The Implications of the *Mtolo v Lombard* Decision on the Understanding of the Nature of Ownership

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SUMMARY

In the South African context, property law has changed considerably in line with the Constitution. Ownership (property rights in the broader sense) now involves a constitutionally required balance between the interests of owners and non-owners. Therefore, ownership can no longer be perceived only in terms of its absolutist or exclusionary element. The Constitution and court judgments have radically affected the nature of ownership in South Africa. For example, the Constitutional Court decision in *Mtolo v Lombard* confirms that the nature, content and concept of ownership have changed. The decision also demonstrates that the nature of ownership continues to evolve in light of the legal and constitutional framework within which ownership operates. In *Mtolo*, the Constitutional Court considered whether the respondents (landowners in this case) had, in fact, restored the applicants' home to a state suitable for human habitation, in compliance with an order of the High Court. The Constitutional Court found that the restoration of the roof and windows was not done and instructed the respondents to comply forthwith with the order.

The author claims that the decision provides insights into understanding ownership in the constitutional era. This article looks at the implications of the *Mtolo* decision on the nature of ownership. In so doing, the article takes into consideration the current needs (of applicants) and the changing circumstances of society, and of the constitutional system that recognises competing rights, and on which limitations and obligations are to be expected.

The author introduces the article with a brief overview of the plight of non-owners – in particular, farmworkers who work and live on farmland. The article then proceeds first, to outline the facts and issues of the *Mtolo* case; secondly, to explore the outcome of the *Mtolo* case and its relevance, taking into account the elements of a dignified and habitable home, the constitutional rights that are implicated and the obligations of the State, as well as private owners, to ensure habitable homes for occupiers; and thirdly, to assess the implications of the *Mtolo* decision on the nature of ownership. The article concludes that in a legal and constitutional system, the nature of ownership continues to evolve and adapt to prevailing circumstances, such as protecting the constitutional rights of vulnerable farmworkers.

KEYWORDS: ownership, habitable dwelling for farm workers, human dignity

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1 INTRODUCTION

The Constitution of the Republic of South Africa, 1996 (Constitution), has had a considerable effect on property law.[1] Sometimes, the Constitution protects ownership, but ownership rights may also be limited in order to protect other constitutional rights.[2] In effect, limitations imposed on ownership show that this right is not absolute.[3] Furthermore, the limitations reveal that context does play a role in property disputes since all relevant circumstances are taken into account in deciding whether a particular limitation is justified.[4] Ownership (property rights in the broader sense) can no longer be perceived only in terms of its absolutist element, since it involves a constitutionally required balance between the interests of both owners and non-owners.[5] As a result, the notion of ownership should be understood in light of the existing needs and changing circumstances of society, and of the constitutional system that recognises competing rights, and on which limitations are to be expected.[6]

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1 Van der Walt "The Modest Systemic Status of Property Rights" 2014 1 *Journal for Law, Property and Society* 15–106; Van der Walt and Dhliwayo "The Notion of Absolute and Exclusive Ownership: A Doctrinal Analysis" 2017 134 *South African Law Journal* 34–52; Dhliwayo "Justifying the Limitations on the Landowner's Right to Exclude" 2019 12 *Tydskrif vir die Suid-Afrikaanse Reg* 252–284.

2 Van der Walt *Constitutional Property Law* 3ed (2011) 215; Van der Walt *Property and Constitution* (2012) 29.

3 For a general discussion on the limitations imposed on ownership, see Van der Walt and Dhliwayo 2017 *SALJ* 34–52; Dhliwayo 2019 *TSAR* 252–284.

4 Dhliwayo and Muller "General Principles of Ownership" in Muller (ed) *General Principles of South African Property Law* (2019) 50; Dhliwayo 2019 *TSAR* 252–284.

5 Dhliwayo and Muller in Muller (ed) *General Principles* 50. This balancing of rights, for e.g., between a property right (s 25 of the Constitution) and a housing right (s 26 of the Constitution), is evident in eviction cases. The consideration of all relevant circumstances in an eviction case amounts to a balancing process in which the landowner's rights (ownership) are weighed against the interests of the occupiers (housing). In this context, the courts have a discretion to decide whether to grant an eviction order after all the relevant circumstances have been taken into account. Liebenberg (*Socio-Economic Rights: Adjudication Under a Transformative Constitution* (2010) 343) argues that the power of property rights in the case of the pre-constitutional common law is reflected in the *rei vindicatio* remedy. The courts' discretion overrides the abstract application of the common-law *rei vindicatio* in that the eviction order is not based purely on proving the common-law requirements that the applicant is the owner, and that the occupier is in possession, but on all relevant circumstances. See Van der Walt *Property in the Margins* (2009) 43–44. In *Ndlovu v Ngcobo*; *Bekker v Jika* 2003 (1) SA 113 (SCA), the court held that an eviction order cannot be granted without considering the personal and socio-economic circumstances of the occupiers. In instances where there are compelling circumstances or factors, the eviction should not be granted. See also cases such as *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 (5) SA 3 (CC), where the property rights of landowners were not upheld and were not allowed to trump the constitutional rights of non-owners, such as the right to equality, dignity and the right to have access to adequate housing.

6 Dhliwayo *A Constitutional Analysis of Access Rights That Limit Landowners' Right to Exclude* (doctoral dissertation, Stellenbosch University) 2015 ch 3; Dhliwayo and Muller in Muller (ed) *General Principles* 50.

Non-owners, such as farmworkers, enjoy rights under the Constitution[7] and legislation such as the Extension of Security of Tenure Act[8] (ESTA). Access rights to housing, linked with tenure security for farmworkers, may cause conflict with farm owners' property rights.[9] In instances where such a conflict arises, it is crucial to protect the farmworkers' constitutionally and statutorily protected rights.[10] The Constitution is transformative in nature:[11] as such, protecting the rights of farmworkers is in line with the transformative vision of the Constitution.

It is undisputed that land dispossessions contributed to a cycle of poverty and homelessness among many people in South Africa.[12] The legacy of apartheid and its discriminatory laws still have a negative impact on the living conditions of the majority of South Africans, and farmworkers in particular. In this regard, legislative measures were drafted and promulgated post-1994, in line with the constitutional mandate,[13] to improve the land-tenure system and to regulate living and working conditions on farmland.[14] ESTA, for example, provides security of tenure for occupiers residing with consent on rural or peri-urban land.[15] ESTA is aimed at creating and developing a transformative land-tenure system in rural areas that improves the land rights of occupiers. However, tenure insecurity for farmworkers remains high, especially on commercial farmlands.

Notwithstanding that legislative measures have been in operation for 30 years, tenure security is still lacking. Some progress has indeed been made through these legislative measures, but the plight of farmworkers' rights remains a concern. The issue of insecure tenure, (forced) eviction and landlessness continues unabated in relation to farmland, and this affects farmworkers and their families, particularly because of the direct effect it has

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7 For e.g., the right to tenure security provided in s 25(6) of the Constitution; the right to human dignity (s 10 of the Constitution) and the right of access to adequate housing (s 26(1) of the Constitution).

8 62 of 1997. ESTA was enacted to give effect to s 25(6) of the Constitution (the right to tenure security).

9 Pienaar (*Land Reform* (2014) 393–436) provides an overview of the overlapping rights and interests of farmworkers that are created by legislation to protect and give effect to these rights.

10 For e.g., the court in *Port Elizabeth Municipality v Various Occupiers supra* par 15 emphasised "the need for the orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past".

11 Van der Walt *Property in the Margins* 6. See also Davis and Klare "Transformative Constitutionalism and the Common and Customary Law" 2010 26 *South African Journal on Human Rights* 403–509; Liebenberg *Socio-Economic Rights* 272.

12 Smith "Land Reform in South Africa as a Means to Combat Poverty" 2004 45 *Dutch Reformed Theological Journal* 466 467.

13 For e.g., the government enacted ESTA to create an enabling legislative framework to facilitate the acquisition and strengthening of tenure security in rural areas, in line with s 25(6), read with s 25(9) of the Constitution. S 25(6) of the Constitution guarantees secure tenure to previously disadvantaged persons by placing an obligation on the legislature to enact laws to give effect to the tenure-security right.

14 Roodt "Security of Tenure and Livelihood Options in South Africa: A Case Study of a Rural Community Facing Eviction Under Post-Apartheid Legislation in the Eastern Cape Province" 2007 37 *Africanus* 3 5.

15 ESTA covers the category of farmworkers and regulates their relationship with the farm owner.

on the right of access to adequate housing and human dignity.[16] Therefore, there is still a need for a concerted effort on the part of the State and various other stakeholders to ensure that the constitutional and statutory rights of farmworkers and their families are upheld and protected.

Mtolo v Lombard[17] (*Mtolo*) (the Constitutional Court decision discussed in this article) demonstrates the conflict that can arise between section 25 of the Constitution (the right to property) and other constitutional rights, such as section 26 of the Constitution (right of access to adequate housing and right not to be unlawfully evicted from one's home); section 25(6) (right to secure tenure); and section 10 (right to human dignity). The *Mtolo* case also demonstrates: a) the lack of protection and enforcement of the constitutional right of tenure security for farmworkers; b) that unlawful evictions on farmland persist and in most instances, farmworkers and their families are left homeless and without alternative land or accommodation; and c) that the human dignity of the farmworkers and their families is disrespected when they are made to live in deplorable conditions in housing that is not habitable.

In this article, the author considers the place of ownership in resolving property disputes in the constitutional era. In particular, the article examines the Constitutional Court's engagement with whether the landowner's property rights are relevant in matters concerning adequate and habitable housing for non-owners such as farmworkers. The selected Constitutional Court decision is discussed to the extent that it provides insights into understanding ownership in the post-apartheid constitutional dispensation. A decision like that of *Mtolo* is important for our evolving understanding of the place of ownership in democratic South Africa. The decision related predominantly to claims that the landowners or person in charge should make the house habitable for the occupiers, to afford them a dignified home and life.

The aim here is to look at the implications of the *Mtolo* decision on the nature of ownership, and to re-evaluate the notion of ownership, considering the current needs of society and the constitutional system that recognises competing rights and interests. Here, the author supports the argument that placing ownership at the centre of any dispute that may concern property can, in certain circumstances, undermine the constitutional objectives of healing the divisions of the past and building a society based on fundamental values such as human dignity.[18]

Thirty years into democracy, there are indications that the government's attempts still fall short of suitable solutions to resolve the challenges faced by farmworkers and their families on farmland. These challenges impede the enforcement of farmworkers' tenure security and human dignity. What then

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16 Dhliwayo "Tenure Security and Farmland: Will Recent Policy and Legislative Developments Improve the Plight of Rural Dwellers?" 2014 25 *Stellenbosch Law Review* 143–159.

17 [2021] ZACC 39.

18 Van der Walt 2014 *Journal for Law, Property and Society* 15–106; Boggenpoel and Slade "Where Is Property? Some Thoughts on the Theoretical Implications of *Daniels v Scribante*" 2020 10 *Constitutional Court Review* 379–399.

is the way forward? Froneman J in *Daniels v Scribante*[19] (*Daniels*) pointed out that there is a need for a reassessment of our understanding of the nature of ownership and property so that, *inter alia*, the ideals of the Constitution are recognised. This article aims to reassess the nature of ownership, with the following questions in mind. Has the nature of ownership changed? Have the courts, through their judgments, made this change possible, if any, and what is the effect of the *Mtolo* decision on the understanding of the nature of ownership? The following parts provide a cursory overview of the *Mtolo* case, the facts, issues and outcome, as well as how the decision can assist in reassessing one's conceptualisation of the nature of ownership.

2 AN OVERVIEW OF THE *MTOLO* CASE

2 1 Facts and issues

The applicants, Mr Mtolo and his wife, were rendered homeless as a result of the removal of the roof and windows of their home, allegedly by the respondents. Mr Mtolo was employed by the first respondent, Mr Lombard. The applicants lived with their eight children on the property owned by the fourth respondent, Mrs Lombard. The property was later sold to the third respondent, Mr Hunter.[20]

The Mtolos claimed that on 16 June 2021, Mr Lombard visited them at their house, together with the police, and informed them that the property had been sold.[21] Mr Lombard assured them that they could reside on the property until they secured alternative accommodation. The Mtolos also claimed that, despite an assurance by Mr Lombard that they could reside on the property until they secured alternative accommodation, Mr Lombard had visited them on 24 June 2021, again accompanied by the police and intimidated them into vacating the premises.[22] The Mtolos alleged that the respondents removed the roof and windows of their house, effectively evicting them. Such removal resulted in the applicants, together with their children, sleeping and living in the open and the car.[23] This new living arrangement affected their children's schooling – affecting, in particular, two of the children who were in Grade 12.[24]

The applicants then approached the High Court to challenge the lawfulness of the eviction.[25] In the High Court, Mr and Mrs Lombard were ordered to restore the house to a state fit for human occupation and to allow the applicants (the Mtolos) to resume possession of the property. The High

19 2017 (4) SA 341 (CC) par 115.
20 *Mtolo v Lombard supra* par 1.
21 *Mtolo v Lombard supra* par 4.
22 *Mtolo v Lombard supra* par 4–5.
23 *Mtolo v Lombard supra* par 7.
24 *Mtolo v Lombard supra* par 7 and 15.
25 *Mtolo v Lombard supra* par 8.

Court also granted the Mtolos leave to approach it on an urgent basis, if there were non-compliance with its order.[26]

Consequently, the Mtolos brought an urgent High Court application on the basis that the house remained unfit for human occupation. In their response, the respondents alleged that they did comply with the court order and averred that the Mtolos had since secured alternative accommodation. As a result, the urgent High Court application was struck from the roll for lack of urgency.[27] The Mtolos then approached the Constitutional Court, declaring that the respondents had not complied with the High Court's order and that such non-compliance infringed on their right to human dignity, their children's right to basic education, and their right of access to adequate housing.[28] The Constitutional Court found that the Mtolos would suffer irreparable harm if they were made to wait for the next available date for a hearing and accepted that the matter was urgent.[29]

In the High Court, the applicants had obtained an order requiring the respondents to replace the roof and windows to make the home fit for human occupation. The issue before the Constitutional Court was to determine whether the respondents had complied with the order, as this case concerned the applicants' right of access to adequate housing, right to human dignity and the children's right to basic education. In other words, the issue was whether the failure by the respondents to restore the applicants' home to a state suitable for human habitation violated the applicants' right of access to adequate housing and, relatedly, their right to human dignity, as well as their children's right to basic education.[30]

2 2 Outcome and relevance of the *Mtolo* decision

The decision in *Mtolo* should be read against the earlier Constitutional Court decision in *Daniels*, where the court took steps to link the right to security of tenure and the right to human dignity. This link is crucial in the context of a constitutional system that places obligations on a private landowner to ensure that the dwelling of their occupiers is also dignified and habitable.

In the High Court, the applicants in *Mtolo* obtained an order requiring the respondents to replace the roof and windows to make the home fit for human occupation, but the Constitutional Court found that the respondents had failed to comply with the High Court ruling. The Constitutional Court then ordered the respondents to comply with the order so that the human dignity of the applicants and their children could be restored.[31]

The court also ordered the respondents to do everything that was integral to fixing the roof. It furthermore directed the Emfuleni Local Municipality to appoint a suitably qualified person to inspect the house and prepare a report

[26] *Mtolo v Lombard supra* par 8–9.
[27] *Mtolo v Lombard supra* par 13.
[28] *Mtolo v Lombard supra* par 14.
[29] *Mtolo v Lombard supra* par 15.
[30] *Mtolo v Lombard supra* par 2.
[31] *Mtolo v Lombard supra* par 26–42.

on whether it was fit for human occupation, if the Mtolos said it was unfit for occupation.[32] The court sent the matter back to the High Court to ensure that it would supervise compliance with the court order.[33]

2 2 1 A dignified and habitable home

In the *Mtolo* case, the applicants (Mr Mtolo, his wife and their eight children) were rendered homeless because of the removal of the roof and windows of their home, allegedly by the respondents. It is argued that a dwelling (in this case a house) will exhibit habitability if it contains certain elements that make a dwelling habitable – namely, the minimum standard of adequate space; protection against excessive environmental factors; security from conduct potentially caused by individuals or harsh external factors; and generally a dwelling that has no structural defects.[34] The roof and windows of a home ensure protection against excessive environmental factors and provide security from harsh external factors. If the roof and windows had been removed, it meant that the applicants' home was rendered not habitable, as some of the elements of habitability were absent.

In *Mtolo*, the Constitutional Court said:

> "I am satisfied that the respondents have not complied with the order. They must do so soonest so that the dignity of the applicants and their children may be restored. From the photographs, it is plain that this is a modest home. That matters not. As Mhlantla J says '[a] home is more than brick and mortar, it is often a place of comfort [and] safety'. Indeed, to the applicants their modest home is home nonetheless and for the past 11 or so years the applicants and their children have enjoyed a dignified family life, assured of a roof over their heads and protected from the indignity and pain of homelessness. All that Antonie AJ's order does is temporarily to keep that situation in place and guarantee that its termination will be done under judicial supervision."

Here, the court recognises that an owner cannot simply act as they wish if that renders housing inhabitable. The court echoed the same sentiments as were raised in *Port Elizabeth Municipality v Various Occupiers*.[35] In this case, the court said:

> "[A] home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often, it will be the only relatively secure space of privacy and tranquillity in what (for poor people, in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat."[36]

A home is understood not just as providing physical protection and shelter but also as a space that allows one to enjoy privacy and constitutionally

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32 *Mtolo v Lombard supra* par 43.

33 *Mtolo v Lombard supra* par 43–46.

34 Ngwenyama *A Common Standard of Habitability? A Comparison Between Tenants, Usufructuaries and Occupiers in South African Law* (doctoral dissertation, Stellenbosch University) 2020 ch 2, discussing key elements of what makes a dwelling habitable.

35 *Supra*.

36 *Port Elizabeth Municipality v Various Occupiers supra* par 17.

recognised rights such as human dignity.[37] The United Nations Housing Rights Programme also notes:

> "To live in a place, and to have established one's own personal habitat with peace, security and dignity, should be considered neither a luxury, a privilege nor purely the good fortune of those who can afford a decent home. Rather, the requisite imperative of housing for personal security, privacy, health, safety, protection from the elements and many other attributes of a shared humanity, has led the international community to recognize adequate housing as a basic and fundamental human right."[38]

It is therefore important for farmworkers, like the Mtolos, to have a home that is habitable because it enables the exercise of many human rights, such as the right to human dignity. Furthermore, a home that is habitable ensures safety and security. A forced eviction in the form of removing the roof and windows from the Mtolo home undoubtedly disturbs the family's safety and security as well as the exercise of their rights. For 11 years, the Mtolos had been assured of a dignified life because they had a home with a roof and windows. A roof and windows made them feel safe and secure as they were protected against the excessive environmental factors of the outside world.

The Mtolos' safety and assurance of a dignified home can be intrinsically linked to having a home with windows and a roof over their heads. This shows that a roof and windows are essential elements of what is considered a habitable home.[39] These elements make it possible for the home to be fit and suitable for human habitation. Accordingly, the court's decision to order the respondents to repair the roof and windows is correct, in that it ensured that the Mtolos' home would be structurally sound and that they would occupy a physically safe home.

2 2 2 Constitutional rights implicated

The *Mtolo* matter implicates constitutional rights, including the right to human dignity (section 10), the right of access to adequate housing (section 26) and the right to basic education (section 29).[40] In *Mtolo*, the Constitutional Court ordered that the landowners repair the roof and windows of the occupiers' house to render the house fit for human habitation, and repair any other defects as may be necessary to repair the roof. This shows how, in a constitutional system, landowners have an obligation to ensure that the housing of occupiers is fit for human habitation. Thus, landowners are

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37 *Port Elizabeth Municipality v Various Occupiers supra* par 17. See also Ngwenyama *A Common Standard of Habitability* ch 2.

38 See United Nations Housing Rights Programme *Housing Rights Legislation: Review of International and National Legal Instruments* (Report No. 1- Global Campaign for Secure Tenure No. 05) 2002 1. See also *Port Elizabeth Municipality v Various Occupiers supra* par 17.

39 *Mtolo v Lombard supra* par 26, the court mentioned: "The order appears to link the restoration to habitability by human beings to the replacement of the roof and windows."

40 A discussion of the right to basic education falls outside the scope of this article. For such a discussion, see generally De Vos, Freedman, Brand, Gevers, Govender, Lenaghan, Mailula, Ntlama, Sibanda and Stone "Socio-Economic Rights" in De Vos and Freedman (eds) *South African Constitutional Law in Context* (2014) ch 16.

prevented from exercising the full extent of ownership rights over their property if other non-property rights or values in the Constitution are at stake.

The court in the *Mtolo* case took considerable steps towards acknowledging a standard of habitability that is consonant with constitutional rights and values. The court's order sought to restore the habitability of the home. In doing so, the court linked habitability with the constitutional right to human dignity so as to return to the Mtolos a home that is habitable, as well as to restore their access to adequate housing.

Section 10 of the Constitution provides: "Everyone has inherent dignity and the right to have their dignity respected and protected." What does this mean in the context of farmworkers, in general and to the Mtolos in particular? The notion of inherent dignity encompasses a personal understanding that every person should be acknowledged as a human being and should be treated humanely.[41] As a consequence, allowing conduct or a condition that may cause someone to be seen and treated as if they are less human is not supported by section 10 of the Constitution.[42] Removing the roof and windows from the Mtolos' house accordingly resulted in conduct that led to the infringement of the Mtolos' right to human dignity. In the *Mtolo* case, it is undisputed that the condition of the Mtolos' dwelling, after the removal of the roof and windows, was such that living there violated their right to human dignity.

In line with section 10 of the Constitution, everyone is entitled to have their human dignity respected and protected. The court's order for the repair of the roof therefore ensured that the Mtolos would live in a habitable and dignified home; at the same time, their right to human dignity would be respected. The protection afforded to everyone in terms of section 10 of the Constitution also applies to instances in which living conditions are deplorable, as seen in the *Mtolo* case.[43] In the *Mtolo* case, the Constitutional Court illustrated that the respect for the right to human dignity may require that occupiers (including farmworkers) live in homes that are habitable and thus meet a standard of human dignity.

Arguably, the Mtolos' housing right was supported by the constitutional right to human dignity. This is confirmation that other constitutional rights, such as human dignity, might function as a support for the right of access to adequate housing.[44] The right to human dignity accordingly plays a crucial role in the interpretation of constitutional rights such as the right of access to adequate housing in the *Mtolo* case.

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41 See De Vos *et al* in De Vos and Freedman (eds) *South African Constitutional Law in Context* (2014) 457; *Khumalo v Holomisa* 2002 (5) SA 401 (CC) par 27.

42 De Vos *et al* in De Vos and Freedman (eds) *South African Constitutional Law* 457; Haysom "Dignity" in Cheadle, Davis and Haysom (eds) *South African Constitutional Law: The Bill of Rights* 2ed (2015) 5–10 and 5–12. See also Ngwenyama (*A Common Standard of Habitability* ch 2), who makes a similar argument in the context of occupiers.

43 See also *Daniels v Scribante supra* par 31.

44 Dhliwayo *A Constitutional Analysis of Access Rights* 189.

In *Government of the Republic of South Africa v Grootboom*[45] (*Grootboom*), the court mentioned that when people do not have access to food, clothing or adequate housing, they are denied the foundational values of human dignity, freedom and equality.[46] This, therefore, means that human dignity informs a standard of life to which occupants such as the Mtolos are entitled. According to Liebenberg,[47] using human dignity to interpret rights such as the right to housing may guarantee that occupiers of homes live in conditions that enable them to flourish as human beings. If the respondents repair the roof and windows of the Mtolos' home, that will ensure restoration of their human dignity, protect their security of tenure and promote access to adequate housing. The court's emphasis on human dignity and its restoration shows how the right to human dignity can be applied in each case to inform and give substance to other rights – in this case, the right of access to adequate housing, as well as the right to secure tenure.[48]

2 2 3 The obligation of the State and private owners to ensure habitable homes for occupiers

Section 8(2) of the Constitution states that a provision of the Bill of Rights binds a natural or juristic person if and to the extent that it is applicable, considering the nature of the right and the nature of any duty imposed by the right. Section 8(2) of the Constitution is useful, as it frames the question of what we can expect of private landowners when their property rights come into conflict with the non-property constitutional rights of other persons such as occupiers or farmworkers.[49] In the *Daniels* case, the court pointed towards the potential for an imposition of positive obligations on private landowners. Madlanga J held:

> "This positive/negative obligation argument needs to be confronted head-on […] Although the right we are concerned with here is expanded on in ESTA, its true source is section 25(6) of the Constitution, which is located in the Bill of Rights. Thus section 8(2) finds application. I see no basis for reading the reference in section 8(2) to 'the nature of the duty imposed by the right' to mean, if a right in the Bill of Rights would have the effect of imposing a positive obligation, under no circumstances will it bind a natural or juristic person. Whether private persons will be bound depends on a number of factors. What is paramount includes: what is the nature of the right; what is the history behind the right; what does the right seek to achieve; how best can that be achieved; what is the 'potential of invasion of that right by persons other than the State or organs of state'; and, would letting private persons off the net not negate the essential content of the right? If, on weighing up all the

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45 2001 (1) SA 46 (CC).

46 *Government of the Republic of South Africa v Grootboom supra* par 23. See also De Vos *et al* in De Vos and Freedman *South African Constitutional Law* 459.

47 Liebenberg "The Value of Human Dignity in Interpreting Socio-Economic Rights" 2000 21 *South African Journal of Human Rights* 1 13. See also De Vos *et al* in De Vos and Freedman *South African Constitutional Law* 459–460.

48 *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) par 35.

49 *Daniels v Scribante supra* par 37–39. See also Van der Sijde "Tenure Security for ESTA Occupiers: Building on the Obiter Remarks in *Baron v Claytile Limited*" 2020 36 *South African Journal on Human Rights* 74 85.

> relevant factors, we are led to the conclusion that private persons are not only bound but must in fact bear a positive obligation, we should not shy away from imposing it; section 8(2) does envisage that."[50]

Here, the court in *Daniels* provided a useful framework for the legal and factual considerations that could be relevant when courts are called upon to adjudicate whether a landowner can be expected to provide suitable alternative accommodation in a specific case or to ensure that accommodation is habitable.[51]

In the *Mtolo* case, the court held: "The appropriate order is for the respondents to comply with Antonie AJ's order. And a suitably qualified official of the Emfuleni Local Municipality must inspect the house for compliance."[52] Antonie AJ's order stipulated that the respondents were required to replace the roof and windows to make the home of the Mtolos fit for human occupation.[53] This order clearly or expressly indicated that the landowners had a responsibility to replace the roof and windows, and the municipality had the responsibility to ensure that this was done properly. Arguably, the court placed a positive obligation on the respondents, as the private owners of the property, to replace the roof and windows on the house occupied by the Mtolos. Section 25(6) of the Constitution, through ESTA, enjoins an owner to accommodate an occupier on their property.[54] As a result, the respondents, by permitting the Mtolos to use the property as accommodation, incurred an obligation to ensure that the dwelling was habitable.[55] Therefore, the outcome in the case (with the support of the *Daniels* decision)[56] may indicate that the respondents (landowners) have an obligation to ensure that the Mtolos have a habitable dwelling.

Here, the court also ordered the local municipality to check whether the house was habitable after the respondents had made the necessary repairs. The court confirmed what is mentioned in section 7(2) of the Constitution that "the state must respect, protect, promote and fulfil the rights in the Bill of Rights". This section entails that the State must be creative and put in place

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50 *Daniels v Scribante supra* par 38–39.

51 Van der Sijde 2020 *South African Journal on Human Rights* 86. See Liebenberg *Socio-Economic Rights* 54–59, for a general discussion of the difference between positive or negative rights and obligations within the broader socio-economic rights.

52 *Mtolo v Lombard supra* par 43.

53 *Mtolo v Lombard supra* par 1.

54 *Daniels v Scribante supra* par 49.

55 See Ngwenyama (*A Common Standard of Habitability* ch 5), who argues that the obligation to ensure that the property of an occupier is habitable should primarily be on the owner.

56 The *Daniels* decision illustrates that a private landowner (Mr Scribante) has a positive obligation to provide housing with secure tenure to Ms Daniels. If Ms Daniels had been denied the right to make improvements on her house, then her right to human dignity would have been disrespected. Furthermore, her right of access to adequate housing, which would have allowed Ms Daniels to have a certain degree of tenure security, would have been undermined, and she and her children would have continued living in deplorable conditions. Allowing Ms Daniels to make improvements without the landowner's consent, to ensure that her home is dignified, means that the landowner or person in charge of the farmland is enjoined through s 8(2) of the Constitution not to conduct themselves in such a way as to impede protection of Ms Daniels's constitutional rights. See *Daniels v Scribante supra* par 49 and 157.

efficient mechanisms to curb the infringement of rights in the Bill of Rights. The role to be played by the municipality in inspecting the house of the Mtolos is very important because the municipality has an obligation to uphold implicated constitutional rights like the right to human dignity. The involvement of the municipality could possibly ensure that the respondents comply with the court's order and repair the roof and windows of the house to a standard that would restore the Mtolos' human dignity.

Section 8(2) of the Constitution also reinforces section 10 of the Constitution. The *Mtolo* case may imply that the respondents have a duty to respect and uphold the right to human dignity. If the respondents complied with the court order to effect repairs on the Mtolos' house, they would effectively be upholding the right to human dignity, and failure to comply with the court's order would perpetuate disrespect of the Mtolos' human dignity. The court's requirement that the respondents make the necessary repairs on the house is an indication that, under the circumstances, it was important to ensure that the Mtolos' house be restored to a habitable state, and that they would live in dignified conditions. If the house was habitable, it also implied that security of tenure was upheld, as well as the right of access to adequate housing.

In circumstances where the human dignity of the occupiers is at stake, the *Mtolo* decision illustrates that landowners have an obligation to ensure that their conduct does not impair occupiers' rights. Furthermore, landowners may be expected to make sure that their property is habitable for occupiers to give effect to their human dignity, security of tenure and access to adequate housing. Important to note is that the protection provided by section 10 of the Constitution guarantees that landowners are prevented from acting in a manner that degrades the living conditions of occupiers and from disrespecting the occupiers' right to human dignity.[57] In accordance with section 10 of the Constitution, everyone (including occupiers or farm workers) has inherent human dignity, and this implies that everyone is entitled to a dignified standard of living. This places a limitation on landowners' rights and shows that ownership rights in some instances do not trump other non-property constitutional rights.

3 IMPLICATIONS OF THE *MTOLO* DECISION ON THE NATURE OF OWNERSHIP

The starting point of the South African law of ownership is that ownership is the most complete right; it is presumed to be free from limitations imposed by law or by the owner's consent.[58] Ownership is said to be exclusive in its nature, and in the absence of any agreement or other legal restriction to the contrary, it entitles the owner to claim possession from anyone who cannot set up a better title to it, to warn him off the property, and have him ejected

[57] See also Ngwenyama (*A Common Standard of Habitability* ch 2), who makes a similar argument.

[58] Dhliwayo *A Constitutional Analysis of Access Rights* ch 2; Van der Walt and Dhliwayo 2017 *SALJ* 34–52.

from it.[59] At common law, at least in principle, ownership is strongly protected to the extent that any limitation on ownership has to be proved.[60]

Prior to the Constitution, ownership may have been highly exalted as the apex right in private law. However, this is no longer the default position.[61] Ownership, as a trump-all right under the common law, is not protected in the same manner under the constitutional dispensation.[62] Ownership is limited extensively, both at common law and by statutory control measures or constitutional provisions; for example, occupiers are allowed to have access to land and be on someone else's land for various purposes.[63] According to Van der Walt, ownership (property in the broader sense) is a limited, circumscribed right that is recognised and protected within a property system that is inherently and inevitably regulated.[64] Many limitations on ownership (property) are inherent to the property system; they are granted by law, against the landowner's will and without their consent.

In the *Mtolo* case, the court did not place property or ownership at the centre of the decision on whether the owners could remove the roof and windows and not be required to replace them. If the court had placed ownership at the centre of the discussion, then a discussion on ownership and the owner's rights would have dominated the discussion and impacted the outcome of whether the owners were required to replace the roof and windows of a house occupied by the Mtolos.[65] The outcome would have favoured the owners and would not have considered other constitutional rights that place limitations on what the owner can do.

The decision in *Mtolo* brings to the fore the Constitutional Court's commitment to protecting the constitutional rights of vulnerable occupiers. The decision also indicates the court's tendency to favour occupiers, by placing ownership or property at the margins of consideration in a dispute where other constitutional rights such as human dignity, secure tenure and access to adequate housing are at stake.

In the *Mtolo* case, the Constitutional Court rejected the claim that landowners of private premises can do as they please with their property. The outcome in this case was to uphold a limitation of ownership or property rights so as to secure other constitutional rights. The *Mtolo* decision is interesting because the Constitutional Court did not decide the matters

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59 Van der Walt and Dhliwayo 2017 *SALJ* 34–52; Maasdorp (edited and revised by Hall) *Maasdorp's Institutes of South African Law Volume II: The Law of Property* 10ed (1976) 83.

60 Van der Walt and Dhliwayo 2017 *SALJ* 34–52.

61 See Van der Walt (*Property in the Margins* 78), who explains: "[T]he rights paradigm obviously does not exist in a 'pure' or unadulterated form in the sense that ownership (or other strong property rights) inevitably and always trumps supposedly inherently weak property interests". Furthermore, despite domination of ownership over other interests in land, "[…] governments routinely use legislation to amend or regulate the hierarchical domination of property ownership in response to social, economic and political circumstances and requirements."

62 Van der Walt *Property in the Margins* 27–41; Van der Walt *Property and Constitution* 113–171; Van der Walt *Constitutional Property Law* 86–88.

63 Dhliwayo *A Constitutional Analysis of Access Rights* ch 2.

64 Van der Walt *Property and Constitution* 29.

65 Boggenpoel and Slade 2020 *Constitutional Court Review* 379–399.

based simply on ownership rights – that is, what the owners can or cannot do.[66] Instead, the Constitution Court ruled in favour of the farmworkers (the Mtolos) residing on privately owned farmland. In other words, the right to ownership was not upheld absolutely; the decision centred on giving effect to other implicated constitutional rights like the right to human dignity, right of access to adequate housing and right to tenure security. Thus, the Constitutional Court in the *Mtolo* case limited the exercise of ownership rights so as to protect other constitutional rights of farmworkers and to afford the farmworkers and their families a dignified and habitable home.

The decision confirms the importance of the right to human dignity, and when there is a direct tension between the rights to property and human dignity, the former is not protected absolutely and cannot be allowed to trump other non-property constitutional rights.[67] In addition, the decision strongly confirms that ownership is not absolute; instead, it is subject to limitation by law, in particular the Constitution and legislation. The decision also shows that courts consider the circumstances of the relevant parties, weigh the different interests and provide an outcome that is just and in line with the transformative vision of the Constitution. This is an indication that context plays a role in considering whether a landowner's rights will always trump other non-property rights.

It is noteworthy to consider, in the *Mtolo* case, that the Constitutional Court's commitment to ensuring that the Mtolos have access to adequate habitable housing did not expand on the issue of suitable alternative accommodation or land in an eviction case. The decision pivots on making sure the homes of farmworkers are habitable, in that occupiers and their families should live in housing conditions that are suitable for human habitation. In addition, the court reiterated the need to respect the applicants' right to human dignity and to afford the applicants a dignified standard of living in their homes. Lastly, the decision encourages us to think of land, property and ownership differently in a constitutional system. This entails the reconceptualisation of land, property and ownership in terms of relationships and social context, rather than purely in terms of the landowner's rights; that is, whether they can be required to effect necessary repairs to a dwelling occupied by farmworkers and their families to ensure the home is in a habitable state, so that they can live in dignified conditions.

4 CONCLUDING REMARKS

There is a natural tension between the rights of landowners and those of non-owners. Increasingly, there is a move to place property on the fringes of consideration in favour of protecting and giving effect to non-owners' occupancy rights linked to human dignity, tenure security and rights of access in general.[68] The author has selected and briefly sketched the *Mtolo*

[66] Dhliwayo *A Constitutional Analysis of Access Rights* ch 2; Boggenpoel and Slade 2020 *Constitutional Court Review* 379–399.

[67] Van der Walt 2014 *Journal for Law, Property and Society* 15–106.

[68] Van der Walt *Property in the Margins* 169–222; Boggenpoel and Slade 2020 *Constitutional Court Review* 379–399.

judgment owing to its importance in the constitutional system. The importance of the outcome of this case is that it was not determined with reference to ownership. Instead, consideration of other constitutional rights was the underlying basis for the outcome. The nature of ownership has been fundamentally affected by the Constitution and court judgments.[69] The Constitutional Court's decision in *Mtolo* shows how the nature, content and concept of ownership have changed, and continue to change, considering the legal and constitutional system in which ownership now functions. In other words, the decision provides an insight into how ownership is understood in the new constitutional era.

[69] For e.g., consider the *Daniels v Scribante supra* decision.