allowed for the uprooting of

non-whites from areas deemed to be of particular value to the Apartheid government leaving thousands with no homes. This was a brazen showing of forced eviction and unlawful acquisition of immovable property.

Lastly, the Native Lands Act 38 of 1927 gave non-natives the power to exert their influence over native affairs where they deemed necessary and or in the “ public interest”. Thus, we can observe how Apartheid law used the idea of ownership to disenfranchise, and was decreed through statute and not common law; the latter of which the judge has taken offense to. However, we know that the legal history within South Africa has experienced cataclysmic changes over the last couple of decades. The greatest changes have been through the revision of legal culture from the previously haphazard and arbitrary judicial choices to a system that is more just and equitable. I

n order to understand the causal link between law and justice in the country pre-1990, one must consider the rule of law, and the implications it has imparted on the legal story of the nation. Our relationship to ownership is encompassed therein. Albert Dicey referred to the rule of law as the “ supremacy of law over the arbitrary wielding of power”. It could be surmised that without the implementation of this maxim in South African law, the country may have remained in a regressive state, reeling from the remnants of the hegemonic Apartheid rule. With that said, the thought of “ absolute ownership” cannot plausibly be a consideration for the nation today. This would be giving rise to the days of inflexibility, autocracy and anti-democracy with instances of unfounded occupation and deprivation. With that brief overview, we can begin to scrutinise the judge’s claims. As

aforementioned, ownership was previously imbalanced and largely skewed in favour of white interests. It was certainly “rigid and absolute”, but not in the manner we think of it today. Denying natives their ownership entitlements was performed as a manner in buttressing colonial power as he suggests remains the case today.

However, today we can observe how the idea of ownership is not value-neutral, and is informed by the socio-economic conditions that are currently prevalent e. g. redress. His argument thus seems somewhat misguided and unwarranted, given the understanding that absoluteness in ownership cannot occur. Some of the literature around the topic also contradicts the judge’s claims. Van Der Walt states that in the “current Constitutional era of South Africa, absoluteness of ownership is rejected or regarded as a historical overstatement, even in private law relationships. We know this is definitely the case, because ownership as we know it today was not initially derived from Roman-Dutch sources, but that of Pandectist writings which was so often the case. These writings were propagated the idea that they were enhancing Roman law and created a false perception that ownership principles were timeless and universal rather than historically contingent. These writers all show that a drastic shift has been undergone, and I agree with their assertions that the notion of ownership could not remain entrenched in the past. It needed adaptation if it was to fit with the boni mores of contemporary society.

The judge makes the claim that the common law must be reimagined in a way that is in line with the transformative vision of the Constitution. The

latter is undoubtedly a noble pursuit, and I concur with Albertyn and Goldblatt ideas when they argue “ transformation project involves the eradication of systematic forms of domination and material disadvantages based on race, gender, class and other grounds of inequality”. I am sure this is what the judge agrees with too. However, it is only right to examine how the common law has developed since then if the judges claims are to be given leverage. For starters, the Constitution guards very strictly against absolute ownership of property in both s25 and s26. The latter performs as a means to protect the interests of landowners and occupiers in the view of housing rights, and s26(3) talks of how “ no one may be evicted from their home or have their home demolished without a court order made after considering all the relevant circumstances”. The former is more extensively seen as attempting to “ protect existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions. The State may even expropriate land if it assumes it is being done in the best “ interests of the public interest or for a defined public purpose” which may be analysed either from a rational or proportional basis.

Cases such as that of FNB, Port Elizabeth Municipality and Alexkor have all alluded to some degree in their judgments that ownership cannot be absolute and rather should be in line with the spirit and purport of the Bill of Rights in light of Constitutional supremacy. Therefore, the judge’s statements again struggle to hold sway in view of current common law provisions that have exhaustively sought to ensure a semblance of equity in the interests of all parties concerned.

To conclude, I do not believe the current claims made by the judge are of particular relevance in contemporary society. The strides undergone to transform and adapt previously stringent and inflexible forms of ownership rights have been substantial, and thus renders his argument ill-considered and rash. Alternatively, one may argue his case on imaginative grounds with the plausible suggestion that although his wording may have been askew, the overarching idea he could be implying is one that provides for a more expeditious form of redress measures. Currently, the question of ownership and land is still hotly debated, and no one can disagree that even with the advances made in the Constitutional era, there still lie several instances in which individuals that have not been sufficiently recompensed for the injustices faced in the past. To this end I can agree, but again, this is surmise and one can only go off the textual basis of what the Judge has said unless he retracts and refashions his statements.