

The Constitutionality of Estoppel in the Context of Vindication

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ABSTRACT: When the defence of estoppel succeeds against the *rei vindicatio* it results in the suspension of the owner's *rei vindicatio* for an indefinite period. This result is generally in line with the limited evidentiary and defence function of estoppel, which underscores that estoppel cannot change the legal position of the parties. Yet, in 2011, the Supreme Court of Appeal in *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* 2011 (2) SA 508 (SCA) made controversial remarks that suggest that estoppel can have ownership acquisition consequences. This interpretation significantly increases the impact of estoppel on ownership by suggesting that estoppel does not merely suspend the owner's right to recover its property but instead terminates it altogether. Although the argument that estoppel should have ownership acquisition consequences has been considered by scholars based on doctrinal, comparative and policy reasons, neither the traditional position nor the *Oriental Products* interpretation has been subjected to detailed constitutional scrutiny. Such scrutiny is imperative as it will establish whether these interpretations are valid interpretations. Therefore, this contribution aims to determine whether the traditional position and the *Oriental Products* interpretation, respectively, would survive constitutional muster if tested against section 25 of the Constitution of the Republic of South Africa, 1996. The conclusion is that the traditional position constitutes a severe deprivation, but not an arbitrary deprivation of property. It also does not constitute an expropriation of property, since expropriations cannot take place in terms of the common law. Essentially the contribution shows that the traditional position regarding the consequences of estoppel is valid in view of section 25 of the Constitution, the property clause, and can therefore be upheld. Notably, the *Oriental Products* interpretation, does not survive constitutional scrutiny. It does not meet the law of general application requirement of section 25 and cannot be saved by the limitation clause, viz, section 36 of the Constitution. This is because estoppel, in principle, cannot authorise transfer or compulsory loss and acquisition of ownership since it cannot change the legal position of the parties. What this finding essentially reveals is that the interpretation that estoppel can result in ownership acquisition should be avoided as it is doctrinally flawed and constitutionally invalid.

KEYWORDS: Estoppel and the *rei vindicatio*, consequences of estoppel, single system of law, section-25 analysis, the property clause, law of general application, non-arbitrary deprivation of property, expropriation, limitation analysis

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I INTRODUCTION

The consequences of a successful estoppel defence ordinarily entail the suspension of the owner's *rei vindicatio* and hedged possession in favour of the successful estoppel raiser.¹ At the very least, this consequence of estoppel limits ownership by preventing the owner from recovering the property and from being in possession of the property. In recent times, however, the Supreme Court of Appeal in the *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* case has remarked that the result of estoppel succeeding in vindicatory proceedings is termination of ownership.² The *Oriental Products* interpretation has significantly increased the impact of estoppel on ownership from constituting a mere limitation to termination thereof. Although the traditional interpretation of estoppel has been questioned on doctrinal, policy and comparative grounds,³ and the *Oriental Products* interpretation has been flagged as possibly not being constitutionally compliant,⁴ the impact that these respective interpretations have on ownership has not been tested against the Constitution in detail.

In *Ex parte President of the Republic of South Africa: In Re Pharmaceutical Manufacturers Association of South Africa* the Constitutional Court held that:⁵

There is only one system of law. It is shaped by the Constitution, which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.⁶

Accordingly, rules and principles that comprise the common law (which includes the defence of estoppel and its consequences) must be subjected to constitutional control, especially where potential constitutional issues have already been flagged.⁷ It is against this backdrop that this

¹ DL Carey Miller *The Acquisition and Protection of Ownership* (1986) 308; CG van der Merwe *Sakereg* (2nd Ed, 1989) 374; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd Ed, 1994) 473; G Muller et al *Silberberg and Schoeman's The Law of Property* (6th Ed, 2019) 269. See the discussion of the *Apostoliese Geloofsending van Suid-Afrika (Maitland Gemeente) v Capes* 1978 (4) SA 48 (C) 58 (*'Apostoliese Geloofsending'*) in part IIB below. For a comprehensive discussion of the estoppel doctrine in South Africa, see JC de Wet *Estoppel by Representation in die Suid-Afrikaanse Reg* (unpublished LLD dissertation Stellenbosch University 1939); JC Sonnekus *The Law of Estoppel in South Africa* (3rd ed, 2012).

² [2010] ZASCA 166, 2011 (2) SA 508 (SCA) (*'Oriental Products'*) at paras 23, 31. See part III below for a discussion of the case.

³ HJO van Heerden 'Estoppel: 'n Wyse van Eiendomsverkryging' (1970) 33 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 19, 25; JW Louw 'Estoppel en die *Rei vindicatio*' (1975) 38 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 218, 234; JC van der Walt 'Die Beskerming van die Bona Fide Besitsverkryger: 'n Vergelyking Tussen die Suid-Afrikaanse en Nederlandse Reg' in JJ Gauntlett (ed) *JC Noster 'n Feesbundel* (1979) 73, 96; Van der Merwe (note 1 above) at 373; PJ Visser & JM Potgieter *Estoppel: Cases and Materials* (1994) 240; PJ Visser 'Estoppel en die Verkryging van Eiendomsreg in Roerende Eiendom' (1994) 57 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* 633, 636; FB Pelsler 'Aspekte van Eiendomsverkryging deur Estoppel' (2005) 38 *De Jure* 153, 157.

⁴ JC Sonnekus 'Eienaars en Ander Reghebbendes Mag Ervaar Dat Swye Nie Altyd Goud Werd Is Nie' 2013 *Tydskrif vir die Suid-Afrikaanse Reg* 326, 339; ZT Boggenpoel *Property Remedies* (2017) 81–85; ZT Boggenpoel & C Cloete 'The Proprietary Consequences of Estoppel in Light of Section 25(1): Testing Van der Walt's Hypotheses' in G Muller et al (eds) *Transformative Property Law: Festschrift in Honour of AJ van der Walt* (2018) 147, 166–171.

⁵ [2000] ZACC 1, 2000 (2) SA 674 (CC) (*'Pharmaceutical Manufacturers'*)

⁶ *Ibid* at para 44.

⁷ Section 1(c) of the Constitution of the Republic of South Africa, 1996 read together with s 39(2) of the Constitution. See also *Pharmaceutical Manufacturers* (note 5 above) at para 44; *Carmichele v Minister of Safety and Security* [2001] ZACC 22, 2001 (4) SA 938 (CC) at paras 54–55.

contribution aims to test the constitutional validity of the traditional interpretation of the consequences of estoppel and the *Oriental Products* interpretation of the consequences of estoppel. Since both these interpretations involve interferences with property through the limitation and compulsory termination of ownership, respectively, the interferences will be tested against section 25 of the Constitution, the property clause.

To this end, the first part of the article contextualises the constitutional issue by describing the traditional interpretation of the consequences of estoppel; identifying the extent of the limitation caused by the traditional interpretation on ownership entitlements; and exploring some of the pertinent justifications for the limitation on ownership by estoppel. The second part of the article then discusses the *Oriental Products* case and analyses the remarks the court made in the case regarding the consequences of estoppel. Finally, the third part considers the traditional interpretation and the *Oriental Products* interpretation of estoppel in the terms of the provisions of the property clause. It considers whether the consequences of estoppel under these respective interpretations result in arbitrary deprivations of property in terms of section 25(1); if so, whether the limitations on section 25 can be remedied by section 36 (the limitation clause), and if so, whether the deprivations also amount to expropriations in terms of section 25(2)–(3) of the Constitution. The final part contains the conclusion.

II THE TRADITIONAL CONSEQUENCES OF ESTOPPEL

A The common law

A property owner can vindicate her movable or immovable property from an unlawful *bona fide* or *mala fide* possessor with the property law remedy the *rei vindicatio*.⁸ However, a possessor will be able to refute the owner's *rei vindicatio* with the defence of estoppel if she can show that the elements of estoppel are present, namely misrepresentation, negligence, prejudice, causation and maintainability.⁹ In the context of vindication these elements require the possessor to prove that the owner of the property created a negligent representation (that the seller was the owner or at the least had the authority to transfer ownership to the possessor) on which the possessor reasonably relied to her detriment.¹⁰ If the possessor succeeds in proving these requirements, the owner's *rei vindicatio* will fail.

Estoppel is traditionally understood to be a rule of evidence that estops (prevents) the representor *from denying the truth of the representation* that she previously made to the representee, where the latter relied on the representation to her detriment. This rule precludes the representor from going back on her representation.¹¹ In the context of vindication, this ordinarily means that the owner who institutes the *rei vindicatio*, to recover her property, may

⁸ Carey Miller (note 1 above) at 255; Van der Merwe (note 1 above) at 347. See also G Muller et al (note 1 above) at 269.

⁹ For a discussion of the requirements of estoppel by representation in general see De Wet (note 1 above) at 16–45; Sonnekus (note 1 above) at 65–280; LTC Harms 'Estoppel' in WA Joubert & JA Faris (eds) *The Law of South Africa* Vol 18 Part 1 (3rd Ed, 2015) at paras 82–97.

¹⁰ *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd* 1976 (1) SA 441 (A) 452; *Absa Bank Ltd v Knysna Auto Services CC* [2016] ZASCA 93, 2016 JOL 36038 (SCA) at para 16. See further Van der Merwe (note 1 above) at 368; Boggenpoel (note 4 above) at 77–78; Muller et al (note 1 above) at 274.

¹¹ *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd* 1981 (3) SA 274 (A) 291. See also CG van der Merwe 'Things' in WA Joubert & JA Faris (eds) *Law of South Africa* Vol 27 Part 2 (2nd Ed, 2014) at para 259. For a contradictory view, see Harms (note 9 above) para 79.

not deny that the person who sold property had the authority to dispose of the property (*ius disponendi*) or that the seller had the right of ownership (*dominium*).¹² The legal ramification of this so-called evidentiary block or bar on the denial of the representation through vindication involves the suspension of the *rei vindicatio* for an indefinite period.¹³ In other words, the owner as the plaintiff is prohibited from recovering the property from the estoppel raiser. The implication of the suspended vindicatory claim is that the successful estoppel raiser, arguably by default, remains in control of the property also for an indefinite period.

B The limitation caused by the traditional position

1 *The extent of the limitation on ownership*

The *Apostoliese Geloofsending van Suid-Afrika (Maitland Gemeente) v Capes* case confirms the traditional position regarding the consequences of estoppel, but also indicates that more than the entitlement to recover/vindicate the property is suspended by estoppel.¹⁴ The *Apostoliese Geloofsending* (AG) had built a wall to separate two plots that it owned. The wall was not on the boundary between the two plots. AG sold the one plot, which was subsequently transferred to Capes, the defendant. Both the first purchaser and Capes were under the impression that the land on which the wall was situated formed part of the transferred plot. When AG informed Capes that it wants to demolish the wall, Capes protested. Capes argued that the wall forms part of its property as indicated in the written deed of sale that accompanied the transfer of the plot from AG to the first purchaser and then to Capes. AG then asked the court to declare that it is the owner of the land on which the wall is situated and that it can therefore demolish the wall. Capes raised estoppel against AG's claim. When Capes succeeded with estoppel, AG asked the court to pronounce on whether an owner can, subsequent to estoppel succeeding, still do with the property whatever the owner deems fit.¹⁵ In the first place, the court held that the defendant, Capes, was not entitled to transfer of the property.¹⁶ The court then held that the plaintiff (AG, the owner of the disputed piece of the plot) was precluded from exercising its normal ownership entitlements over the property.¹⁷ This dictum has served as authority for the traditional view that the consequences of estoppel are restricted to merely limiting ownership and do not result in transfer or acquisition of ownership.¹⁸

Regarding what this means for the parties' legal position, Sonnekus and Neels opine that estoppel has no substantive effect.¹⁹ They argue that estoppel operates to prevent the owner from relying on her ownership in contradiction of her previous representation. Therefore, no

¹² Louw (note 3 above) at 218–219; Van der Merwe (note 1 above) at 373. See also Van der Merwe (note 11 above) at para 257.

¹³ Van der Merwe (note 1 above) at 374; Carey Miller (note 1 above) at 308; Sonnekus and Neels (note 1 above) at 473. See also *Apostoliese Geloofsending* (note 1 above) at 58. The suspension of the right to recover for an indefinite period is a consequence of estoppel's success against the *rei vindicatio* combined with the *ne bis in idem* rule, which holds that no action can be instituted twice on the same facts. See Van der Merwe (note 1 above) at 373.

¹⁴ *Apostoliese Geloofsending* (note 1 above) at 59–60.

¹⁵ *Ibid* at 59.

¹⁶ *Ibid* at 60.

¹⁷ *Apostoliese Geloofsending* (note 1 above) at 60.

¹⁸ Van der Merwe (note 1 above) at 373; Boggenpoel (note 4 above) at 79; Muller et al (note 1 above) at 278; Sonnekus (note 1 above) at 348.

¹⁹ Sonnekus & Neels (note 1 above) at 473. See also Sonnekus (note 4 above) at 330. Whether this stance is still the position subsequent to the *Oriental Products* case is debatable. In this regard, see *Oriental Products* (note 2

direct or real legal consequences can be ascribed to a successful estoppel defence against an owner's *rei vindicatio*. This means that the legal position of both the owner and the *bona fide* purchaser remains unaffected by a successful estoppel defence. However, since the court's dicta in *Apostoliese Geloofsending* was about the owner's ability to do what it deemed fit with the property, I submit that the reference here to normal ownership entitlements being impacted purportedly refer to entitlements such as the *ius possidendi* (right to possess), *ius utendi* (the right to use and enjoy), *ius disponendi* (the right to dispose) and perhaps even the *ius fruendi* (the right to fruits).²⁰ The finding of the court therefore serves as authority that more than the owner's entitlement to vindicate the property will ordinarily be limited by the traditional consequences of estoppel. Moreover, the finding indicates that Sonnekus and Neels' submission about estoppel not having substantive effect merely holds true for termination and acquisition of rights but not for limitations on rights. Other than these remarks made in the *Apostoliese Geloofsending* case, which implies that ownership entitlements are limited by estoppel, case law has not dealt adequately with exactly which entitlements are suspended alongside the entitlement to vindicate the property. Since this article sets out to determine the constitutional validity of the consequences of estoppel, establishing the extent of the impact that estoppel has on ownership entitlements is necessary for an accurate section-25 analysis.

Scholars have outlined anomalies that result from the traditional position regarding the consequences of estoppel.²¹ They have pointed out that when assessing the owner's legal position subsequent to a successful estoppel defence it is possible that the owner would remain liable in instances relating to the property, despite the owner not being in control of the property.²² For instance, the owner presumably stands to be held liable for (i) any prescribed taxes payable in respect of the property in certain circumstances and (ii) any damage caused by the property where the property is, for instance, an animal.²³ What makes the owner's position even more precarious is that her ownership can potentially be lost if the successful estoppel raiser is sequestered or defaults in paying rent to such an extent that the lessor's tacit hypothec is triggered and her property is attached and sold in execution.²⁴ In my opinion, these anomalies result from the owner being precluded from exercising several of its entitlements.

The remarks made in the *Apostoliese Geloofsending* case together with the anomalies that have been identified by scholars, show that estoppel potentially has a severe impact on ownership. However, the precise extent of the impact depends on the number of entitlements that are

above) at para 20 and the discussion of the case in part III below. See further Boggenpoel (note 4 above) at 79; Boggenpoel & Cloete (note 4 above) at 151. See also Harms (note 9 above) at para 79 for a contrary view.

²⁰ A closed list of ownership entitlements does not exist. For a description of some entitlements see Van der Merwe (note 1 above) at 173–176; Muller et al (note 1 above) at 105; Sonnekus & Neels (note 1 above) at 249.

²¹ In this regard, see the arguments made by Visser (note 3 above) at 635; Pelser (note 3 above) at 154; Van der Merwe (note 11 above) at para 259.

²² Visser (note 3 above) at 635; Pelser (note 3 above) at 154; Van der Merwe (note 11 above) para 259.

²³ Ibid. For the general requirements of the *actio de pauperie*, see *Loriza Brahman v Dippenaar* [2001] ZASCA 138, 2002 (2) SA 477 (SCA) at para 13. See also MM Loubser & R Midgley *The Law of Delict in South Africa* (2nd Ed, 2012) at 28–29.

²⁴ Pelser (note 3 above) at 154. The landlord's tacit hypothec is a tacit real security right that allows the lessor to attach and sell property owned by a third party where the lessor defaults with rental payments. For a discussion of the landlord's tacit hypothec over a third party's property, see NS Siphuma *The Lessor's Tacit Hypothec: A Constitutional Analysis* (unpublished LLM thesis Stellenbosch University 2013) at 44–78; AJ van der Walt & NS Siphuma 'Extending the Lessor's Hypothec to Third Parties' Property' (2015) 132 *South African Law Journal* 518, 523–533; S Viljoen *The Law of Landlord and Tenant* (2016) at 335–339.

limited by estoppel. When assessing which entitlements are limited by estoppel, a distinction should be drawn between movables (goods) and immovables (land). In the context of movable property, the absence of physical control over the movable property after a successful estoppel purportedly results in the owner not being in a position to use and enjoy the movable property. In addition, she will be unable to deliver such property to a subsequent purchaser, lessee or pledgee, or, at the very least, provide effective control in terms of any of the constructive modes of delivery that ordinarily would allow her to burden the movable property.²⁵ Therefore, the owner would likely not be able to sell, lease or pledge the movable property that she failed to claim back due to estoppel.

Similarly, the owner of immovable property cannot exercise the normal entitlements of ownership in respect of her property. Because the facts that could give rise to a successful estoppel defence in the context of immovable property will always be unique, a distinction will have to be drawn between cases that are similar to *Oriental Products*, in the sense that successive sales took place where the *owner was deregistered*, on the one hand,²⁶ and cases in which the sale took place but the registration into the name of the purchaser had not been concluded, on the other hand. In other words, the distinction arises when *the owner is still registered as owner* of the property. In cases with similar facts to *Oriental Products*, where the plaintiff owner's *rei vindicatio* failed due to estoppel succeeding, the owner will be denied the rectification of the deeds register and denied control of the immovable property.²⁷ The result is that the owner's entitlements over the immovable property are severely limited for an indeterminate time. For instance, the owner cannot occupy the property, and since she is not in occupation of the property, she cannot use and enjoy the immovable property.²⁸ It also seems like the owner would not be able to exercise her entitlement to dispose of the property, since she would purportedly be unable to provide registration as well as vacant possession of the immovable property to a potential buyer.²⁹ Furthermore, her entitlement to encumber or burden the property will in all likelihood also be of no real value. The encumbering of immovable property with real rights requires that the particulars of the owner who wishes to burden the immovable property must be reflected in the deeds register.³⁰ However, since the owner's particulars are not reflected on the deed, and no endorsement to explain the estoppel situation is made in the Deeds Office, it is implausible that the Registrar would allow registration of a real security right or servitude against the property where the unregistered owner requests such registration.

²⁵ Muller et al (note 1 above) at 181 provides an overview of the methods of constructive delivery that exist in South African law.

²⁶ *Oriental Products* (note 2 above) at paras 23–24. It is acknowledged that the facts of *Oriental Products* case are quite peculiar, since it concerns successive sales before estoppel was raised because the registration of the name of the purchaser took place in the deeds register and since the representation was specifically about the failure to rectify the deed. It is also trite that the circumstances in which estoppel could be raised successfully will always be unique. Consequently, it is very difficult to envisage a standard estoppel scenario.

²⁷ *Oriental Products* (note 2 above) at paras 23–24.

²⁸ In this regard, see the discussion of *Apostoliese Geloofsending* (note 1 above) at 60 in part IIB above.

²⁹ For valid transfer of immovable property, registration of immovable property in the name of the purchaser is essential. Furthermore, an owner wanting to transfer ownership over her immovable property to a purchaser has a common law obligation to give the purchaser vacant possession at transfer. Carey Miller (note 1 above) at 164; Muller et al (note 1 above) at 244–250; s 16 of the Deeds Registries Act 47 of 1937.

³⁰ For the creation of limited real rights such as real security rights or servitudes over immovable property, registration of the limited real rights in the deeds registry must take place. Muller et al (note 1 above) at 85; s 16 of the Deeds Registries Act 47 of 1937.

Consequently, it would be fitting to describe the owner as a *bare owner*, in the sense that she retains the status of owner, albeit without the usual publicity, but has virtually none of the ordinary ownership entitlements at her disposal for an indefinite time.

In the scenario where the owner who made the misrepresentation is *still registered as owner* in the deeds registry, the owner would effectively also be a *bare owner* once her vindication claim is defeated by estoppel. The owner would be denied control over the immovable property and would not be allowed to occupy or to use and enjoy the property. In practice, the owner's right of disposal of the property would presumably also be severely restricted, mainly because she would be unable to provide vacant possession of the property to a third party because of the indefinite hedged possession of the successful estoppel raiser even though the property is still registered in her name. Furthermore, her entitlement to either lease, encumber or burden the property will in all likelihood also be of little practical value. She cannot lease the property to a third party because she is incapable of transferring physical control to the third party. Since she is still reflected as the registered owner of the property in the deeds registry, she may in principle still be capable of burdening the property with a mortgage or servitude, but it is uncertain how the relevant registrar of deeds will handle the situation.³¹ In this context, the owner could also be described as a *bare owner*, in the sense that she retains the status of owner but has virtually none of the ordinary ownership entitlements at her disposal. This bare ownership status continues for an indefinite period and can be argued to place the owner in a powerless position in relation to her property. Except for her ownership status that essentially remains intact, she is practically in the position of someone with little or no rights over the property, while at the same time she must endure the risk of liability in certain circumstances that she typically would not be able to avoid.

2 *Justification for the limitation caused by estoppel*

One could argue that the unsatisfactory legal position of the owner is simply required for the successful estoppel raiser to receive adequate protection under the law. In the South African common law, the strength of the owner's right to recover physical control of her property is determined by the *ubi rem meam invenio ibi vindico* principle, which allows the owner to recover her property from any unlawful possessor.³² This principle ordinarily extends to the circumstances where such possessor was a *bona fide* purchaser.³³ However, in early South African law, the need to protect innocent purchasers arose in situations where the *bona fide* purchaser would suffer prejudice because of the owner's careless actions, words or omissions.³⁴ In these circumstances, fairness required that the innocent purchaser who had been misled by the owner should be protected rather than the careless owner.³⁵ Such protection was achieved by introducing the English doctrine of estoppel by representation as a defence against the

³¹ Ibid.

³² *Chetty v Naidoo* 1974 (3) SA 13 (A) 20. For a discussion of the Roman maxim *ubi rem meam invenio ibi eam vindicio*, see Van der Merwe (note 1 above) at 347; JRL Milton 'Ownership' in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 657, 686. For a discussion of this maxim in the context of estoppel see Pelser (note 3 above) at 153.

³³ Van der Merwe (note 1 above) at 347; Muller et al (note 1 above) at 347.

³⁴ Milton (note 32 above) at 688.

³⁵ Ibid.

careless owner's recovery claim.³⁶ Essentially, estoppel was imported into the South African legal system to counter the harsh consequences of the *ubi rem meam invenio ibi vindico* principle from which the owner's right to vindicate flows.

In view of the above, considerations of fairness and equity necessitate the purchaser's protection, since it is regarded as unfair to provide the owner with exclusive protection in these circumstances.³⁷ As a result, fairness and equity form the basis for the protection afforded to the purchaser in the context of estoppel, especially because there is no other defence or direct remedy afforded to the *bona fide* purchaser against the owner in South African law, contrary to what is available in other jurisdictions.³⁸

That fairness requires the protection of the innocent purchaser rather than the careless owner is further underscored by the risk principle and the negligence requirement. The risk principle indicates that since the owner created the risk of misleading the purchaser to her detriment, the owner must carry the loss instead of the purchaser.³⁹ In other words, the risk principle justifies the protection of the purchaser as opposed to the protection of the owner on the grounds of risk setting. Moreover, the fact that the owner must have been negligent, thus culpable, in making the representation, shows blameworthiness, and further strengthens the justification for the purchaser's protection against that of the owner.⁴⁰

The analysis above shows that the impact of the traditional position on the owner is not confined to the right to vindicate (*ius vindicandi*). Other ownership entitlements such as the *ius possidendi*, *ius utendi*, *ius fruendi*, *ius abutendi* and the *ius dispondendi* will ordinarily also be limited indefinitely. This preliminary observation about the extent of the impact that the traditional interpretation of the consequences of estoppel has on ownership will have a significant bearing on the outcome of the section-25 analysis in part IV below. The

³⁶ De Wet (note 1 above) at 10–11; Sonnekus (note 1 above) at 52. These authors discuss how estoppel established itself in legal proceedings in the late nineteenth and early twentieth centuries in South Africa. See also *Merriman v William* 1880 Foord 135 172–176. (This case is one of the earliest cases dealing with estoppel. Although the court decided the case on another basis, it considered whether the party that made the representation could be said to be estopped from denying the representation. It provides evidence of the use of the term and the doctrine in South Africa at the end of the nineteenth century.) See also *Beckett & Co v Gundelfinger* (1897) 4 Off Rep 77 78; *In Re The Contributories of the Rosemount Gold Mining Syndicate in Liquidation* 1905 TH 169 171.

³⁷ Louw (note 3 above) at 220; Pelsler (note 3 above) at 154; Harms (note 9 above) at para 79. For a general discussion of equity in South African law see DH van Zyl 'Aspekte van Billikheid in die Reg en Regspleging' (1986) 19 *De Jure* 110, 114–124; TW Bennet 'Ubuntu: An African Equity' in F Diedrich (ed) *Ubuntu, Good Faith and Equity* (2011) 3, 3. It should be noted that South African law has no separate or parallel law of equity as is the case in English law. Yet, it has been reiterated that the South African common law (which predominantly reflects the civilian legal tradition) has equity built into its rules and principles. See HR Hahlo & E Khan *The South African legal System and its Background* (1968) 178; R Zimmermann 'Good faith and equity' in R Zimmermann & D Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 217, 217.

³⁸ See for example article 3:86 of the Dutch Civil Code of 1992 and article 932 of the German Civil Code of 1900. See further Louw (note 3 above) at 227; Van der Walt (note 3 above) 74–75; HJO van Heerden 'Estoppel: 'n Wyse van Eiendomsverkryging' in E Kahn (ed) *The Quest for Justice: Essays in Honour of Michael McGregor Corbett* (1995) 304, 305.

³⁹ JC van der Walt submits that the risk is found in the representation and not in whether the owner should have foreseen the risk. This latter element, which encapsulates negligence in Van der Walt's opinion, only increases the already existing risk. Van der Walt (note 3 above) at 92. For a contradictory view, see De Wet (note 1 above) at 96.

⁴⁰ For a discussion of the effect of the addition of negligence to the requirements of estoppel see De Wet (note 1 above) at 99 and Van der Walt (note 3 above) at 92–93.

above analysis also shows that the limitation caused by the traditional position regarding the consequences of estoppel is justified by considerations of fairness and equity, risk setting and fault through negligence. These justifications will also play a pertinent role when I turn to testing the limitation in accordance with the provisions of section 25.

Interestingly, the most recent case that has remarked on the consequences of estoppel seems to suggest that estoppel does not merely result in a limitation of ownership entitlements, it results in compulsory loss and acquisition of ownership by the successful estoppel raiser. This judgment and the remarks made therein, seem to offer an alternate interpretation of the consequences of estoppel. However, due to the severity of compulsory loss and acquisition of ownership this interpretation should not be accepted without proper scrutiny. In this regard, the part below provides an overview of the case and an analysis of the court's remarks relating to the consequences of estoppel to set the scene for a section-25 analysis of this interpretation in part IV below.

III THE *ORIENTAL PRODUCTS* CASE

A An overview of the case

In *Oriental Products*, the third respondent (a former agent of the appellant) fraudulently transferred immovable property, owned by the appellant, to the second respondent, a *bona fide* purchaser.⁴¹ This transfer took place without the appellant's permission. After this unauthorised transfer, the second respondent transferred the property to the first respondent, also a *bona fide* purchaser, and the property was registered in the first respondent's name. This second transfer occurred two months after the appellant discovered that the property was no longer registered in its name. The appellant only instituted proceedings to vindicate after the second sale and transfer took place.⁴² In this regard, the appellant as owner instituted the *rei vindicatio* to recover the immovable property and sought rectification of the deeds registry.

To defeat the appellant's recovery claim, the first respondent raised the defence of estoppel by representation.⁴³ The argument was that the appellant had made a negligent representation that the second respondent had the right to dispose of the property as the registered owner when the appellant failed to rectify the deeds registry immediately after becoming aware of the deregistration. Based on the evidence, the court agreed that the owner's failure to act timeously created the required negligent representation under estoppel and that all the other requirements of estoppel were also met.⁴⁴ Thus, the court was satisfied that estoppel should succeed.

In an attempt to refute the first respondent's estoppel defence, the appellant argued that estoppel is a defence and not a weapon to claim that transfer of ownership had occurred.⁴⁵ In this regard, Shongwe JA, who wrote the main judgment, remarked:

In the context of this case, the appellant is entitled to retransfer of the property, but for the fact that it cannot assert its right of ownership because of estoppel. Hence the applicant *loses its ownership of the property*.⁴⁶ (Own emphasis added)

Harms DP, who wrote the concurring judgment, held:

⁴¹ *Oriental Products* (note 2 above) at paras 3–10.

⁴² *Ibid* at para 2.

⁴³ *Ibid* at para 15.

⁴⁴ *Ibid* at para 22.

⁴⁵ *Ibid* at para 20.

⁴⁶ *Ibid* at para 23.

That estoppel may only be used as a defence is part of English law, and since the Roman-Dutch roots of the doctrine are said to be found in the *exceptio doli*, a legal defence rather than an action, the same may be said to apply in our law. Whether this formalistic approach can still be justified need not be considered in this case, *even though the effect of the successful reliance on estoppel is that the appellant may not deny that the first respondent holds the unassailable title in the property*, or that the deeds registry entry is correct. *This means that should the latter wish to dispose of the property, the appellant would not be able to interfere. If this means that ownership passed by virtue of estoppel, so be it.* The better view would be that the underlying act of transfer is deemed to have been validly executed.⁴⁷ (Own emphasis added)

These remarks seem to suggest that a successful estoppel defence could potentially result in the owner's loss of ownership and the purchaser's acquisition of that ownership. Both the main and concurring judgments therefore made some interesting and controversial remarks regarding the consequences of estoppel in vindication proceedings.

B Implications of the court's remarks

Scholars are not in agreement regarding the legal ramifications of these remarks. In particular, there seems to be uncertainty about whether the case means estoppel now results in ownership acquisition or whether the remarks were merely an *obiter dictum*.⁴⁸ Van der Merwe is of the opinion that the remarks made by the court in *Oriental Products* were made *obiter*.⁴⁹ Specifically, the remarks pertaining to whether the traditional formalist view that estoppel is merely a cause of action still has a place in our law and therefore whether ownership is now acquired in these circumstances remains *obiter*. He takes this stance since the first respondent did not expressly argue that ownership had been transferred by way of estoppel. However, he pointed out that the court's *dicta* indicate that the court may be open to accepting that acquisition of ownership can take place by way of estoppel.⁵⁰

Conversely, Sonnekus concedes that the court in the *Oriental Products* case held that estoppel creates ownership.⁵¹ However, he opines that Harms DP failed to reflect properly on the consequences of his remarks in this regard.⁵² He relies on *Knox NO v Mofokeng* to argue that the court's statements regarding estoppel having the potential to create rights has not been confirmed in case law.⁵³ It should, however, be noted that estoppel was not pleaded in the *Knox* case, and that the court did not pronounce on the consequences of estoppel.⁵⁴ Consequently, the *Knox* case cannot be relied on to argue that the court has revoked its statements concerning the proprietary consequences of estoppel.

In my view, what should also be considered here is the fact that the court's statements in *Oriental Products* were made in direct response to the applicant's attempt to counter the estoppel defence when the applicant argued that ownership could not be acquired through estoppel. Nonetheless, both views regarding the implications of the judgment warrant testing

⁴⁷ Ibid at para 31.

⁴⁸ For diverging views regarding the impact of *Oriental Products* on the consequences of estoppel see Van der Merwe (note 11 above) at para 259; Sonnekus (note 4 above) at 331; Sonnekus (note 1 above) at 349.

⁴⁹ Van der Merwe (note 11 above) at para 259.

⁵⁰ Ibid.

⁵¹ Sonnekus (note 1 above) at 349.

⁵² Ibid at 355; Sonnekus (note 4 above) at 331.

⁵³ [2012] ZAGPJHC 23, 2013 (4) SA 46 (GSJ) (*'Knox'*) at 355.

⁵⁴ Ibid at para 30.

of the purported *Oriental Products* interpretation of the consequences of estoppel against section 25 of the Constitution. If Van der Merwe's view is correct a section-25 analysis of the interpretation will function as an *ex ante* checks and balances analysis since it will allow for observations to be made regarding the constitutional validity of such interpretation. However, if Sonnekus's view is the better view of the implication of the *Oriental Products* case, a section-25 analysis of the interpretation will still be valuable as an *ex post* assessment of the validity of the new interpretation of the consequences of estoppel.

What is also evident from the judgment is that the court is not in unison concerning the mode of acquisition of ownership through which ownership is purportedly acquired by way of estoppel. Harms DP's remark of ownership passing as a result of estoppel⁵⁵ ostensibly points to the recognition that estoppel results in ownership being transferred to the successful estoppel raiser through derivative means. The statement by Shongwe JA, in turn, hints that the 'applicant loses its ownership of the property' when the defendant is successful with a claim based on estoppel and creates the impression that, at least theoretically, estoppel may result in the successful estoppel raiser acquiring ownership, albeit by way of an original mode of acquisition.⁵⁶ Consequently, this inconsistent use of acquisition terminology creates uncertainty concerning the correct means of acquisition that would apply when estoppel is successfully raised in vindication proceedings.

Establishing the mode of acquisition that estoppel with its purported ownership acquisition consequences is likely to operate under is necessary for determining the extent of the impact that such consequences may have on existing rights, such as limited real rights. It is generally accepted that if ownership is acquired through derivative means, the transferee would be acquiring burdened property and the property would be transferred with the cooperation of the predecessor in title.⁵⁷ Conversely, where the property is acquired by way of original means, it is generally understood that property is acquired without any burdens and without the cooperation of the predecessor in title, since the acquisition instead takes place by operation of law.⁵⁸ In other words, if the exact means of acquisition is a derivative acquisition, in the context of estoppel, the impact of a successful estoppel defence that purportedly results in ownership acquisition in favour of a successful estoppel raiser would be limited to the termination of ownership. However, if acquisition takes place through the original mode of acquisition then the impact of the purported acquisition by way of estoppel would not only be limited to the termination of ownership but would rather extend to the termination of existing limited real rights, which includes servitudes and real security rights.⁵⁹ The expansive impact that original acquisition will have on existing rights as opposed to that of derivative acquisition has led several scholars to submit that if acquisition through estoppel becomes an original mode, it will likely not survive constitutional muster.⁶⁰ More specifically, it has been flagged that the termination of ownership and limited real rights that would result from a successful estoppel defence would possibly be interpreted as an arbitrary deprivation of property in terms of

⁵⁵ *Oriental Products* (note 2 above) at para 31.

⁵⁶ *Ibid* at 23. For an overview of the different modes of original acquisition of ownership, see Muller et al (note 1 above) at 155–194.

⁵⁷ Carey Miller (note 1 above) at 130; Muller et al (note 1 above) at 83.

⁵⁸ Carey Miller (note 1 above) at 115; Muller et al (note 1 above) at 83.

⁵⁹ *Ibid*.

⁶⁰ Sonnekus (note 4 above) at 339; Boggenpoel (note 4 above) at 81–85; Boggenpoel & Cloete (note 4 above) at 166–171.

section 25(1) of the Constitution.⁶¹ For this reason, scholars have raised the question whether derivative acquisition of ownership might be more fitting in this context.⁶²

The above submission would be plausible if the premise on which it is based is correct (namely that original acquisition always results in the termination of existing limited real rights). However, the submission that derivative acquisition is more suitable in the context of the purported acquisition of ownership through estoppel must fail. Derivative acquisition of ownership requires the cooperation of the predecessor in title, in the sense that the predecessor wills the transfer of ownership. This intention to transfer ownership forms part of the real agreement that is central to the abstract system of transfer that South African law follows.⁶³ A cursory look at the circumstances that would ordinarily result in a successful estoppel defence shows that the owner, or even the *mala fide* seller (if an exception to the *nemo plus iuris* principle can be argued for),⁶⁴ does not have the necessary intention to establish a real agreement to transfer ownership.⁶⁵ Consequently, it is perhaps prudent to submit from a doctrinal point of view that although original acquisition might have a more significant impact on existing rights, it arguably is the most appropriate mode of acquisition in the context of estoppel. Besides, Pienaar puts into dispute whether original acquisition indeed has the consequence of terminating limited real rights.⁶⁶ His contribution to the distinction between original and derivative means of acquisition (specifically that it is not an automatic consequence of original modes that existing burdens such as limited real rights terminate at original acquisition of ownership) further casts doubt on whether estoppel as an original mode would indeed result in other rights terminating with ownership.⁶⁷

The above outlined uncertainties regarding whether the case is *obiter* or binding, and whether the new interpretation of estoppel means that estoppel results in ownership acquisition as a derivative or original mode of acquisition, and the possible constitutional implications of the respective modes, underscores the vital role that a detailed section-25 analysis would play in providing clarity around the consequences of estoppel. The part below will therefore turn to the section-25 analysis of both the *Oriental Products* interpretation of the consequences of estoppel (termination of ownership), and the traditional interpretation of the consequences of estoppel (mere limitation on ownership).

⁶¹ Ibid.

⁶² Sonnekus, Boggenpoel and Cloete have raised this question but found that there are also challenges with arguing that estoppel should be a mode of derivative acquisition of ownership. See Sonnekus (note 4 above) at 334; Boggenpoel (note 4 above) at 81–85; Boggenpoel & Cloete (note 4 above) at 166–171. Van der Merwe submits that a new mode of derivative acquisition should be developed in the context of estoppel. See Van der Merwe (note 1 above) at 373.

⁶³ Carey Miller (note 1 above) at 124–125; Muller et al (note 1 above) at 195.

⁶⁴ Van der Merwe argues for such an exception to be recognised. Van der Merwe (note 1 above) at 373.

⁶⁵ Carey Miller (note 1 above) at 308–309; Sonnekus (note 4 above) at 351; Boggenpoel (note 4 above) at 80–81; Boggenpoel & Cloete (note 4 above) at 155.

⁶⁶ GJ Pienaar ‘The Effect of the Original Acquisition of Ownership of Immovable Property’ (2015) 18 *Potchefstroom Electronic Law Journal* 1480, 1480. See also *Unimark Distributors (Pty) Ltd v Erf 94 Silvertondale (Pty) Ltd* 1999 (2) SA 986 (T) 1000 in which the court questioned the distinction that is made by scholars between the original and derivative modes of acquisition.

⁶⁷ Pienaar (note 66 above) at 1480–1505. See also Muller et al (note 1 above) at 83–84.

IV SECTION-25 ANALYSIS

A General approach to the property clause

Section 25(1) of the Constitution prohibits arbitrary deprivation in that it stipulates that:

No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.⁶⁸

Although the section does not positively entrench property rights, its negative expression implies that property rights will enjoy constitutional protection unless these rights are limited in accordance with the requirements expressly set out in the section.⁶⁹ Van der Walt explains that the function of section 25 of the Constitution is not only to guarantee the protection of property rights, but rather to establish and maintain an appropriate balance between the rights of individuals and the interest of the public realised by way of valid regulatory deprivations.⁷⁰ To this end, the property clause indicates that if the two diverging interpretations regarding estoppel are found to be deprivations of property but are brought about by non-arbitrary laws of general application, these interpretations will be constitutionally compliant.

After the Constitution came into operation in 1996, the constitutional text of section 25 required further interpretation to establish its meaning, content and scope with greater certainty. In *First National Bank v Commissioner, South African Revenue Services (FNB)* the Constitutional Court provided much needed clarity in this regard when it developed the following set of questions:

- (a) Does that which is taken away ... amount to 'property' for purpose[s] of s 25?
- (b) Has there been a deprivation of such property ... ?
- (c) If there has, is such deprivation consistent with the provisions of s 25(1)?
- (d) If not, is such deprivation justified under s 36 of the Constitution?
- (e) If it is, does it amount to expropriation for purpose[s] of s 25(2)?
- (f) If so, does the deprivation (sic) comply with the requirements of s 25(2)(a) and
- (g) If not, is the expropriation justified under s 36?⁷¹

These questions are prescriptive in section 25 disputes. They should therefore guide the constitutional analysis focussing on the pre-*Oriental Products* interpretation of the common law position (the traditional position) and what could be argued to be the common law position in terms of the *Oriental Products* case (the *Oriental Products* position). To this end, the flagship case of *FNB* will be instructive as a starting point together with more recent

⁶⁸ Section 25(1) of the Constitution. For a critical discussion of s 25 in general, see AJ van der Walt *Constitutional Property Law* (3rd Ed, 2011) chs 1–6; T Roux 'Property' in S Woolman & M Bishop (eds) *Constitutional Law of South Africa* (2nd Ed, 2014) ch 46.

⁶⁹ The implication of the negative phraseology of s 25(1) was explained in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* [1996] ZACC 26, 1996 (4) SA 744 (CC) ('*Certification of the Constitution*') at para 72 and upheld in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [2002] ZACC 5, 2002 (4) SA 768 (CC) ('*FNB*') at para 48. See also Van der Walt (note 68 above) at 34–42.

⁷⁰ Van der Walt (note 68 above) at 91.

⁷¹ *FNB* (note 69 above) para 46. See also Van der Walt (note 68 above) at 75–78; Roux (note 68 above) at 46–2. It should also be noted that subsequent to the *FNB* case, the courts have changed these questions. In this regard, see AJ van der Walt 'Property Vortices (Part 1)' 2016 *Tjdskrif vir die Suid-Afrikaanse Reg* 412, 412–427; AJ van der Walt 'Property Vortices (Part 2)' 2016 *Tjdskrif vir die Suid-Afrikaanse Reg* 597, 597–621 where Van der Walt outlines how the *FNB* questions have been modified by subsequent cases.

developments on each of the questions to ascertain whether the opposing interpretations of estoppel's consequences are in line with section 25, respectively.⁷²

B Property

The first question for determination is whether the interest allegedly infringed constitutes 'property' for purposes of section 25.⁷³ If the interest qualifies as property, such an interest deserves constitutional protection under the section. In this way, the property inquiry as prescribed by *FNB* established a threshold requirement for the application of section 25 of the Constitution.⁷⁴ The Constitution itself does not provide guidance as to what interest or right would qualify for constitutional protection under section 25, apart from indicating in section 25(4)(b) that property is not limited to land.⁷⁵ In *FNB* it was decided that the property concept has to be interpreted generously, because it would be both impossible and unwise to ascribe a fixed meaning to what constitutes property for purposes of section 25, especially so early on in a constitutional democracy.⁷⁶ As a result, the South African approach to the constitutional property concept is described as a wide approach that allows new interests and rights to qualify as property subject to scrutiny on a case-by-case basis.⁷⁷ Furthermore, the Court prescribed a normative approach to the interpretation of section 25 as a whole, and therefore to the question

⁷² Since *FNB* has been criticised (sometimes quite vehemently) by scholars and subsequently developed by some cases, the directive for the application of s 25 as provided for in *FNB* will be used in conjunction with the more recent developments. For criticism of the *FNB* methodology, see Roux (note 68 above) at 46-22; BV Slade 'The Effect of Avoiding the *FNB* Methodology in Section 25 Disputes' (2019) 40 *Obiter* 36, 44-46.

⁷³ *FNB* (note 69 above) at para 46.

⁷⁴ Van der Walt (note 68 above) at 85; Roux (note 68 above) at 46-10.

⁷⁵ Section 25(4)(b) of the Constitution. See also *FNB* (note 69 above) at para 48.

⁷⁶ *FNB* (note 69 above) at para 51. This dictum is in line with the same court's observation concerning the property concept in the earlier case of *Certification of the Constitution* (note 69 above) at para 72 where the Court identified that most foreign jurisdictions follow a wide approach to the interpretation of the property concept for constitutional purposes because no standard international guideline exists to this end. For a discussion of the Court's generous approach to the property concept, see Van der Walt (note 68 above) at 84; Roux (note 68 above) at 46-9-11.

⁷⁷ Subsequent case law followed this generous approach to the interpretation of the constitutional property concept including *Reflect-All 1025 CC & Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government & Another* [2009] ZACC 24, 2009 (6) SA 391 (CC) ('*Reflect-All*') at para 32; *Shoprite Checkers (Pty) Ltd v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape & Others* [2015] ZACC 23, 2015 (6) SA 125 (CC) ('*Shoprite*') at para 104. See also IM Rautenbach 'Dealing with the Social Dimensions of Property' 2015 *Tydskrif vir die Suid-Afrikaanse Reg* 822, 825-829; Van der Walt (note 71 above) 416-419, 599-605; EJ Marais 'Expanding the Contours of the Constitutional Property Concept' 2016 *Tydskrif vir die Suid-Afrikaanse Reg* 576, 576-592; J Swanepoel *Constitutional Property Law in Central Eastern European Jurisdictions: A Comparative Analysis* (unpublished LLD dissertation Stellenbosch University 2016) 211-220; P Badenhorst & C Young 'The Notion of Constitutional Property in South Africa: An Analysis of the Constitutional Court's Approach in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape* 2015 (6) SA 125 (CC)' (2017) 28 *Stellenbosch Law Review* 26, 40-45; M du Plessis & T Palmer 'Property Rights and their Continued Open-Endedness - A Critical Discussion of *Shoprite* and the Constitutional Court's Property Clause Jurisprudence' (2018) 29 *Stellenbosch Law Review* 73, 86-87. The case-by-case approach that the Court has adopted in this regard is evident in the following examples: In *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International & Another* [2005] ZACC 7, 2006 (1) SA 144 (CC) at paras 71, 83 trademarks were accepted as property; in *Phumelela Gaming and Leisure Ltd v Gundlingh & Others* [2006] ZACC 6, 2007 (6) SA 350 (CC) at paras 36-42 where goodwill was accepted to constitute property; in *Shoprite* at para 104 a grocer's wine licence was accepted to qualify as property under

of whether any given interest qualifies as constitutional property. This approach requires that section 25 be construed with all its subsections, historical context and other provisions of the Constitution in mind.⁷⁸

When the consequences of estoppel are considered for purposes of establishing if the interest at stake amounts to property for constitutional purposes, the following becomes evident. The position before *Oriental Products*, which is referred to as the traditional position, entails the indefinite suspension of the owner's *rei vindicatio* (the right to vindicate the property), which essentially entails the indefinite suspension of ownership. In addition, the suspension of the right to vindicate results in the indefinite suspension of other ownership entitlements, including the right to use and enjoy, encumber and dispose of the property, which points to further limitations on ownership.⁷⁹ On the other hand, the *Oriental Products* position regarding estoppel's consequences suggest that the suspension of the owner's *rei vindicatio* at the instance of a successful estoppel defence in effect leads to the owner losing ownership over the concerned property. Considering this interpretation, the property interest at stake is also ownership. Therefore, the question here is whether ownership is deserving of constitutional protection. Since *FNB* held that ownership of land is central to the constitutional concept of property,⁸⁰ the threshold requirement for the application of section 25 would seemingly be met in this instance because precedent indicates that the affected interest at stake, namely ownership, clearly constitutes property. In addition, the Court in *FNB* also held that both the objects of rights and rights themselves qualify as property for purposes of section 25, which confirms that ownership as a right constitutes property for purposes of the section 25.⁸¹ Therefore, ownership, as the interest affected in both interpretations, clearly constitutes constitutional property.

As regards the *Oriental Products* position, the property inquiry arguably does not end with ownership. Since the *Oriental Products* position concerns the loss of ownership in terms of an indeterminate mode of acquisition, it needs to be established whether the category of ownership acquisition has a bearing on the property interests that would be affected by estoppel as a mode of acquisition. It appears that if the most appropriate mode of acquisition by way of estoppel is found to be derivative acquisition, the interest that would be affected would likely be limited to ownership. This is because in terms of derivative acquisition, ownership of the transferor passes to the transferee with all infirmities intact, meaning with all rights that existed

section 25 of the Constitution. See also J Swanepoel & ZT Boggenpoel 'Intangible Constitutional Property: A Comparative Analysis' (2018) 28 *Stellenbosch Law Review* 624, 628–633.

⁷⁸ *FNB* (note 69 above) at para 51; Van der Walt (note 68 above) at 49. *FNB*'s normative approach, particularly in the context of the property question, was further developed in *Shoprite* (note 77 above) at para 50. In *Shoprite*, the Court, in essence, required that for an interest to qualify as constitutional property, such interest should promote the fundamental rights underpinning the Constitution, namely human dignity, freedom and equality. Yet, the *Shoprite* approach remains questionable. See Rautenbach (note 77 above) at 826–827; Van der Walt (note 71 above) at 416–419, 599–605; Marais (note 77 above) at 583; Swanepoel (note 77 above) at 213–215; S Swemmer 'Muddying the Waters – The Lack of Clarity Around the Use of S 25(1) of the Constitution: *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism: Eastern Cape*' (2017) 33 *South African Journal on Human Rights* 286, 287–293.

⁷⁹ Part IIB above.

⁸⁰ *FNB* (note 69 above) at para 51. See also Van der Walt (note 68 above) at 93.

⁸¹ *FNB* (note 69 above) at para 51. See also Van der Walt (note 68 above) at 112. See also *Ex parte Optimal Property Solutions CC* [2001] JOL 9112 (C), 2003 (2) SA 136 (C) at paras 4–6, 19 ('*Optimal Property Solutions*') where it was decided that the property concept 'should be read to include any right to, or in property'.

over the property before transfer.⁸² Consequently, no other rights, except for ownership, would be terminated in the estoppel context. However, if the most appropriate category of acquisition is found to be the original mode of acquisition, scholars have pointed out that the affected interest would not be limited to ownership. This submission is grounded in the proposition that unlike derivative acquisition, which passes ownership with existing burdens to the new owner, the modes of original acquisition terminate all burdens and benefits that existed over the property the moment ownership is extinguished.⁸³ In the estoppel context, this means that holders of limited real rights over the property would purportedly lose these rights if estoppel is seen as a mode of original acquisition. Yet, as explained in part III, whether the termination of burdens and benefits over property acquired by way of original means is a true characteristic of original modes of ownership acquisition is disputed and can therefore not be accepted as an absolute rule.⁸⁴ However, it might still be useful to consider whether limited real rights would qualify as property for purposes of section 25 precisely because of the uncertainty in this regard. Since limited real rights are *rights over property*, the argument can be made that if estoppel is deemed to result in ownership acquisition by way of original means, and if existing limited real rights would be affected by the acquisition that terminated the ownership, the affected limited real rights would also qualify as constitutional property.⁸⁵

C Deprivation

Once it is established that the interests at stake are constitutional property, the second question listed by *FNB* for consideration arises, namely whether a deprivation of the identified property interest has taken place. Since it is clear that both the traditional and *Oriental Products* position respectively involve interests that qualify as property for purposes of section 25 protection, the inquiry may proceed to the deprivation question. Only if deprivation of property can be identified, can the section 25 inquiry proceed to determine whether such deprivation complies with the requirements for a valid deprivation set out in section 25(1).⁸⁶

Van der Walt points out that the term deprivation may be confusing because it ordinarily refers to the taking away of something, which gives the impression that it is akin to an expropriation.⁸⁷ However, he explains that deprivations and expropriations under section 25 of the Constitution are textually and conceptually distinguishable from each other.⁸⁸ The most

⁸² Part III above.

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *FNB* (note 69 above) at para 51; *Optimal Property Solutions* (note 82 above) at paras 4–6, 19.

⁸⁶ *FNB* (note 69 above) at para 46.

⁸⁷ Van der Walt (note 68 above) at 190.

⁸⁸ *Ibid.* at 191. For an exposition of the distinction between deprivations and expropriations, see *Harksen v Lane NO & Others* [1997] ZACC 12, 1998 (1) SA 300 (CC) at para 33; *FNB* (note 69 above) at para 46. See further AJ van der Walt 'Striving for a Better Interpretation – A Critical Reflection on the Constitutional Court's *Harksen* and *FNB* Decisions on the Property Clause' (2004) 121 *South African Law Journal* 854, 873; AJ 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 and Housing, Gauteng*' (2005) 123 *South African Law Journal* 75, 77; Van der Walt (note 68 above) at 339–341; EJ Marais 'When does State Interference with Property (now) Amount to Expropriation? An Analysis of the *Agri SA* Court's State Acquisition Requirement (Part I)' (2015) 18 *Potchefstroom Electronic Law Journal* 2983, 2985.

authoritative approach to the conceptual distinction between deprivations and expropriations was laid down in *FNB*. In *FNB*, the Court held that:

[A]ny interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned. If s 25 is applied to this wide *genus* of interference, 'deprivation' would encompass all species thereof and 'expropriation' would apply only to a narrower species of interference.⁸⁹

Accordingly, *FNB* distinguished between deprivations and expropriations by attaching a broad meaning to the concept of deprivation in terms of which a specific category of deprivations would qualify as expropriations to the extent that 'all expropriations are deprivations, but just some deprivations are expropriations'.⁹⁰

Notably, the definition of deprivation is also set out in the abovementioned extract from *FNB*. In this regard, a deprivation is any interference with the use, enjoyment or exploitation of private property belonging to a right or titleholder of the concerned property.⁹¹ Yet, the same Court in a subsequent case ascribed a much narrower meaning to the deprivation concept.⁹² In *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing and Others (Mkontwana)* the Court held that:

[A]t the very least, *substantial interference or limitation that goes beyond the normal restrictions on property use or enjoyment* found in an open and democratic society would amount to deprivation.⁹³ (Own emphasis added)

Furthermore, the Court in *Mkontwana* identified that the time and duration of the interference would indicate whether an interference goes beyond normal restrictions to constitute a deprivation for purposes of section 25.⁹⁴ The definition of deprivation in *Mkontwana* was later confirmed in *Offit Enterprises (Pty) Ltd v Coega Development Corporation Ltd* where the Constitutional Court added 'the impact [of the interference] must be of sufficient magnitude to warrant constitutional engagement'.⁹⁵ The deprivation concept was further elaborated on in *National Credit Regulator v Opperman and Others* and this definition was subsequently confirmed in *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd and Others*.⁹⁶ These cases endorsed the idea that where the interference goes beyond normal regulation in that the interference has a 'legally relevant impact on the rights of the affected party' such interference would amount to deprivation under section 25(1) of the Constitution.⁹⁷ This

⁸⁹ *FNB* (note 69 above) at para 57.

⁹⁰ See also Van der Walt (note 68 above) at 205; Roux (note 68 above) at 46-18.

⁹¹ *FNB* (note 69 above) at para 57; *Reflect-All* (note 77 above) at para 35; *Shoprite* (note 77 above) at para 73. See also Van der Walt (note 71 above) at 420.

⁹² For academic commentary on the narrow approach, see Van der Walt (note 71 above) at 605–609; K Bezuidenhout *Compensation for Excessive but Otherwise Lawful Regulatory State Action* (unpublished LLD dissertation Stellenbosch University 2014) 16–17. For arguments in favour of the narrower approach to the concept of deprivation, see Swemmer (note 78 above) at 287–293.

⁹³ [2004] ZACC 9, 2005 (1) SA 530 (CC) ('*Mkontwana*') at para 32.

⁹⁴ *Ibid* at para 41. Interestingly, O'Regan J in her concurring judgment warned against a too-narrow approach to the deprivation question. *Mkontwana* at para 90.

⁹⁵ [2010] ZACC 20, 2011 (1) SA 293 (CC) ('*Offit*') at para 41.

⁹⁶ [2012] ZACC 29, 2013 (2) SA 1 (CC) ('*Opperman*'); (CCT184/14) [2015] ZACC 29, 2015 (6) SA 440 (CC) ('*Link Africa*').

⁹⁷ See *Opperman* (note 96 above) at para 66; *Link Africa* (note 96 above) at para 167.

narrow approach was subsequently applied in recent cases such as *Shoprite*⁹⁸ and *South African Diamond Producers Organisation v Minister of Minerals and Energy NO (Diamond Producers)*.⁹⁹ Accordingly, when regard is had to whether the traditional position and the purported position in terms of the *Oriental Products* case amount to deprivations, respectively, the answers would depend on whether the interferences or limitations are so substantial that they have a legally relevant impact on the rights of the affected party.

The first issue to be addressed is whether the limitation of ownership that results from the traditional position qualifies as a deprivation under section 25. The traditional position limits ownership by essentially limiting the owner's entitlement to recover the property and other entitlements.¹⁰⁰ Since the broad benchmark of *FNB* defines all interferences with ownership entitlements as deprivations,¹⁰¹ the interference or limitation on ownership through the limitation of the entitlement to vindicate the property amounts to a deprivation. Therefore, if the *FNB* definition of deprivation is followed, the limitation on ownership will easily amount to a deprivation of property. However, it is perhaps prudent to also include an analysis of the narrow definition as set out in the most recent case on this point, namely *Diamond Producers*. As indicated above, the narrow definition of deprivation that was resorted to in this case is that a limitation will only qualify as a deprivation if the limitation has a legally relevant impact on the identified property. In the *Diamond Producers* case the Court found that s 20A of the Diamonds Act 56 of 1986 affected constitutional property, namely ownership of diamonds.¹⁰² Yet, when the Court had to decide whether s 20A resulted in a deprivation of the identified property (in terms of the narrow meaning of deprivation it construed) it found that there was no deprivation.¹⁰³ Although the Court tendered several reasons for this finding,¹⁰⁴ one of these reasons could be of significance for the consideration of the limitation caused by the traditional position of estoppel. The Court reasoned that since s 20A of the Act merely limits the manner in which owners can do business, it does not limit the *ius disponendi* in its entirety and therefore does not amount to a legally relevant impact on the identified property.¹⁰⁵ Marais points out that the implication of this reasoning in the *Diamond Producers* case is that limitations that merely restrict *how property entitlement can be exercised* and *limitations that affect ownership entitlements partially* will not amount to deprivations.¹⁰⁶ He also explains that this line of reasoning should be avoided in future cases for several reasons which I agree with.¹⁰⁷ However, if the *Diamond Producers* reasoning is indeed endorsed in future cases, it

⁹⁸ *Shoprite* (note 77 above) at para 73.

⁹⁹ [2017] ZACC 26, 2017 (6) SA 331 (CC) at para 48 (*'Diamond Producers'*). For a discussion of the implications of this case on the deprivation concept of s 25 see EJ Marais 'Narrowing the Meaning of Deprivation under the Property Clause: A Critical Analysis of the Implications of the Constitutional Court's *Diamond Producers* Judgment for Constitutional Property Protection' (2018) 34 *South African Journal on Human Rights* 167, 174–188.

¹⁰⁰ Part IIA above.

¹⁰¹ *FNB* (note 69 above) at para 57.

¹⁰² *Diamond Producers* (note 99 above) para 41.

¹⁰³ Paras 54–55.

¹⁰⁴ Paras 49–53. See further Marais (note 99 above) at 176–186 for an analysis of these reasons.

¹⁰⁵ Para 52. See further Marais (note 99 above) at 182–183.

¹⁰⁶ Marais (note 99 above) at 182.

¹⁰⁷ Marais explains that the reasoning of the court is not appealing because it, firstly, entails conceptual severance type reasoning as it severs the manner in which a right can be exercised from the right to alienate or dispose of the property and ownership in an artificially and problematically way; secondly it contradicts the court's

would be possible to argue that the limitation on ownership caused by the traditional position of estoppel is distinguishable from the limitation identified in the *Diamond Producers* case. The limitation on ownership caused by estoppel results from the complete suspension of the right to recover the property for an indefinite period that could include the possibility that the owner would never be able to recover her property.¹⁰⁸ Additionally, many other entitlements are also suspended indefinitely because of the suspension of the right to vindicate the property.¹⁰⁹ Consequently, the limitation caused by estoppel does not affect only one ownership entitlement partially, but in fact limits several entitlements completely and possibly in perpetuity. This means that the limitation caused by the traditional position of estoppel is a limitation that has a legally relevant impact on ownership, since it limits several entitlements completely for an indefinite period. Therefore, the interference with the entitlement of an owner in this context can be argued to also comply with *Diamond Producer's* narrower conceptual understanding of deprivation. This suggests that since the traditional consequences of estoppel can be argued to comply with both the generous and narrow definitions of deprivation, it will amount to a deprivation of property as envisaged by section 25 of the Constitution.

The next consideration is whether the limitation caused by the *Oriental Products* position of estoppel qualifies as a deprivation. In this regard, it is essential to ascertain whether the extinction of ownership, and possibly limited real rights as well, complies with both the wide and the narrow deprivation concepts.¹¹⁰ Interference with these rights or entitlements under the wide definition of deprivation constitutes the interference with real rights by way of the extinction thereof. The extinction of ownership constitutes the loss of the most complete real right a person can have over a thing in its entirety and permanently and can therefore be characterised without hesitation as making a substantial impact on the owner's rights in a legally relevant manner.¹¹¹ For some of the same reasons, the permanent loss of limited real rights that estoppel may bring about as a mode of original acquisition would likely also result in a substantial and legally relevant interference with the rights of limited real right holders. Therefore, the termination of these real rights would purportedly also constitute deprivations for purposes of section 25 of the Constitution.

Given the above, it is evident that the impact of the competing interpretations of the consequences of estoppel on the identified property interests qualifies as deprivations. The third question raised in *FNB* that now becomes relevant is whether the identified deprivations comply with the requirements for a valid deprivation as set out in section 25(1).

D Law of general application

Deprivations are part of the normal regulation of property interests and will only be unconstitutional if the deprivation is inconsistent with the requirements in section 25(1).¹¹² The first leg of section 25(1) requires that a deprivation should be authorised by a law of general

reasoning for finding that s 20A affects a property interest worthy of constitutional property; thirdly it is at odds with the unitary concept of ownership; and finally the reasoning is inconsistent with preceding jurisprudence on deprivations. See Marais (note 99 above) at 182–183 and the sources he refers to there.

¹⁰⁸ Part IIA above.

¹⁰⁹ Part IIB above.

¹¹⁰ Part III above.

¹¹¹ See also *FNB* (note 69 above) at para 111.

¹¹² *FNB* (note 69 above) at para 46. See also Van der Walt (note 68 above) at 218–225; Roux (note 68 above) at 46–20; Bezuidenhout (note 92 above) at 14, 20–21.

application and the second leg requires that the deprivation should not be arbitrary.¹¹³ The law of general application referred to in section 25(1) is a law or rule that is authorised by valid and properly promulgated legislation, regulation, subordinate legislation, municipal by-laws, rules and principles of common law and customary law, rules of court and international conventions that apply to the citizenry.¹¹⁴ The rule or law should be valid and should not apply selectively to only specific individuals or members of groups.¹¹⁵ In addition, the identified law of general application is required to authorise the deprivation.¹¹⁶ If no authority existed for the deprivation, the deprivation would be unconstitutional in terms of section 25(1).¹¹⁷ The section-25 inquiry will accordingly come to an end. However, if valid authority for the deprivation can be established, the Court must determine whether there is compliance with the non-arbitrariness requirement in section 25(1).¹¹⁸

Both deprivations considered above occur due to interpretations of the common law of estoppel. Consequently, it is clear that the common law of estoppel is the source of law that must be scrutinised. In this regard, it should be noted that the Court has held on numerous occasions that the common law constitutes law of general application.¹¹⁹ Yet, the authorisation inquiry does not merely concern determining the source of law that provides for the rule, instead, it sets out to determine whether the identified source of law, which in this case is the common law of estoppel, is indeed authorised to result in the identified deprivation of property.¹²⁰ The focus then turns to whether the common law of estoppel actually authorises the identified deprivations of the property interests brought about by the traditional and the *Oriental Products* positions of estoppel, respectively.

In terms of the traditional common law position regarding estoppel, as a defence against the *rei vindicatio*, once all the requirements of estoppel are complied with, the estoppel prohibits the owner who instituted the *rei vindicatio* from asserting ownership rights against

¹¹³ Section 25(1) of the Constitution.

¹¹⁴ Van der Walt (note 68 above) at 232–237; Roux (note 68 above) at 46–21 provides an explanation of the requirements any law or rule must comply with in order to constitute law of general application.

¹¹⁵ Roux (note 68 above) at 46–21; Bezuidenhout (note 92 above) at 21–22.

¹¹⁶ Van der Walt (note 68 above) at 236–237. See also ZT Boggenpoel ‘Compulsory transfer of encroached-upon land: A constitutional analysis’ (2013) 76 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 313, 320.

¹¹⁷ In Z Temmers *Building Encroachments and Compulsory Transfer of Ownership* (unpublished LLD dissertation Stellenbosch University 2010) at 154–155 the author argued that a deprivation that is not actually authorised by the law will be *procedurally unfair* and for this reason inconsistent with s 25. However, in a subsequent publication the author submitted that where the relevant source of law does not authorise the deprivation complained of the deprivation would be unconstitutional for not complying with *the law of general application* prerequisite of s 25. In this regard, see Boggenpoel (note 116 above) at 320–321. The latter approach has found favour with scholars. See for instance, R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (unpublished LLD dissertation Stellenbosch University 2012) at 297; Siphuma (note 24 above) at 83 where these scholars employed the same reasoning in their analysis of the law of general application requirement.

¹¹⁸ *FNB* (note 69 above) at para 46.

¹¹⁹ The Constitutional Court, in non-constitutional property cases, recognised that law of general application includes the common law. In this regard, see *Du Plessis & Others v De Klerk & Another* [1996] ZACC 10, 1996 (3) SA 850 (CC) at para 44; *S v Thebus & Another* [2003] ZACC 12, 2003 (6) SA 505 (CC) at paras 64–65. Moreover, Van der Walt supports recognising the common law as law of general application, see Van der Walt (note 68 above) at 33.

¹²⁰ Boggenpoel (note 116 above) at 320–321.

the successful estoppel raiser.¹²¹ As a result, the traditional consequence ascribed to estoppel is that the owner's entitlements including the right to vindicate are said to be suspended against the estoppel raiser.¹²² Accordingly, a successful estoppel defence directly authorises the deprivation of property. Therefore, an argument can be made that the said deprivation is authorised by a law of general application, which is the common law of estoppel in this case, and that the first validity requirement of section 25(1) is complied with by the deprivation caused by the traditional interpretation of the consequences of estoppel.

Notably, in a previous publication, Boggenpoel and I raised doubt about whether the authorisation requirement would be met under the *Oriental Products* interpretation of the consequences of estoppel.¹²³ A tentative look at the consequences of estoppel indicated that the function and scope of estoppel as a defence is limited to preventing an inequity from ensuing by precluding the owner from recovering her property. In this regard, the defence of estoppel is not meant to change the legal position of the parties. Consequently, it was submitted that estoppel is arguably not authorised to terminate rights that parties held over property before estoppel succeeded as this would change the position of the relevant parties.¹²⁴ The question therefore remained whether this tentative observation would be confirmed by further research. Further research showed that the general view is that estoppel cannot have direct substantive effect. In other words, as a defence, estoppel lacks substantive operational effect to result in compulsory loss of ownership.¹²⁵ If it was within the ambit and scope of estoppel to result in acquisition and loss of ownership, the estoppel doctrine should have been flexible enough to not only function as a defence but also as a cause of action. However, as case law has consistently held over the years, estoppel is a shield and not a sword, meaning it is a defence to shield against an otherwise inequitable or unfair outcome as appose to constituting a cause of action that enables one to claim and enforce rights.¹²⁶ Therefore, the interpretation that was ascribed to estoppel in *Oriental Products* exceeded the parameters of what the doctrine can have as a consequence and can thus be said to be unauthorised. Since no authority for the deprivation in the form of loss of ownership arguably exists under the *Oriental Products* interpretation of the consequences of estoppel, the deprivation that would be caused by such interpretation will be unconstitutional due to potential non-compliance with the law of general application requirement, regardless of the specific mode of ownership acquisition. Consequently, this analysis confirms the initial suspicion that the common law construct of estoppel does not authorise extinction of ownership or limited real rights, for that matter, and that the law of general application requirement in section 25(1) would therefore not be met.

This finding is further supported by another issue that crops up when scrutinising whether estoppel as a derivative mode of acquisition of ownership would be authorised by the common law. Implicit in the law of general application requirement is the principle that before a deprivation of property can take place in terms of law, the requirements that must be complied with for the law to authorise the relevant deprivation must be satisfied. If the

¹²¹ Part IIA above.

¹²² *Ibid.*

¹²³ Boggenpoel & Cloete (note 4 above) at 166–167.

¹²⁴ *Ibid.*

¹²⁵ Part IIA & B above.

¹²⁶ *Oriental Products* (note 2 above) para 31. See also earlier cases in which this phrase was used: *Pandora's Trustee v Beatty & Co.* 1935 TPD 358 363; *Union Government v National Bank of South Africa Ltd* 1921 (AD) 121 128; *Barclays Western Bank Ltd v Fourie* 1979 (4) SA 157 (C) at 160.

requirements that the law sets out are not complied with, it means that there is no authorisation for the relevant deprivation. Now, since the law of general application would be estoppel as a mode of derivative acquisition, the rules of transfer of ownership would need to be complied with for valid transfer to occur. Yet, as showed in part III, the essential requirement that a real agreement must be concluded for transfer to occur cannot be satisfied in the context of estoppel, since there is no intention or will to transfer ownership. Consequently, derivative acquisition of ownership through estoppel is not authorised. For the above reasons, it would be very difficult to argue that estoppel, either by way of original or by way of derivative means, sanctions ownership acquisition.

It appears that the traditional view of estoppel merely suspending ownership entitlements is authorised by the common law, but that ascribing acquisition of ownership consequences to estoppel is not within the scope of what estoppel can do as a defence, irrespective of the mode of acquisition argued for. Consequently, the *Oriental Products* position will arguably not survive scrutiny under section 25, since the requirement that the law must authorise the deprivation cannot be satisfied. Only the traditional interpretation of the consequences of estoppel arguably survives the authorisation requirement and can therefore be tested further against the remaining requirements of section 25. The value in testing the traditional consequences of estoppel against the Constitution is that the analysis will give significant insight into whether the courts or the legislator might have to start thinking about crafting a constitutionally compliant legal construct with which to replace estoppel if the traditional consequences are found to be unconstitutional.

E Arbitrariness

1 *Procedural non-arbitrariness*

Once the authority of the deprivation has been confirmed the next step according to *FNB*'s questions, is to assess whether the deprivation is arbitrary. *FNB* confirmed that a deprivation would constitute an arbitrary deprivation if the procedures connected to the deprivation do not constitute fair procedures or if insufficient reason(s) exists for the deprivation on a continuum ranging from rationality to proportionality.¹²⁷ Accordingly, the arbitrariness test consists of both a procedural and a substantive leg. Importantly, procedural arbitrariness was not defined in *FNB*, but the subsequent case of *Mkontwana* expanded on the concept to some degree.¹²⁸ In *Mkontwana*, the Court decided that procedural arbitrariness is a flexible notion that must be determined on the facts of each case, much like the concept of procedural fairness in other contexts.¹²⁹ Based on the Court's finding in *Mkontwana*, Van der Walt suggests that procedural arbitrariness under section 25(1) is similar to the procedural fairness inquiry in just administrative actions under administrative law.¹³⁰

¹²⁷ *FNB* (note 69 above) at paras 100. See Van der Walt (note 68 above) at 220–223, 237–241; Roux (note 68 above) at 46–22.

¹²⁸ *Mkontwana* (note 93 above) at para 65.

¹²⁹ *Ibid.* See also *Reflect-All* (note 77 above) at para 40 in which the *Mkontwana* ratio pertaining to the procedural arbitrariness test was confirmed.

¹³⁰ Van der Walt (note 68 above) at 265. However, subsequent to *Mkontwana* it was suggested that the procedural arbitrariness test under s 25(1) is a separate and independent test. See *Opperman* (note 96 above) at para 69. See also AJ van der Walt 'Procedurally Arbitrary Deprivation of Property' (2012) 23 *Stellenbosch Law Review*

When determining if the possible deprivation caused by a successful estoppel defence amounts to a procedurally arbitrary deprivation, it will have to be established whether the legal process that causes the identified deprivation furnishes the original owner with sufficient legal recourse to protect her rights. The factors that point to a fair legal process include the fact that before the deprivation the owner had at her disposal the most powerful remedy available to owners to recover lost possession of the property, namely the *rei vindicatio*; that an independent judge presides over the substantive and procedural aspects of the proceedings; and that the owner can apply for review or appeal the decision in terms of the rules of civil procedure. As a result, it would seem unlikely that the deprivation caused by a successful estoppel defence would amount to a procedurally arbitrary deprivation.¹³¹ Instead, the deprivation of property would purportedly comply with the procedural leg of the non-arbitrariness test.

2 Substantive non-arbitrariness

The substantive leg of the non-arbitrariness requirement involves determining whether sufficient reason exists for the deprivation of property that is authorised by the law under scrutiny. *FNB* indicated that the question of whether there is sufficient reason for a deprivation depends on the facts of each case and that the issue would have to be decided by way of a strict proportionality test or a less strict rationality review.¹³² Where the rationality review or test is applied, the aim is to determine whether the deprivation of the identified property interest is rationally connected to some government purpose. The proportionality test is about determining if the deprivation is proportionate to the purpose it serves, especially in terms of the overall impact that the deprivation has on a particular individual. The substantive arbitrariness test is contextual, and the level of scrutiny ('the thickness of the test') varies depending on the facts of each case.¹³³ In this regard, the Court in *FNB* held that sufficient reason must be established as follows:

- (a) It is to be determined by evaluating the relationship between [the] means employed, namely the deprivation in question and [the] ends sought to be achieved, namely the purpose of the law in question.
- (b) A complexity of relationships has to be considered.
- (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
- (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
- (e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving

88, 90; E van der Sijde *Reconsidering the Relationship between Property and Regulation: A Systemic Constitutional Approach* (unpublished LLD dissertation Stellenbosch University 2015) at 122–123.

¹³¹ In most instances where the common law authorises deprivation of property, it is not likely that the deprivation would be arbitrary due to procedure. Instead, procedural arbitrariness is more likely to arise in the context of legislation. For instance, Boggenpoel argues in the context of encroachments that where a court order brings about the deprivation in terms of the common law, which presumably authorised the deprivation as opposed to a deprivation caused by legislation, procedural fairness should not be in issue. Boggenpoel (note 116 above) at 324. Raphulu makes a similar argument in the context of the right of way of necessity. TN Raphulu *The Right of Way of Necessity: A Constitutional Analysis* (unpublished LLM thesis Stellenbosch University 2013) at 121.

¹³² *FNB* (note 69 above) at para 100.

¹³³ Van der Walt (note 68 above) at 246. See also Van der Walt (note 71 above) at 423, 425; Swanepoel (note 77 above) at 252–264.

law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.

- (f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.
- (g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.
- (h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25. 'Arbitrary' deprivation as applied to s 114 of the Act.¹³⁴

Although the *FNB* decision provided much-needed guidance on how section 25(1) should be approached, the case was silent on how the listed factors should be approached. It can, however, be deduced from subsequent case law that not all the factors will necessarily apply in *all* instances and that courts are likely to apply only those factors that seem relevant to the specific deprivation in question.¹³⁵ This is the approach to arbitrariness factors that will be applied to the traditional position regarding the consequences of estoppel in an attempt to provide a tentative proposal as to how a substantive arbitrariness inquiry of the consequences of estoppel might look. Consequently, anticipated relevant factors will be applied to the deprivation caused by the traditional consequences of estoppel. These consist of the relationship between the means employed and the ends sought; the purpose of the deprivation and the person affected; and the relationship between the purpose and extent of the deprivation and the nature of the property.

aa The means employed and the ends sought

The ends sought to be achieved by the identified deprivation, namely the suspension of some of the owner's entitlements, especially the right to recover the property, is to protect *bona fide* purchasers of property in certain circumstances. These circumstances entail situations where such purchasers reasonably relied on negligent representations made by the owners of the property that the seller was the owner or had the authority to dispose of the property to the purchaser's detriment.¹³⁶ As illustrated in part II, this purpose is based on public policy of fairness which is encapsulated in the English law notion of equity, the risk principle and negligence. In this regard, equity requires that the owner's right should not be enforced against the *bona fide* purchaser because such enforcement will be unfair.¹³⁷ Equity, therefore, requires that the owner's rights, at the very least, should be limited so that the *bona fide* purchaser's interest can be protected. It is accepted that allowing the owner to recover the property in

¹³⁴ *FNB* (note 69 above) at para 100.

¹³⁵ See for instance *Mkontwana* (note 93 above) at paras 92–112; *Reflect-All* (note 77 above) at para 49; *Opperman* (note 96 above) at paras 68–77. See also Slade (note 72 above) at 40–41.

¹³⁶ Part IIA above.

¹³⁷ Harms (note 9 above) at para 79. See also Boggenpoel & Cloete (note 4 above) at 47.

these circumstances will be unfair.¹³⁸ In addition, risk liability by way of the risk principle supports the purpose of the deprivation, namely the protection of the *bona fide* purchaser rather than the protection of the owner, in that risk liability requires that the owner who created the risk of misleading should carry the risk of loss instead of the innocent purchaser.¹³⁹ The means by which the defence of estoppel achieves the protection of the *bona fide* purchaser is through due legal process that suspends the owner's entitlements when estoppel succeeds. In this regard, a court is only permitted to limit ownership if the court is persuaded that the onerous requirements of estoppel are met.¹⁴⁰ Therefore, the deprivation occurs in very specific and limited circumstances. Moreover, South African law provides no other remedy or protection to *bona fide* purchasers against the owner seeking recovery from the purchaser in these circumstances, unlike some foreign jurisdictions which offer a third party or *bona fide* purchaser protection measures.¹⁴¹ In other words, estoppel is the only mechanism with which a *bona fide* purchaser for value can be protected against the property owner. It is also rather difficult to think of achieving the aim of protecting the purchaser without at the very least placing limitations on the owner's entitlement to recover the property. Without estoppel operating as a defence that can be raised against an owner's *rei vindicatio* and by so doing limit the owner's ownership, the owner could easily recover possession of the property and the law would condone an arguably unfair outcome by allowing such recovery. By suspending the owner's ability to recover the property, it appears that estoppel prevents the owner from recovering the property in service of the aims of the deprivation, as set out above. A close relationship (or nexus) can therefore be said to exist between the ends sought to be achieved by the deprivation in question and the means employed by estoppel, namely the protection of the purchaser and the suspension of the right to recover the property. As a starting point this analysis indicates that sufficient reasons arguably exist for the deprivation caused by estoppel.

bb The purpose of the deprivation and the person affected

Regarding the relationship between the person affected and the aim of the deprivation caused by the traditional position, it is apparent that the person affected by the deprivation is the owner of the property. Arguably, a clear nexus is present between the owner who created the risk of misleading by way of the representation, which ultimately led to the purchaser reasonably relying on the representation to her detriment, and the aim of (or reason for) the deprivation.¹⁴² In other words, the owner who fails to recover her property with the *rei vindicatio* caused the inequitable and unfair situation that estoppel aims to remedy. The policy reason

¹³⁸ Ibid.

¹³⁹ Van der Walt (note 3 above) at 92.

¹⁴⁰ Part IIA above.

¹⁴¹ Part IIB above.

¹⁴² This finding is different from what was found in the *FNB* case regarding the relationship between the aim of the deprivation and the person affected. In *FNB*, the Court found that a close enough link between the person affected and the aim of the deprivation did not exist. This was because s 114 of the Customs and Excise Act 91 of 1964 that caused the deprivation allowed the South African Revenue Services to detain and sell the appellant's vehicles situated on the tax debtor's premises to satisfy the debt of the tax debtor. This means that the deprivation, which aimed to secure payment of the debtor's tax debt, affected the appellant as the owner of the vehicle and not the tax debtor. Consequently, a nexus could not be established between the aim of the deprivation (to recover tax debt) and the person affected (the owner of the vehicles who was *not* also the tax debtor). See *FNB* (note 69 above) at para 108.

of equity indicates that it would be unfair to allow the owner who made the representation to recover the property, thereby specifically linking the owner's conduct with the unfairness that would ensue if the owner was allowed to recover the property. Moreover, the link between the owner's representation and the purpose of the deprivation is also supported by the risk principle as an indicator of fairness. Because of the owner's risk creation and facilitation, the *bona fide* purchaser is ultimately in need of protection against detriment.¹⁴³ Therefore, it can be concluded that a close link exists between the person affected by the deprivation (being the owner who created the representation) and the aim of the deprivation (the limitation of several of the owner's entitlements).

cc The purpose and extent of the deprivation and the nature of the property

The nature of the property concerned is the right of ownership, which is limited by the suspension of the right to recover the property through estoppel, and by implication other entitlements. The extent of the limitation of the right of ownership (meaning, the deprivation) is not limited to the right or entitlement to recover property. As shown in paragraph IIB above, the mere fact that the owner cannot recover her property deprives her of numerous other entitlements that she would have been able to exercise and enjoy, but for the deprivation. These entitlements include the *ius possidendi* (right to possess), *ius utendi* (the right to use and enjoy), *ius disponendi* (the right to dispose) and perhaps even the *ius fruendi* (the right to fruits).¹⁴⁴ The extent of the limitation is impacted by the duration of the limitation. In this regard, the duration of the suspension of the owner's right to vindicate is uncertain, although it is generally accepted that these entitlements are suspended indefinitely, which may include a period equivalent to the lifetime of the owner.¹⁴⁵ Furthermore, since the affected property interest is ownership, the link between the nature of the property and the purpose of the deprivation (protection of the *bona fide* purchaser) is clear. Limiting ownership, through the denial of the right to recover, is required to satisfy the deprivation's aim. The fact that several other ownership entitlements are suspended alongside the right to recover the property for an indefinite period further support the purpose for the deprivation.¹⁴⁶ If the suspension was limited to a short period or if it was practically and legally possible for the owner to still use and enjoy, sell, lease or offer the property as security, irrespective of the suspension of the right to recover, the *bona fide* purchaser's protection would not be achieved. These considerations point to the existence of a strong connection between the aim of the deprivation, the nature of the property and the extent of the deprivation.

dd The level of scrutiny

As explained earlier, *FNB* held that the nature and extent of the deprivation shows whether a mere rationality or a strict proportionality test should be applied to determine substantive arbitrariness in terms of the property clause. Therefore, when deciding between a rationality or a strict proportionality test, the courts are required to exercise a discretion based on the nature of

¹⁴³ Part IIB. See also Harms (note 9 above) at para 79. See also Boggendoel & Cloete (note 4 above) at 47.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

the property and the extent of the deprivation, as illustrated by the Court in *FNB*.¹⁴⁷ The reason advanced for the deprivation is required to be more compelling when the deprivation affects all the incidents of ownership completely. The above analysis of these factors confirmed that the deprivation caused by the traditional interpretation of the consequences of estoppel places a limitation on ownership, that the extent of the deprivation is severe since the deprivation is for an indefinite period and does not only involve the suspension of the right to recover but also numerous other ownership entitlements by implication. Considering the identified severity of the deprivation, the arbitrariness inquiry would have to look at proportionality, rather than rationality. Therefore, the proportionality test is the appropriate arbitrariness inquiry for establishing if the traditional view of the consequences of estoppel complies with the non-arbitrariness requirement. On this level of analysis, it may be reasonable to submit that sufficient justification for the deprivation does arguably exist in terms of the proportionality test. This is so since a close relationship was identified between the complexities of relations, the ends sought to be achieved and the means employed, the purpose of the deprivation and the person affected, and the nature and extent of the deprivation in the context of estoppel.

Considering all the close links identified above, it seems probable that a court would likely find that the traditional interpretation of the consequences of estoppel does not result in arbitrary deprivation of property. On the other hand, since no authority could be found for estoppel to have compulsory loss and acquisition of ownership as a consequence, the *Oriental Products* position regarding the consequences of estoppel does not meet the authorisation requirement of section 25 and is therefore invalid and unconstitutional. This means that only the deprivation caused by the traditional interpretation is likely to survive scrutiny under section 25(1) of the Constitution. Because the deprivation caused by the traditional position would likely comply with section 25, as illustrated above, the need to apply section 36 of the Constitution – as indicated in the *FNB* questions – should not arise. However, the analysis above regarding the constitutionality of the *Oriental Products* interpretation of the consequences of estoppel showed that such interpretation would probably not survive constitutional muster, since no authority for compulsory loss of ownership can be found in the common law of estoppel. The question that therefore arises is whether the breach of section-25 can be justified by section 36 of the Constitution. If this breach can be justified, the interpretation can be regarded as constitutionally compliant. Another issue that arises from the section-25 analysis is whether the constitutionally compliant deprivation (the traditional interpretation that was shown to comply with the property clause) and the *Oriental Products* interpretation (if it can be saved by section 36) amount to expropriations. This is a question not yet considered and should arguably be addressed, since litigants may deem their bare owner status, if estoppel defeats their vindicatory actions, as an expropriation brought about by the law.

F Estoppel, the limitation clause and expropriations

According to *FNB*, if a deprivation is arbitrary, a court must consider whether the arbitrary deprivation is nonetheless justified in terms of section 36(1) of the Constitution, the limitation clause.¹⁴⁸ In this regard, the dominant view is that where a deprivation is found to be arbitrary under section 25(1), the deprivation will generally not survive justification under section 36(1).

¹⁴⁷ *FNB* (note 69 above) at para 100.

¹⁴⁸ *FNB* (note 69 above) at para 46. See also Van der Walt (note 68 above) at 77–78; Roux (note 68 above) at 46-26.

The reason being that the arbitrariness inquiry, specifically the proportionality test, is very similar to the justification inquiry under section 36 and would, therefore, possibly have the same results. Since the deprivation caused by the traditional position would likely constitute a non-arbitrary deprivation of property in terms of the proportionality test and, hence, comply with section 25 as illustrated above, the need to apply section 36 of the Constitution to the traditional position – as indicated in the *FNB* questions – does not arise.¹⁴⁹

However, the application of section 36(1) does surface when considering that the *Oriental Products* position regarding estoppel was found to be unauthorised and therefore incongruent with section 25 of the Constitution. Whether section 36 can yield a different outcome for the *Oriental Products* interpretation of estoppel, which was found to infringe section 25 due to a lack of authority for the resultant deprivation of compulsory loss of ownership, remains questionable. Concerning the question of whether deprivations that are found to be inconsistent with section 25 due to such deprivations not being authorised by a law of general application could be saved by section 36, Van der Walt opines that this would be improbable.¹⁵⁰ He argues that since section 36 also requires the infringement to be authorised by law of general application, the reason why the deprivation was found to be inconsistent with section 25 would likewise arguably cause it to be inconsistent with the limitation clause. As a result, it appears that the *Oriental Products* interpretation of the consequences of estoppel cannot be saved by section 36 and would as a result remain unconstitutional.

The remaining question is then whether the traditional interpretation of the consequences of estoppel that was found to be compliant with section 25(1) would amount to an expropriation in terms of section 25(2)–(3) of the Constitution, which would require compensation to be paid to the owner for the suspension of several of her entitlements for an indefinite period. This question arises because in *FNB* the Court held that once it is established that the deprivation is in terms of law of general application, and that the deprivation is not arbitrary, or can be saved by section 36(1), courts must determine whether the deprivation constitutes an expropriation in terms of section 25(2)–(3) of the Constitution.¹⁵¹ In this regard, a constitutionally valid expropriation requires the expropriation to be for a public purpose or in the public interest, and that just and equitable compensation is paid for the expropriation.¹⁵² In addition, the threshold requirement for expropriations is that they must be enforced in terms of a law of general application. This requirement of a law of general application causes the traditional interpretation of the consequences of estoppel to fall short of an expropriation. In South African law, expropriation can only take place in terms of promulgated legislation that expressly empowers the state to expropriate.¹⁵³ In the estoppel scenario, the limitation of ownership takes place in terms of the common law. In this regard, no power to expropriate exists at common

¹⁴⁹ Roux (note 68 above) at 46-26. However, Roux concedes that where the standard of the arbitrariness test is lower, in other words, the rational connection test or measure is applied instead of a full proportionality review, the s 36(1) limitation clause may have some significance. See Roux (note 68 above) at 46-27.

¹⁵⁰ Van der Walt (note 68 above) at 56.

¹⁵¹ *FNB* (note 69 above) at para 100.

¹⁵² Section 25(2)(a)–(b) of the Constitution. See further Van der Walt (note 68 above) at 458–510; Roux (note 68 above) at 46-29, 33–34.

¹⁵³ *Harvey v Umblatzu Municipality & Others* [2010] ZAKZPHC 86, 2011 (1) SA 601 (KZP) paras 81–87. See also Van der Walt (note 68 above) at 453–454, 496; Roux (note 68 above) at 46-29.

law.¹⁵⁴ Therefore, the limitation or suspension of rights that may result from a successful estoppel defence cannot amount to expropriation.

V CONCLUSION

The purpose of this contribution was to determine the constitutional validity of the consequences ascribed to the situation where a *bona fide* purchaser successfully raises the defence of estoppel against the *rei vindicatio*. In this regard, two opposing interpretations had to be considered because the most recent Supreme Court of Appeal case on the topic, *Oriental Products*, arguably deviated from the traditional interpretation of what the consequences of estoppel entail. These interpretations consisted of the traditional position and the *Oriental Products* interpretation.

Part I of the article confirmed that the traditional position involves the suspension of the owner's *rei vindicatio* indefinitely. However, further investigation into the position showed that its impact on ownership goes beyond the mere suspension of the right to vindicate. In this regard, the traditional position in fact also limits several other ownership entitlements such as the *ius possidendi*, *ius utendi*, *ius fruendi*, *ius abutendi* and the *ius dispendendi*, and results in the owner having *bare ownership* status. This finding indicated that a section-25 analysis might result in an arbitrary deprivation of constitutional property because of the apparently severe impact of the traditional position on ownership. It was also shown that several reasons exist for the limitation such as considerations of fairness and equity, the risk principle and fault, which may render the position compliant with section 25.

The constitutional analysis of the traditional position completed in part IV showed that although the traditional position results in a severe deprivation of constitutional property, the deprivation is justified under the proportionality non-arbitrariness test, causing it to be a valid deprivation. The position also does not amount to an expropriation since expropriations cannot be authorised by the common law. This means that the traditional position is constitutionally compliant. This finding is significant for a number of reasons. First, it indicates that the position can be upheld as its validity and force is supported by the Constitution. Secondly, litigants who aver that estoppel arbitrarily deprives them of their property or that it amounts to an expropriation because of their bare ownership status, will purportedly not succeed. Thirdly, it shows that the existence of doctrinal anomalies, such as those elaborated in part II of the article, would not, per se render a deprivation arbitrary. The contextual nature of the arbitrariness inquiry is therefore underscored by this observation. Lastly, the finding that the traditional position is constitutionally compliant supports the proponents of the traditional position, since it confirms its validity. Linked to this is the observation that opponents of the traditional position will have to find justification elsewhere to argue for a different outcome in these circumstances.

Part III revealed that the *Oriental Products* interpretation, which entails that estoppel results in acquisition and loss of ownership, is plagued with uncertainties. It is debatable whether the ownership acquisition interpretation (and the *dicta* it is based on) are merely *obiter* or binding. However, I argued in part III that despite this uncertainty about the nature of the remarks, a section-25 analysis will be valuable either as an *ex ante* or *ex post* examination of the constitutional validity of the interpretation. Furthermore, the court's inconsistent use

¹⁵⁴ Van der Walt (note 68 above) at 346, 453.

of derivative and original terminology to describe the acquisition of ownership by way of estoppel is problematic from a doctrinal point of view and has implications for the section 25 analysis. Although scholars are also not in agreement regarding the most appropriate mode of acquisition in this regard, they have pointed out that the essential requirement of a real agreement is absent when estoppel succeeds. This essentially eliminates derivative acquisition as an option.

Regarding estoppel and original acquisition, scholars have highlighted that since ownership is acquired unencumbered through original modes, rights other than ownership will also be terminated at acquisition through estoppel. The issue with this argument is that the termination of these rights might not survive scrutiny under section 25. However, it is questionable if this is a valid concern as it has been disputed whether the termination of burdens and benefits is indeed a defining principle of original modes of acquisition. Nevertheless, I submitted that a section-25 analysis that considers both options could potentially be the decider.

Critically, the *Oriental Products* interpretation does not pass constitutional muster under section 25. The hurdle that this interpretation of estoppel cannot overcome is the law-of-general-application requirement. In this regard, estoppel does not authorise the resultant deprivation (termination of ownership), irrespective of whether estoppel operates as an original or derivative mode of acquisition. This is because estoppel is not authorised to change the legal position of the parties, and so cannot terminate rights such as ownership. The termination of limited real rights by way of estoppel is in contravention of section 25 for the same reason. Accordingly, the *Oriental Products* interpretation infringes section 25 of the Constitution. It cannot be saved by section 36 (the limitation clause) because the limitation clause also requires the infringement to be in terms of a law-of-general-application. An important implication of this finding is that an argument to the effect that estoppel by representation can result in the acquisition of ownership is doctrinally flawed and unconstitutional. Thus, if a section-25 challenge is brought against the *Oriental Products* interpretation of estoppel, such challenge will likely succeed. Therefore, courts should steer clear of this kind of reasoning.

