

(IN)EQUALITY IN PROPERTY OWNERSHIP: THE RHETORIC OF HOMELESSNESS*

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SUMMARY

Given South Africa's shameful apartheid past, equality before the law should seep through every stratum of its society. Arguably, equality should be more of a consideration in areas where apartheid caused significant damage, such as in property relations. Yet, this is far from being the case. In this article, the authors contend that legal protection of certain categories of property is based on who the property owners are and on the value of the asset. This argument is based on a case study of the legal protection afforded to homeless people's ownership of property.

Property relations in capitalist "post"-apartheid South Africa operate and exist within a hierarchy of property interests, resulting in more protection being afforded to certain forms of property interests and less (and sometimes no) protection given to other forms of property interests. Thus, certain forms of property ("formal property"), such as immovable property, enjoy more protection than "informal property", such as the makeshift homes of homeless people. This dichotomy is most evident in South Africa in light of the housing crisis. While the State focuses on preserving the free market, safeguarding rights over formal property, and minimising the existence of "nuisance" in urban areas, homeless people remain the most destitute people in the country. Hence, it is contended that property law does not protect homeless people and their belongings as informal property owners.

Two chief arguments are made in this regard. First, it is asserted that there is an ordering of property rights protection in a capitalist society and a correlating hierarchy of property interests. Although informal property is property deserving of legal protection, it is generally deprived of such protection because it is perceived as less valuable. This article focuses primarily on homeless people's belongings (informal property), which, it is emphasised constitutes "property" as envisaged under section 25(1) of the Constitution, and extends to the materials that shelter homeless people. Thus, law enforcement agencies' appropriation of homeless people's belongings constitutes an arbitrary deprivation of property. The authors posit that the tendency to prioritise "formal" property over "informal" property is arbitrary and unconstitutional.

A second contention is that this difference in treatment of, and protection afforded to, informal property constitutes discrimination on the ground of poverty, which falls foul of the equality clause under section 9(3) of the Constitution, and of the

Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA). The argument is made that the difference in treatment between legal protection afforded to certain property owners as opposed to others constitutes indirect unfair discrimination.

1 INTRODUCTION

“Everyone is equal before the law and has the right to equal protection and benefit of the law.”

This is the guarantee afforded by section 9(1) of the Constitution of the Republic of South Africa, 1996 (Constitution). Equality before the law is so fundamental that it was identified by early constitutional-law theorist Dicey as one of the three fundamental principles of the rule of law.¹ Equality before the law is the most basic protection that the rule of law seeks to afford its constituencies. It is independent of fickle external factors, such as socio-economic conditions, and, on the spectrum of equality, is arguably the most easily achievable standard, since it entails no positive duty or extra resources from the State. As such, it ought to constitute the bare minimum of any constitutional democracy. Despite South Africa’s global ranking as the world’s most unequal country,² equality before the law ought to be achievable.

Equality before the law should seep through every stratum of South African society, given South Africa’s shameful past. Some would argue that equality should be more of a consideration in areas where apartheid law caused significant damage, such as in property relations. Yet, this is far from being the case. In this article, it is argued that legal protection of certain categories of property is based instead on who the property owners are and on the asset’s value. The article considers the legal protection afforded to homeless people’s private ownership of property. Approximately 200 000 people are living on the streets in South Africa.³ Many homeless people use cardboard boxes, wooden pallets, and plastic sheets to build makeshift structures for shelter. Usually erected in urban areas, these structures have been met with resistance. Law enforcement (such as the South African Police Service) and other community members (shop owners and private security guards)⁴ have demolished these structures. They argue that such

* This article was presented at the Modern Studies in Property Law Conference held at St Johns College, University of Oxford on 29–31 March 2022.

¹ Dicey *Introduction to the Study of the Law of the Constitution* (1885) 120.

² International Center for Transitional Justice (ICTJ) “Country in the World: Report” (3 October 2022) <https://www.ictj.org/node/35024#:~:text=South%20Africa%20is%20the%20most,World%20Bank%20report%20has%20said> (accessed 2023-07-05).

³ Lesegie “Homelessness in SA: Surviving Another Cold Season in the Streets” (16 April 2023) *City Press* <https://www.news24.com/citypress/news/photos-homelessness-in-sa-surviving-another-cold-season-in-the-streets-20230416> (accessed 2023-09-17).

⁴ Ntseku “Probe into CCID’s ‘Assault’ of Homeless Man in the CBD” (7 June 2021) *IOL* <https://www.iol.co.za/capeargus/news/probe-into-ccids-assault-of-homeless-man-in-the-cbd-3aa9e6c3-7939-4a90-bd2e-52afcae31bb6> (accessed 2023-09-17); Bradpiece “‘David versus Goliath’: Being homeless in the City of Cape Town” (4 June 2021) *Aljazeera*

actions are justified because homeless people “dirty” their communities and that they should not erect these structures.⁵

Property relations in capitalist “post”-apartheid South Africa operate and exist within a hierarchy of property interests, resulting in more protection being afforded to certain forms of property interests and less (and sometimes no) protection for others.⁶ Thus, certain forms of property – what the authors call “formal property”, such as immovable property – enjoy more protection than “informal property”, such as the makeshift homes of homeless people. This dichotomy is most evident in South Africa in light of the housing crisis.⁷ While the State focuses on preserving the free market, safeguarding the property rights of particular forms of property interests (formal property), and minimising the existence of “nuisance” in urban areas,⁸ homeless people remain the most destitute people in the country.⁹ It is contended that property law does not protect homeless people and their belongings as informal property owners.

<https://www.aljazeera.com/features/2021/6/4/david-versus-goliath-the-story-of-being-homeless-in-south-africa> (accessed 2023-09-17).

⁵ This can be regarded as a perceived right to self-help enjoyed by these property owners. The authors acknowledge that there is no actual right to self-help under South African law, hence the inclusion of the word “perceived”. However, the common-law remedy of *mandament van spolie*, which if all legal requirements are met (peaceful and undisturbed possession of the property at the time of spoliation, and the spoliator’s deprivation of possession was wrongful), allows the lawful possessor to regain possession of the property, and is often seen as a means of self-help. However, this article is concerned not with the remedy of self-help in the context of evictions, but rather with the different protections afforded to distinct types of property. See *Yeko v Qana* 1973 4 SA 735 (A) 739G; *Ness v Greef* 1985 4 SA 641 (C) 647D; Van der Walt and Pienaar *Introduction to the Law of Property* (2016) 228; Van Schalkwyk and Van der Spuy *General Principles of the Law of Things* (2012) 76; *Mbangi v Dobsonville City Council* 1991 (2) SA 330 (W); *Kgosana v Otto* 1991 (2) SA 113 (W); *Deana v Minister of Environmental Affairs and Tourism* 2002 JOL 9962 (Tk). It should be noted that, in the context of unlawful occupation, there is much debate around whether the unlawful occupiers can rely on this common-law remedy to regain possession of the unlawfully occupied land, and whether the landowner consequently has a defence of “counter-spoliation” to eject the unlawful occupiers. For more, see Scott “The Precarious Position of a Landowner vis-à-vis Unlawful Occupiers” 2018 *TSAR* 158–176; and in response, Muller and Marais “Reconsidering Counter-Spoliation as a Common-Law Remedy in the Eviction Context in View of the Single System-of-Law Principle” 2020 *TSAR* 103–124.

⁶ This does not seek to ignore the major shift in property paradigm noted in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

⁷ Marutlulle “A Critical Analysis of Housing Inadequacy in South Africa and Its Ramifications” 2021 9 *Africa’s Public Service Delivery and Performance Review* 372; Viljoen “A Systemically Correct Approach in State Evictions” 2020 31 *Stellenbosch Law Review* 201; Roux “Pro-Poor Court, Anti-Court Outcomes: Explaining the Performance of the South African Land Claims Court” 2004 20 *SAJHR* 511; and Kumar and Shika “South Africa’s Housing Crisis: A New Breed of Honest Politicians Is Needed to Unlock the Land” (21 June 2021) *Daily Maverick* <https://www.dailymaverick.co.za/opinionista/2021-06-21-south-africas-housing-crisis-a-new-breed-of-honest-politicians-is-needed-to-unlock-the-land/> (accessed 2023-09-17).

⁸ Van der Walt *The Law of Neighbours* (2010) 9–14.

⁹ Wilson “Planning for Inclusion in South Africa: The State’s Duty to Prevent Homelessness and the Potential of ‘Meaningful Engagement’” 2011 22 *Urban Forum* 262.

Two chief arguments are made in this regard, using as a case study the Unlawful Occupation By-Law promulgated by the City of Cape Town, which allows the City to impound homeless people's belongings.¹⁰ First, relying on Pistor,¹¹ it is asserted that there is an ordering of property rights protection in a capitalist society, and a correlating hierarchy of property interests. It is argued that this is because ownership over specific, valuable property interests results in higher-value economic returns. Although informal property is property deserving of legal protection, it is generally deprived of such protection because it is perceived as less valuable, and cannot be exchanged for capital. This article focuses primarily on homeless people's belongings (informal property), which, it is contended, constitutes "property" as envisaged under section 25(1) of the Constitution.¹² It is argued that "property" under section 25(1) cannot merely refer to certain forms of property, but also extends to the materials that shelter homeless people.¹³ It is consequently maintained that law enforcement agencies' appropriation of homeless people's belongings constitutes an arbitrary deprivation of property, as referred to in section 25(1). The authors posit that the tendency to prioritise "formal" property over "informal" property is arbitrary and unconstitutional.

A second contention is that this difference in treatment of, and protection afforded to, informal property constitutes discrimination on the basis of poverty, which falls foul of the equality clause under section 9(3) of the Constitution and of the Promotion of Equality and Prevention of Unfair Discrimination Act¹⁴ (PEPUDA), legislation enacted in terms of section 9(4) of the Constitution.¹⁵ Section 9(3) of the Constitution states:

"The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

While poverty is not a listed ground of discrimination under section 9(3), PEPUDA prohibits indirect and direct unfair discrimination in terms of

¹⁰ City of Cape Town "Unlawful Occupation By-Law 2021" https://resource.capetown.gov.za/documentcentre/Documents/Bylaws%20and%20policies/Unlawful_Occupation_By-law.pdf (accessed 2023-07-05). S 9(2)(b) and 9(4) give the City of Cape Town the power to impound the belonging of homeless people.

¹¹ Pistor *The Code of Capital: How the Law Creates Wealth and Inequality* (2019).

¹² On a close reading of *Ngomane v City of Johannesburg Metropolitan Municipality* 2020 (1) SA 52 (SCA), the Supreme Court of Appeal does not clearly decide whether homeless people's belongings are property and deserving of protecting under s 25 of the Constitution. For a critical analysis of this judgment see, Boggenpoel "Revisiting the *Tswelopele*-Remedy: A Critical Analysis of *Ngomane v City of Johannesburg Metropolitan Municipality*" 2020 137 SALJ 424.

¹³ Roark "Homelessness at the Cathedral" 2016 80 *Missouri Law Review* 53.

¹⁴ Act 4 of 2000 (PEPUDA).

¹⁵ S 9(4) states:

"No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination."

grounds listed in the Act, as well as unlisted grounds.¹⁶ Relying on the case of *Social Justice Coalition v Minister of Police*¹⁷ (SJC case), where the High Court recognised poverty as a ground of indirect discrimination under PEPUDA for the first time, the authors make the argument that the difference in treatment between legal protection afforded to certain property owners as opposed to others constitutes indirect unfair discrimination.

2 HOMELESSNESS IN THE PROPERTY PARADIGM

Although homelessness is a worldwide phenomenon,¹⁸ it has no universal definition, as it may vary from country to country.¹⁹ Homelessness is often seen as not having a home, but the term is complex.²⁰ For instance, in an Australian study, Hanson-Easey *et al* define homelessness as living in accommodation that is below the minimum standard or as lacking secure tenure.²¹ In contrast, the Canadian Observatory on Homelessness described homelessness as a situation where an individual, family or community is without safe, stable, permanent, appropriate housing or the immediate prospect, means and ability to acquire it.²² Homelessness can be defined by patterns of time that persons spend without, or outside of, conventional shelters or housing. It can be episodic, permanent or temporary.²³ With that in mind, our conceptualisation of homelessness encompasses individuals or families who reside (live and sleep) on streets and in overnight shelters for any period owing to a lack of economic means to secure a place they can call home.²⁴ Homelessness generally results in an individual being exposed to harsh conditions that endanger their health and leave them open to

¹⁶ See s 1 of PEPUDA, which defines “prohibited grounds”.

¹⁷ 2019 (4) SA 82 (WCC).

¹⁸ Olufemi “Street Homelessness in Johannesburg Inner-City: A Preliminary Survey” 1998 10 *Environment and Urbanization* 223 223.

¹⁹ Obioha “Addressing Homelessness Through Public Works Programmes in South Africa” 2019 *Expert Group Meeting on the Priority Theme: Affordable Housing and Social Protection Systems for All to Address Homelessness* 1 1.

²⁰ Predictably, the definitions of homelessness seem to evolve around the definition of a home, which is just as contentious as the term “homelessness”. For more, see Daya and Wilkins “The Body, the Shelter, and the Shebeen: An Affective Geography of Homelessness in South Africa” 2013 20 *Cultural Geographies* 357; Dovey “Home and Homelessness” in Altman and Werner (eds) *Home Environments* (1985) 33–64; and Somerville “Homelessness and the Meaning of Home: Rooflessness or Rootlessness?” 1992 16 *International Journal of Urban and Regional Research* 529–539.

²¹ Hanson-Easey, Every, Tehan and Krackowizer “Climate Change, Housing and Homelessness: Report on the Homelessness and Climate Change Forum” (2016). For more on the habitability of the home, see Muller and Viljoen *Property in Housing* (2021) 316–330.

²² Canadian Observatory on Homelessness “What is Homelessness?” <https://www.homelesshub.ca/about-homelessness/homelessness-101/what-homelessness> (accessed 2023-07-05).

²³ Rule-Groenewald, Timol, Khalemo and Desmond “More Than Just a Roof: Unpacking Homelessness” 2015 13 *HSRC* 3–4.

²⁴ Therefore, this framing excludes people who voluntarily decide to not have a home or a house, despite having the economic means to have a home.

exploitation.²⁵ Confronted by such conditions, homeless people often have to protect themselves from the elements through make-shift structures. While these are not made of materials of high economic value, they are valuable to the property owners, as can be seen from the following statement by a dispossessed homeless person:

“Our belongings are meagre and our homes may appear ramshackle, but this is all we have, and this is what affords us the only bit of dignity which we enjoy.”²⁶

Indeed, property is ubiquitous.²⁷ Yet, despite the omnipresent nature of property and its importance as a social institution, there is marginal agreement on the core of what constitutes property. It is nonetheless essential to determine whether homeless people’s belongings are “property” in the strict sense. Some property scholars eschew a rigid definition of property.²⁸ Harris notes that there is no true definition of property, and what might constitute property in one jurisdiction might not be considered property in another.²⁹ Generally, ownership entails numerous entitlements, such as the right to have or possess the thing in question,³⁰ the right to exclude others from the thing, and the right to deal with the thing in whatever way one pleases.³¹ Despite the debates concerning the nature of property,³² there is a common and prevailing conception of property that characterises it as innately exclusionary. Under this conception, as Van der Walt remarks, property acts as a fence that protects and safeguards owners against external threats, and the exclusionary nature of property triggers a legion of legally conclusive results.³³

The formalist approach to property, delineated above, is the dominant conception of property in South Africa, and places ownership at the centre of

²⁵ Richter, Burns and Botha “Research Planning for Global Poverty and Homelessness Policy and Services: A Case Study of a Joint Canadian-South African Initiative” 2012 1 *Journal of Social Science Research* 85.

²⁶ This statement was lifted verbatim from the founding affidavit of one of the homeless applicants in *Ngomane*.

²⁷ Harris *Property and Justice* (1996) 4 and 6.

²⁸ Van der Walt “The Modest Systemic Status of Property Rights” 2015 1 *Journal of Law, Property and Society* 16 16.

²⁹ *Ibid.*

³⁰ According to *Maasdorp’s Institutes of South African Law*, “the term thing (*res*) is applied in law to everything which can be the object of a right, that is, everything with respect to which one person may be entitled to a right and another person subject to a duty.” Things can be either corporeal or incorporeal. For more, see Maasdorp *Maasdorp’s Institutes of South African Law Vol 2* (1948) 1.

³¹ Humbach “Property as Prophecy: Legal Realism and the Indeterminacy of Ownership” 2017 49 *Case Western Reserve Journal of International Law* 211 211.

³² Schlatter *Private Property: The History of an Idea* (1951); Cohen “Dialogue on Private Property” 1954 9 *Rutgers Law Review* 357; Waldron *The Right to Private Property* (1988); Munzer *A Theory of Property* (1990); and Christman *The Myth of Property* (1994); and Penner *The Idea of Property in Law* (1997).

³³ Van der Walt “Property and Marginality” in Alexander and Peñalver (eds) *Property and Community* (2009) 82; Dhliwayo *A Constitutional Analysis of Access Rights That Limit Landowners’ Right to Exclude* (doctoral thesis, Stellenbosch University) 2015.

property.³⁴ Thus, ownership is generally regarded as the most comprehensive right that one can have over property within the limits of the law and, therefore, the most superior right in property. Under this formalist approach to property, what has been termed “informal property” is property in the strict sense, regardless of its economic value, and is worthy of constitutional protection. A ten-storey mansion is no more “property” than is a wooden pallet or plastic sheet.³⁵ Accordingly, the entitlements of ownership apply to property owners, regardless of the economic value of the property. For instance, the entitlement to vindicate is integral to ownership, and flows logically from the right to exclude.³⁶ The right to exclude an intruder from one’s property, within the confines of the law, is vital to ownership and property. Attached to this right is the correlative duty it imposes on the rest of the world not deliberately or carelessly to interfere with the owner’s property; in other words, this is the entitlement to resist any unlawful invasion (*ius negandi*).³⁷ Douglas and McFarlane contend that the distinctiveness of property lies in its conferral of a right on the property owner to exclude non-owners.³⁸ Thus, from the homeless people’s status as property owners flows their corresponding right to exclude non-owners, including the State, from their property.

It is apparent from the ensuing discussion about the Unlawful Occupation By-Law, and reported incidents of the seizure of homeless people’s property, that property owners are treated differently within property law itself. Owners who own property of higher economic value (formal property) are treated more favourably and enjoy more significant legal protection than those with property of low or no economic value (informal property). This is at the core of the argument developed below. It is argued that the right to private ownership of property is perceived as much more valuable when the right is over property of some economic value. For instance, the right to ownership is particularly strong when the property is a house affixed on land, but it

³⁴ For critiques on this approach to property, see Kolabhai “Private Property as Public Unhealth: A Critical-Systemic Paradigm in Times of Crises” in Boggenpoel, Van der Sijde, Tlale and Mahomed (eds) *Property and Pandemics: Property Law Responses to COVID-19* (2021) 302; Van der Walt “Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law” 1995 11 *SAJHR* 169; Van der Walt “Dancing With Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State” 2001 118 *SALJ* 258; and Bhandar “Fault-Lines in the Settler-Colony: On the Margins of Settled Law” in Muller, Brits, Slade and Van Wyk (eds) *Transformative Property Law: Festschrift in Honour of AJ Van der Walt* (2018) 295.

³⁵ As the Ninth Circuit held in *Lavan v City of L.A.*, 693 F.3d 1022, 1032 (9th Cir. 2012) (quoting *Clement v. City of Glendale*, 518 F.3d 1090, 1093 (9th Cir. 2008)):

“The government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking: ‘... This simple rule holds regardless of whether the property in question is an Escalade or an EDAR, a Cadillac or a cart.” (emphasis added)

³⁶ The right to exclude, in this article, should be read as “the right to exclude within the confines of the law”. This article acknowledges that the right to exclude is not absolute and that limits are regularly ascribed to this entitlement of property ownership.

³⁷ Dhliwayo and Muller “General Principles of Ownership” in Muller (ed) *General Principles of South African Property Law* (2014) 64.

³⁸ Douglas and McFarlane “Defining Property Rights” in Penner and Smith (eds) *Philosophical Foundations of Property Law* (2013) 223–232.

tends to be weaker when it is an empty cardboard box. To illustrate this point, the authors focus on the tension between property owners who own houses affixed on land, or buildings from which they operate their commercial business, and homeless people whose belongings may be less valuable because they are perceived not to be fixtures or buildings in the (more) formal sense.

3 THE HIERARCHY OF PROPERTY RIGHTS AND INTERESTS

“How assets are selected to be legally coded as capital, by whom, and for whose benefit are questions that cut to the core of capital and the political economy of capitalism.”³⁹

Law, including property rights, represents many different things to many people. To the indefatigable Marxist, the law is an instrument to exercise power. To the cynical rational choice theorist, however, law can be both an expression of, or a constraint on, power.⁴⁰ The authors do not wish to demonstrate which school of thought either of them belongs to, save to highlight the blind spot to which, Pistor argues, both camps fall prey – that “in [the law’s] absence, the legal privileges capital enjoys would not be respected by others.”⁴¹ The protection afforded by the law to capital, and by virtue of this to capital owners, can be observed in all scenarios. The protection of the law has been inextricably linked to social and political status over centuries. For instance, under colonialism, white people had more rights than their Black counterparts, more privileges, and, of course, higher social and political status.⁴² Likewise, under feudalism, the nobility enjoyed far more rights than peasants, and these rights often related to property. These systems were put into place and reinforced by law but driven by market forces in the form of commerce.⁴³

Property law is crucial in capitalist societies for the alchemy of converting abundant resources, such as land, into scarce resources or assets that can be alienated, transferred, and exploited for economic gain. Pistor contends that this alchemy has been one of the critical motivations for the progression of private law generally and property law specifically.⁴⁴ Economists posit that private property is fundamental to economic development.⁴⁵ Given that

³⁹ Pistor *The Code of Capital* 32.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Whiteness has also been seen to be property and capital in and of itself, hence the inordinate legal protection for white people as opposed to Black people. For more on this, Harris “Whiteness as Property” 1993 106 *Harvard Law Review* 1707–1791.

⁴³ Weber *General Economic History* (1981) 277 and Weber *Economy and Society* (2013) 880.

⁴⁴ Pistor *The Code of Capital* 101 and Pistor “Liberal Property Law vs. Capitalism” (27 January 2021) <https://lpeproject.org/blog/liberal-property-law-vs-capitalism/> (accessed 2023-09-17).

⁴⁵ There is considerable debate on what constitutes private property. There is further contestation on the justification of private property. See Ostrom “Private and Common Property Rights” in *Encyclopedia of Law and Economics, Vol. II: Civil Law and Economics* (2000); Epstein “Possession as the Root of Title” 1979 13 *Georgia Law Review* 1221; Epstein *Takings* (1985); Rose *Property and Persuasion* (1994); Hardin “The Tragedy of the

individuals have to compete for the use and enjoyment of scarce resources, it becomes necessary to develop rules and principles to resolve conflicts in the event of a dispute.⁴⁶ As a result of the instrumentality of property in a capitalist society, these rules and principles are ultimately directed at achieving specific values, such as certainty, efficiency, and autonomy. One may plausibly resist our claim and argue that law, including property law, can be separated from the economy, and has its own internal logic⁴⁷ that is abstract and divorced from political ideologies, the economy, and the social world. One might even cite McFarlane's claim:

"Law, unlike life, must have a structure. Life is messy and throws up impossible problems. Law has to be clear and give us workable solutions. To do its job, law cannot merely replicate reality: it must ... construct something artificial ... [and this] artifice ... can have a clarity and coherence rarely seen in the mess of the real world."⁴⁸

However, such a response would ignore the fact that law, notably property law, has ideological underpinnings. It takes for granted that property has a propensity to inflict injustice,⁴⁹ regardless of its "clarity" and "coherence". A recent example of this is apartheid. Under apartheid, property followed an abstract, syllogistic logic predicated on an immutable, hierarchical rights arrangement.⁵⁰ Ownership reigned supreme at the top of the hierarchy. This meant that a property owner had the right to exclude from their property, and evict, any person who had no right to be on the land. The right to exclude was enforced using racial and class lines, which led to the brutal dispossession of Black people *en masse*.⁵¹

In its simplest form, property law is a means through which asset holders find protection for their assets. This article does not seek to elaborate on the class of people the law protects,⁵² but, instead, focuses on the property interests that the law protects; to demonstrate the latter, it is fundamental to address the link between the two. The more economic value a thing has, the more it is protected by law. This is so for two reasons: first, because the law was crafted to preserve capital; and secondly, because the owners of the thing have the means to secure adequate legal representation to vindicate

Commons" 1968 162 *Science* 1243; Ellickson, Rose and Smith *Perspectives on Property Law* (1995); Dukeminier and Krier *Property* (1993); and Harris *Property and Justice*.

⁴⁶ Cheung "Common Property Rights" in Eatwell, Milgate, Newman (eds) *The World of Economics* (1991) 83.

⁴⁷ Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1995) 195–210.

⁴⁸ McFarlane *The Structure of Property Law* (2008) 5.

⁴⁹ Davy "'Dehumanized Housing' and the Ideology of Property as a Social Function" 2019 19 *Planning Theory* 28 44.

⁵⁰ Van der Walt *Property and Constitution* (2012) 114; Van der Walt "Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land Reform Legislation" 2002 2 *Journal of South African Law* 254; and Van der Walt "The South African Law of Ownership: A Historical and Philosophical Perspective" 1992 25 *De Jure* 446 447.

⁵¹ Van der Walt *Property and Constitution* (2012) 114; Van der Walt *Journal of South African Law* 254; and Van der Walt 1992 *De Jure* 447.

⁵² For a powerful article on the import of property on "propertied parties" and "unpropertied parties", see O'Mahony "Property Outsiders and the Hidden Politics of Doctrinalism" 2014 67 *Current Legal Problems* 409–445.

their rights. In Kolabhai's words, "property law thus cannot be said to be the will of the people, as much as it is the will of powerful non-State actors that have historically had determinative control over the State and its laws."⁵³ As is seen later, the law is more likely to heavily regulate non-owners' intrusion on land than to create specific legislation on whether one may occupy a homeless person's tent. The law's fondness for asset holders also affects how property rights are dealt with. Much as the law favours the thing with the highest economic value, it also favours the individual who holds the right to said thing. As a result, homeless people are not a class of people whose property rights are protected by the law, as is seen next.

4 CAN THE TAKING OF THE PROPERTY OF HOMELESS PERSONS BE JUSTIFIED?

"Law is the cloth from which capital is cut; it gives holders of capital assets the right to exclusive use and to the future returns on their assets; it allows capital to rule not by force, but by law."⁵⁴

Although homeless people have rights guaranteed by the Constitution, they do not seem to experience equal protection of the law, at least not by law enforcement agencies.⁵⁵ At the very least, they are entitled to property rights over the little that they have. What they own sustains them and protects them against the elements. There is no question that what they have constitutes property. However, they are treated as if they do not have property, and the law does not protect them. There lies the rub. They are perceived as a nuisance, drug addicts, and criminals instead of property owners.⁵⁶ This is evident from the recent by-law enacted by the City of Cape Town. Section 9(2)(b) of the Unlawful Occupation By-Law states that the City may seize homeless people's property if they believe an unlawful occupation is imminent.⁵⁷ In pursuing the alleged regulation of public spaces,

⁵³ Kolabhai in Boggenpoel *et al* (eds) *Property and Pandemics* 305.

⁵⁴ Pistor *The Code of Capital* 209.

⁵⁵ See for instance, Shoba "The Reality of Living on the Street in SA" (10 October 2021) *Daily Maverick* <https://www.dailymaverick.co.za/article/2021-10-10-the-reality-of-living-on-the-street-in-sa/> (accessed 2023-09-17); Gooikin "City's Approach to Homeless People Is Not Working" (1 June 2021) *Daily Maverick* <https://www.dailymaverick.co.za/article/2021-06-01-city-of-cape-towns-approach-to-homeless-people-is-not-working/> (accessed 2023-09-17); Mlauzi "Here's How SA Can Tackle Homelessness" (12 October 2018) <https://saiia.org.za/research/heres-how-sa-can-tackle-homelessness/> (accessed 2023-03-04); Bajaber "Homeless vs. Homelessness in Cape Town" (28 November 2016) <https://agorajournal.squarespace.com/blog/2016/11/27/homelessness-vs-houselessness-in-cape-town> (accessed 2023-09-17); *City of Cape Town v South African Human Rights Commission* [2021] ZASCA 182; and Bradpiece <https://www.aljazeera.com/features/2021/6/4/david-versus-goliath-the-story-of-being-homeless-in-south-africa>.

⁵⁶ See Pophaim "Homelessness Victimization in South Africa and Its Potential Inclusion in Hate Crime and Hate Speech Bill" 2021 34 *South African Journal of Criminal Justice* 259–280.

⁵⁷ S 9(2)(b) of the Unlawful Occupation By-Law states:
 "(2) If the intending occupier refuses or fails to comply with an instruction given under subsection (1)(b), the authorised official may—
 (b) dismantle the structure of the person who intends to occupy the land and impound the building materials and possessions if the structure is—

there seems to be marginal care for homeless persons' right not to be arbitrarily deprived of their property under section 25 of the Constitution.

Section 25(1) does not apply only to a specific class of right-holders; the provision uses the term "no one".⁵⁸ Furthermore, the provision does not apply only to a category of property interests or a certain economic value of a thing. Nevertheless, a study conducted by the Human Sciences Research Council on homelessness found that 68 per cent of persons living on the streets reported one of their main challenges to be victimisation and harassment by police.⁵⁹ The definition of violence included "*personal property confiscation, inappropriate arrests, and violently dislocating them outside the environments where they often access services*".⁶⁰ Section 25(1) applies as much to a billionaire's right not to be arbitrarily deprived of their tenth holiday home as to a homeless person's right not to be arbitrarily deprived of their tent. This much was recognised in *Ngomane v City of Johannesburg Metropolitan Municipality*,⁶¹ where the Supreme Court of Appeal recognised the seizure of the homeless people's belongings to be an arbitrary deprivation of property. Informal property is property, regardless of its economic value. Applying the methodology 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*⁶² (*FNB*) to the deprivation occasioned by section 9(2)(b) and (4) of the Unlawful Occupation By-Law, it is argued that the deprivation is arbitrary and unconstitutional.

In *FNB*, the court held that "any interference with the use, enjoyment and exploitation of private property involves some deprivation in respect of that person."⁶³ This decision rendered the test for deprivation very wide and was quickly narrowed by the Constitutional Court only a few years later in *Mkontwana v Nelson Mandela Metropolitan Municipality*.⁶⁴ In that decision, the court held: "at the very least, substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment found in an open and democratic society would amount to deprivation."⁶⁵ Following this approach, the interference with the property use or enjoyment would

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- (i) on land under the City's control;
 - (ii) on a public thoroughfare; or
 - (iii) not yet capable of constituting a home on any other land."

⁵⁸ See for instance, Van der Walt *Constitutional Property Law* (2011) on the beneficiaries of s 25.

⁵⁹ Timol and Groenewald "Ikhaya Lami: Understanding Homelessness in Durban" (2016) *Human Sciences Research Council* <https://repository.hsrc.ac.za/bitstream/handle/20.500.11910/10039/9353.pdf?sequence=1&isAllowed=y> (accessed 2023-06-20) 26.

⁶⁰ *Ibid.*

⁶¹ *Ngomane supra* par 21.

⁶² 2002 (4) SA 768 (CC).

⁶³ *FNB supra* par 57.

⁶⁴ *Mkontwana v Nelson Mandela Metropolitan Municipality; Bisset v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 (1) SA 530 (CC).

⁶⁵ *Mkontwana supra* par 32.

need to be significant enough to have a “legally relevant impact” on some of the ownership entitlements.⁶⁶

Section 25(1) states that “no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.” Whether one adopts the *FNB* or *Mkontwana* formulation of deprivation under section 25(1), it is clear that the seizure of belongings constitutes deprivation. This is because the court held that interference with property use or enjoyment would need to be significant enough to have a “legally relevant impact” on some of the ownership entitlements. In this case, the seizure of the belongings of homeless people falls within the scope of deprivation.

Once deprivation has been established, the next step is to consider whether the municipal by-law constitutes “law of general application” under section 25(1).⁶⁷ The court has adopted a broad understanding of “law”, including original and delegated legislation, common law and customary law.⁶⁸ That a municipal by-law constitutes law is evident. According to section 156(2) of the Constitution, municipalities have the power to legislate and administer by-laws “for the effective administration of the matters which it has the right to administer”. In our case, the matters concerned would be control of public nuisances, local amenities, municipal roads, and public spaces, which fall under Schedule 5 of the Constitution, and which municipalities have the right to administer. Municipalities may legislate as they deem fit as long as the by-laws do not fall foul of the Constitution or national or provincial legislation.⁶⁹ However, in the case of section 25(1) of the Constitution, the by-law ought to be of general application – meaning it ought not to target specific persons. While on the face of it, the by-law applies to everyone who intends to occupy land and is thus contingent only on this intention, Waldron notes that “laws that in their effect are targeted at

⁶⁶ Slade “Constitutional Property Law” in Muller, Brits, Boggenpoel, Dhliwayo, Erlank, Marais and Slade (eds) *General Principles of South African Property Law* (2019) 63. These two conceptions of how significant the interference needs to be to constitute deprivation have caused many debates among property law scholars in South Africa, but unfortunately they fall outside of the scope of this article. For more see, Van der Walt “Retreating From the *FNB* Arbitrariness Test Already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government & Housing, Gauteng*” 2005 122 SALJ 75 79–80.

⁶⁷ It is commonly understood that the requirements to be met for the existence of a law of general application for expropriation purposes are vastly different from the broader understanding of the requirements in the constitutional context. According to Van der Walt, this is because “there is no common law authority for expropriation in South African law.” However, given that this article only considers deprivation and not expropriation, since there is no explicit statutory authority to expropriate, this distinction is not discussed further. For more, see Van der Walt *Constitutional Property Law* (2011) 453. See also Van der Walt *Property and the Constitution* (2012) 27; and Slade “The ‘Law of General Application’ Requirement in Expropriation Law and the Impact of the Expropriation Bill of 2015” 2017 50(2) *De Jure* 2017 346–362.

⁶⁸ Woolman and Botha “Limitations” in Woolman and Bishop (eds) *Constitutional Law of South Africa Vol II* (2006) ch 34–7; *S v Thebus* 2003 (6) SA 505 (CC) par 64–65; Van der Walt *Constitutional Property Law* (2011) 453; Van der Walt *Property and the Constitution* (2012) 27; and Slade 2017 *De Jure* 346–362.

⁶⁹ S 156(3) of the Constitution.

a particular group, such as the homeless, may not be hidden behind the banner of general application".⁷⁰ The by-law seems, in theory, to apply to everyone, but in practice, its effects are only felt by those who have insecure tenure in land and seek to occupy land for shelter, such as homeless persons.

Even if a law of general application authorises the deprivation, it constitutes an infringement if it is arbitrary. The factors to be considered under the test for arbitrariness are set out in *FNB*.⁷¹ Generally, this test would involve evaluating the relationship between the means of the deprivation and the purpose of the deprivation. Regard must also be had to the person whose property is being interfered with and the purpose of the deprivation. In this case, the purpose of depriving homeless people of their belongings seems to be an attempt to discourage them from unlawfully occupying land. Given that the purpose is a legitimate governmental purpose and is connected to the deprivation, the deprivation is not considered arbitrary. If the deprivation was arbitrary and not under a law of general application, it would be an infringement of the property owners' right not to be arbitrarily deprived of property under section 25(1).

Based on *FNB*,⁷² infringement can only be rescued if it is proved to be a justifiable limitation under section 36(1) of the Constitution. In the South African constitutional property-law landscape, there is a contentious debate about whether any infringement of section 25(1) can be justified by section 36(1), as the analysis required by the latter constitutes a higher threshold than section 25(1)'s internal limitation.⁷³ The Constitutional Court held in *National Credit Regulator v Opperman*:⁷⁴ "Many of the factors employed under the arbitrariness test [as set out in *FNB*] to determine the sufficiency of reasons yield the same conclusion when considering whether a limitation is reasonable and justifiable under section 36." For instance, in the arbitrariness test illustrated above, the importance and purpose of the limitation, its nature and extent, and the relationship between the limitation and its purpose, which are all considerations under section 36, have already been assessed. The only addition that section 36(1) brings to section 25(1) is the proportionality test. The latter requires one to question whether there are less restrictive means to achieve the purpose of the impugned law.

Homeless people should be allowed to move their property elsewhere should they be found to have unlawfully occupied land. There should also be many more shelters available, and adequate access to housing should be provided to prevent unlawful occupation. The Unlawful Occupation By-Law dismally fails the proportionality test as its intended purpose of public regulation of land ought not to outweigh a right protected under the Bill of Rights, namely section 25(1) of the Constitution. Such lack of respect for the

⁷⁰ Waldron "Homelessness and the Issue of Freedom" 1991 39 *UCLA Law Review* 312 and Killander "Criminalising Homelessness and Survival Strategies Through Municipal By-Laws: Colonial Legacy and Constitutionality" 2019 35(1) *SAJHR* 88.

⁷¹ *Supra* par 100.

⁷² *FNB supra* par 46 and 110.

⁷³ Van der Walt *Constitutional Property Law* 76–78.

⁷⁴ 2013 (2) SA 1 (CC) par 75.

ownership rights of homeless persons also ignores the fact that property owners are responsible for preventing interference with their property interests, *ius negandi*, by adequately protecting it, as mentioned before. Destroying such property is certainly not in line with their section 25(1) right not to be arbitrarily deprived of their property. Impoundment cannot be the first means that municipalities and law enforcement seek to adopt – at least, not in a society that prizes private ownership so highly. Thus, sections 9(2)(b) and (4) of the by-law are disproportionate and fail to withstand constitutional scrutiny. This different treatment between owners of formal and informal property clearly shows that there is differentiation based on poverty. Whether this differentiation amounts to unfair discrimination is explored next.

5 THE INEQUALITY IN HOMELESSNESS

“Decoding capital and uncovering the legal code that underpins it regardless of its outward appearance reveals that not all assets are equal; the ones with the superior legal coding tend to be ‘more equal’ than others.”⁷⁵

Section 1 of PEPUDA defines discrimination as any law, *inter alia*, that “imposes burdens, obligations or disadvantage on; or withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds”. Although the phrasing of the Unlawful Occupation By-Law is neutral, the act of impounding the belongings of “intending” occupiers indirectly disadvantages homeless people by withholding the protection of section 25(1) to their property on the ground of their poverty, and exposing them to the risk of harsh conditions with no shelter. Indirect discrimination occurs when the conduct, practice or, in this case, application of legislation seems innocuous and neutral but results in differential treatment, the impact of which is discriminatory.⁷⁶ If the discrimination is not based on a listed ground, as with the ground of poverty, it can still be presumed unfair if, as per section 1 of PEPUDA, the discrimination

- “(i) causes or perpetuates systemic disadvantage;
- (ii) undermines human dignity; or
- (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a).”⁷⁷

Thus, if one of the above requirements is met for the discriminatory ground of poverty, the discrimination will be presumed unfair unless the respondent disproves the discrimination. Section 34(1) of PEPUDA provides a directive principle for the Equality Review Committee to consider including, *inter alia*, socio-economic status as a discriminatory ground. Section 1 defines socio-economic status as including “a social or economic condition or perceived

⁷⁵ Pistor *The Code of Capital* 5.

⁷⁶ Currie and De Waal *Bill of Rights Handbook* (2013) 238 and Van der Linde “Poverty as a Ground of Indirect Discrimination in the Allocation of Police Resources – A Discussion of *Social Justice Coalition v Minister of Police* 2019 4 SA 82 (WCC)” 2020 23 *PELJ* 4.

⁷⁷ With paragraph (a) referring to the listed grounds in PEPUDA.

condition of a person who is *disadvantaged by poverty*, low employment status or lack of or low-level educational qualifications” (emphasis added). Basson argues that the lack of “special consideration” of this directive principle by the Minister of Justice and Constitutional Development and the Equality Review Committee⁷⁸ has resulted in a lack of clarity over the legal status of poverty as a prohibited ground of discrimination under PEPUDA.⁷⁹

Despite this legislative negligence, poverty has received attention as a ground of discrimination, even before the *SJC* case, especially under the framework of intersectionality.⁸⁰ This can be seen in the case of *Mahlangu v Minister of Labour*.⁸¹ There, the Constitutional Court considered a constitutional challenge to section 1(xix) of the Compensation for Occupational Injuries and Diseases Act,⁸² which expressly excluded domestic workers from accessing social security assistance in case of injury, disability or death in the workplace.⁸³ When considering who would be targeted by such an exclusion, the majority of the court found that the work was performed by “poor Black women”,⁸⁴ and that racist and gendered assumptions led to a loss of dignity suffered by domestic workers. Importantly, the court also clearly associated such injury with the socio-economic status of the Black women concerned. Thus, there is precedent in the *SJC* case and, in some instances, *Mahlangu*, for poverty to be considered as a ground of discrimination under PEPUDA.

Poverty ought to be a recognised ground of indirect discrimination. On that basis, the authors asseverate that the difference in treatment between formal and informal property owners amounts to unfair and indirect discrimination on the grounds of poverty and race. In the *SJC* case, the applicants extensively proved all three requirements of section 1 of PEPUDA to the court’s satisfaction.⁸⁵ Relying on *Soobramoney v Minister of Health (KwaZulu-Natal)*,⁸⁶ they argued that South Africa’s historical context led to the inevitable conclusion that poverty is systemic in the country. As for poverty’s impact on human dignity, the applicants relied on the case of *Minister of Health v New Clicks South Africa (Pty) Ltd*,⁸⁷ where the

⁷⁸ S 34(1)(a)–(b).

⁷⁹ Basson “Poverty Discrimination Under the Promotion of Equality and Prevention of Unfair Discrimination Act: A Transformative Substantive Equality Approach” 2023 *SAJHR* 2.

⁸⁰ Intersectionality, was defined by Crenshaw, as acknowledging “[t]he interconnected nature of social categorizations such as race, class, and gender, [that create] overlapping and interdependent systems of discrimination or disadvantage.” For more on intersectionality and the Constitutional Court’s endorsement thereof, see Jeewa and Bhima “Discriminatory Language: A Remnant of Colonial Oppression” 2021 11(1) *Constitutional Court Review* 9–13.

⁸¹ 2021 (2) SA 54 (CC).

⁸² 130 of 1993 (COIDA).

⁸³ COIDA did so by excluding domestic workers from the definition of an ‘employee’. For more, read Atrey “Beyond Discrimination: *Mahlangu* and the Use of Intersectionality as a General Theory of Constitutional Interpretation” 2021 21 2 *International Journal of Discrimination and the Law* 2021.

⁸⁴ *Mahlangu supra* par 110.

⁸⁵ *SJC* case par 64–65.

⁸⁶ 1996 (1) SA 765 (CC) par 8.

⁸⁷ 2006 (2) SA 311 (CC) par 64.

Constitutional Court linked the State's obligation to root out poverty to the ability of people to enjoy their rights. This was confirmed by the Constitutional Court in *Khosa v Minister of Social Development*,⁸⁸ where the court found that certain material conditions were necessary for recognising a person's dignity. More poignantly, in this case, the authors are reminded of the applicants' submissions in *Ngomane* where they refer to "[t]he only bit of dignity which [they] enjoy,"⁸⁹ referring to the fact that their material conditions as poor people already affect their dignity considerably. For the final requirement, the applicants in the *SJC* case also referred to *Khosa*,⁹⁰ where a link was made between poverty and citizenship. Relating the last requirement to our case, homeless people's poverty has led to an infringement of their right not to be arbitrarily deprived of property. In *Ngomane*, the SCA also identifies a breach of homeless people's rights to dignity and privacy.

It is contended that the differentiation in treatment of people who own formal and informal property amounts to discrimination on the ground of poverty, which meets all the requirements under section 1 of PEPUDA, and can be presumed to be unfair discrimination. People with shelter and tenure security will not run the risk of unlawfully occupying land or being considered an "intending occupier". It is clear from the language of the by-law that the City of Cape Town has broad discretion in determining who is capable of holding the intention to occupy land unlawfully. Such assessment by law enforcement officials is likely to require consideration of who fits the stereotype of an unlawful occupier, requiring even more "stereotyping, humiliation, denigration, and violence of and towards impoverished people".⁹¹

6 CONCLUSION

"Vesting some with legal entitlements while denying similar treatment to others, and stripping certain protections from some assets and grafting them onto others are actions that make or destroy wealth."⁹²

It is often the rallying cry of traditional property theorists that property rights ought to be protected at all costs. However, the raging caveat seems to be that whether one's property rights deserve any protection depends on one's socio-economic conditions, and on said property's economic value. In this article, the authors have relied on the Unlawful Occupation By-Law enacted by the City of Cape Town to show that the level of legal protection afforded to property can differ depending on whether one owns formal or informal property. It has been argued that informal property is not afforded the same legal protection despite such being envisaged under section 25(1) of the

⁸⁸ 2004 (6) 505 (CC) par 74.

⁸⁹ *Ngomane supra* par 24.

⁹⁰ *Khosa supra* par 74. For more, see Albertyn and Goldblatt "Equality" in Woolman *et al* (eds) *Constitutional Law of South Africa* (2013) 35–63.

⁹¹ Basson 2023 *SAJHR* 2 and Fredman "Substantive Equality Revisited" 2016 3 *International Journal of Constitutional Law* 712 731–732.

⁹² Pistor *The Code of Capital* 46.

Constitution, owing to the fact that the owners are homeless people, and the property itself is seen to lack economic value. Consequently, it is argued that the by-law is unconstitutional, not only because it infringes section 25(1) of the Constitution, but also because it indirectly discriminates against homeless people on the basis of poverty, an unlisted ground of discrimination under PEPUDA.