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First submission:30 June 2025
Acceptance: 14 August 2025
Published: 31 August 2025

https://doi.org/10.38140/aa.v57i1.9853

ISSN: 0587-2405
e-ISSN: 2415-0479
Acta Academica • 2025 57(1): 141-159

Reconsidering our legal reasoning, legal culture and vision of law: 20 years after Froneman

Abstract

This paper reflects on whether and to what extent we have made progress in transforming our formal vision of law to a constitutional vision of law, particularly in the application and interpretation of private law. What was needed for this transformation was a more substantive reasoning that acknowledges the unavoidable connection between law and politics. Following the adoption of the Constitution, different academics identified a disconnect between the legal culture and the transformative aspirations of the Constitution and questioned whether we were equipped to meet the necessary demands. The judgment in the matter between Changing Tides 74 (Pty) Ltd and the Municipality of Johannesburg is considered in this paper to indicate our prevailing formal vision of law, legal culture and legal reasoning.

Keywords: transformative constitutionalism, legal reasoning, legal culture

Introduction

In this paper, I reflect on Froneman's argument in 2005 that our prevailing formal vision of law influences our legal culture, which leads to constricted legal reasoning (Froneman 2005). He

states that we need to brush up on what we make of democracy and law in order to tease out when and how fundamental rights apply in private litigation (Froneman 2005: 5). While Froneman referred to the judgment of *Du Plessis v De Klerk*, 1996, to illustrate this point, I will argue along the same lines with reference to *Changing Tides 74 (Pty) Ltd v The City of Johannesburg*, 2025, in an attempt to determine whether and to what extent the needed progress has been made in the last 20 years.

This paper was initially prepared and presented as part of a panel discussion at the International Conference on Transformative Constitutionalism and Private Law that was hosted by the Faculty of Law of the University of the Free State. In the call for papers for the conference, it was stated that "one of the most significant areas *influenced* by Transformative Constitutionalism is Private Law, encompassing fields such as contract law, property law, law of delict, family law, law of succession and beyond. This conference will explore how the Constitution's transformative mandate has shaped the *development* of Private Law in South Africa and elsewhere. It seeks to foster *interdisciplinary* discussions on the *intersections between constitutional principles and the evolution of Private Law*." [own emphasis]

I was interested in the wording chosen to formulate the call for papers. The words "influenced" and "development" are much weaker than "transformation", and "intersections between constitutional principles and the evolution of Private Law" connotes an understanding that these are indeed separate principles which occasionally overlap. The call for papers reminded me of Froneman's warning against the restriction caused by a more formal vision of the law and the question he poses on the helpfulness of formal reasoning when determining whether fundamental rights are applicable in litigation between private persons under the Constitution (Froneman 2005: 5).

This raises the question of what is understood by the concept "Transformative Constitutionalism" and whether its impact would result in a vision of law that would "influence" or "radically change" our perspective of what is considered "private law". The wording of the call for papers and the case law considered below further cause me to doubt whether we have made progress with the transformative constitutionalism project and whether we are not simply attempting to align existing private law principles with constitutional imperatives while still viewing them as separate from one another.

Transformative constitutionalism, first described by Klare, is understood as a long-term project of constitutional enactment, interpretation, and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction (Klare 1998: 150). According to Klare, the transformation he has in mind is too extensive to be accurately described by the phrase "reform", but is short of the term "revolution" in the traditional sense of the word (Klare 1998: 150). In my opinion, the word "influence" is even weaker than "reform" and definitely does not accurately describe "transformation". In his 1998 paper on legal culture and transformative constitutionalism, Klare identifies a disconnect between the Constitution's transformative aspirations and the conservative character of South African legal culture. The conservative legal culture had such a restraining influence on its participants at the time of the enactment of the Constitution that they would not be able to produce the transformative legal outcomes mandated by the Constitution. What was needed, according to Klare, was a transformation or leavening of South Africa's legal culture and legal education to bring them into closer harmony with the values and aspirations of the Constitution (Klare 1998: 151).

Froneman states that, although he deals with similar issues as Klare, he joins the discussion because he believes that some of the fundamental ideas are still far from being widely accepted as obvious truths in our evolving legal culture. According to Froneman, our legal reasoning and legal culture are closely linked with our vision of law. He believes that our traditional and formal understanding of law is more consistent with the notion of "law as law," in contrast to a substantive approach (mandated by the Constitution), which recognises the unavoidable connection between law and politics. According to him, unless we are able to accept that law and politics are inseparable, and that this inseparability doesn't signal the collapse of the legal system, we are unlikely to abandon our deeply held commitment to a formal conception of law (Froneman 2005: 4).

In 1995, Van der Walt already questioned whether the Constitution would make any difference to the civil-law tradition with regard to property rights. According to Van der Walt, the Constitution required adopting an alternative approach to property that entailed a clear and deliberate break from the civil-law tradition, both in terms of its methods and underlying principles. What many regard as the civil-law tradition's greatest strength, its conceptualist methodology, may, in fact, pose one of the most significant risks to the new

constitutional order. Van der Walt insisted that this new legal framework could not afford to let tradition stand in for explicit value-based choices, while quietly continuing to depend on the less admirable aspects of the seemingly respectable pre-1994 civil-law legacy (Van der Walt 1995: 190).

In exploring our current vision of the law, and, by extension, our legal culture and methods of legal reasoning, I examine the facts, reasoning, and outcome of the unreported judgment in *Changing Tides 74 (Pty) Ltd v City of Johannesburg* in paragraph 2. Paragraph 3 links to suggestions made in paragraph 2 and considers what a genuine transformation of our legal vision through substantive reasoning would entail. I then conclude, in paragraph 4, by assessing the extent of the progress made in the last 20 years.

Changing Tides 74 (Pty) Ltd v The City of Johannesburg (40135/2016) [2025] ZAGPJHC 279 (14 March 2025)

Background

The property in question is a building (Chung Hua Mansions, an 11-story building at 191 Jeppe Street) that was acquired by Changing Tides 74 (Pty) Ltd in 2007 for the purchase price of R3m. According to SearchWorks, Changing Tides 74 (Pty) Ltd (registration number 200101190807) (hereafter referred to as "Changing Tides") was the registered owner of 58 properties in Johannesburg on the date of the search (30 April 2025).

191 Jeppe Street is situated in the centre of Johannesburg. The building on the property was originally used as an office block, but it was eventually abandoned and became a shelter for poor and homeless people. Changing Tides knew that the building was occupied by poor and homeless people when the property was acquired for the purpose of renovation and upgrade (*City of Johannesburg Metropolitan Municipality and others v Hlophe and others* (1035/2013) [2015] ZASCA 16: par 1).

It would not be a stretch to assume that the property could be acquired for the minimal amount of R3m due to its dilapidated state and the occupation of it by homeless people. Changing Tides categorise their main business as the renovation and refurbishment of inter-city buildings with the purpose of renting them out as student accommodation, providing upliftment to the inner City of Johannesburg and meeting an important need to house students. It is further

assumed that a company in this business and with such an extensive property portfolio would have weighed up their investment against the potential risks of having to evict the current occupiers and the lengthy legal procedures and costs associated with eviction applications. In this particular instance, Changing Tides bought a property in anticipation of evictions that would necessarily follow in order for them to turn it into a profitable investment and still considered it a worthwhile risk. I will return to this argument when what constitutes "temporary emergency accommodation" is considered.

The eviction application preceding the claim for damages

This was originally an eviction application that made several turns in the South Gauteng Division of the High Court and in the Supreme Court of Appeal. The last case, and the focus of this paper, involved a claim by the plaintiff, Changing Tides, against the defendant, the City of Johannesburg, seeking damages for economic loss based on delict, along with a declaratory order and related relief. The central question was whether the City's failure to provide temporary emergency accommodation for the unlawful occupiers of Changing Tides' building was wrongful and amounted to a violation of certain constitutional rights.

Although the property was registered in favour of Changing Tides in October 2007, they only launched their application to evict approximately 249 unlawful occupiers in the South Gauteng High Court in May 2011. The court ordered that the City of Johannesburg had to provide temporary shelter to residents listed in the "List of Residents of Chung Hua Mansions" by 30 January 2013, on condition that they were still occupying the property (referred to as the Claassen Order (14 June 2012) (*Changing Tides 74 (Pty) Ltd v The City of Johannesburg 202*5: 279, par 4-5). The City of Johannesburg failed to comply with the Claassen order, prompting the occupiers to bring an enforcement application. On 6 February 2013, Lamont J consolidated this enforcement application with another matter and ordered compliance (*Changing Tides 74 (Pty) Ltd v The City of Johannesburg* 2025: 279, par 6).

Continued non-compliance by the City of Johannesburg led to a further enforcement order by Satchwell J on 3 April 2013. The City's appeals to the SCA and Constitutional Court failed. In November 2015, Changing Tides applied to re-enrol the case for relief, including compelling the City of Johannesburg to comply and explaining individual official accountability (*Changing Tides 74 (Pty) Ltd v The City of Johannesburg* 2025: 279, par 7-8).

In response to a contempt application by occupiers, the City of Johannesburg eventually provided temporary emergency accommodation in January 2016 (*Changing Tides 74 (Pty) Ltd v The City of Johannesburg* 2025: 279, par 9).

The claim for damages

Immediately after the occupiers were eventually evicted in January 2016, Changing Tides instituted a claim for damages against the City of Johannesburg. They contended that the City's failure to comply with the Claassen order not only caused a financial loss but also constitutional infringements: violation of occupiers' right to housing (s 26(1)) and of its own property rights (s 25(1)) due to inability to renovate and rent out the property until 2017. The City of Johannesburg denied wrongdoing, citing a lack of resources and efforts made through accommodation offers in line with its housing policies (*Changing Tides 74 (Pty) Ltd v The City of Johannesburg* 2025: 279, par 11-12).

The case before the court was, in essence, a claim for pure economic loss of Changing Tides that was wrongfully and negligently caused by the City of Johannesburg.

The legal framework: delictual elements

Harm-causing conduct

Changing Tides relied on the City of Johannesburg's failure to comply with the Claassen order as the harm-causing conduct. The court accepted the argument that the City's persistent failure to provide the occupiers with temporary emergency accommodation for three years constituted harm-causing conduct. The steps taken by the municipality were considered, but the court found that the accommodation tendered by the City during this time to be "non-existent, inadequate or unacceptable" (*Changing Tides 74 (Pty) Ltd v The City of Johannesburg* 2025: 279, par 16-22).

Interestingly, it was never considered that Changing Tides knew that they were acquiring a building occupied by poor and homeless people, that they would have to evict them, that the eviction process would take time, and nevertheless continued with the transaction. The fact that they would not be able to commence with renovations right away was known to them,

and they could (or should) have foreseen the risk of a delayed process of eviction. It should also be noted that the "emergency" of homeless people not having accommodation was not caused by a *vis major* or other unforeseen circumstances, but by a foreseen eviction without the property owner warning or consulting the City of Johannesburg about its intention.

Wrongfulness

With regard to wrongfulness, Changing Tides argued that the City of Johannesburg's failure to comply with the Claassen Order violated the occupiers' constitutional right to adequate housing under section 26(1), as it left them with no alternative but to continue living unlawfully in the property, despite its unsafe and worsening condition (*Changing Tides 74 (Pty) Ltd v The City of Johannesburg* 2025: 279, par 23). The City of Johannesburg argued that its duty under section 26 was restricted by the resources at its disposal, specifically, funds allocated for providing Temporary Emergency Accommodation to the occupiers. The court, however, agreed with Changing Tides that this argument lacked merit because the Claassen Order required the City of Johannesburg to provide such emergency accommodation regardless of whether it was already available and regardless of the City's financial circumstances (*Changing Tides 74 (Pty) Ltd v The City of Johannesburg* 2025: 279, par 24).

The court found that, if the City of Johannesburg's circumstances had changed after the Claassen Order was granted – such as when it submitted the Housing Report on 21 November 2012, stating it was "impossible" to house the occupiers due to financial and other constraints—it should have approached the Court to seek a variation of that order. However, it failed to do so (*Changing Tides 74 (Pty) Ltd v The City of Johannesburg* 2025: 279, par 26-27).

The court concluded its finding on wrongfulness by stating that the City of Johannesburg's non-compliance with the Claassen Order prevented the eviction from being carried out, placing Changing Tides in a position where it had no choice but to continue accommodating the occupiers. This occurred despite Changing Tides having lawfully obtained a court order to safeguard its rights (*Changing Tides 74 (Pty) Ltd v The City of Johannesburg* 2025: 279, par 29).

From this, it can be gathered that the court found the City of Johannesburg's conduct wrongful because it failed to adhere to a court order, and that

Changing Tides' legally protected interest was infringed as a result of this failure. It is conceded that non-compliance with a court order would generally be accepted as legally reprehensible or not in accordance with the policy and legal convictions of the community, and that the court would be correct to find that the City of Johannesburg should have challenged the Claassen Order if it had reason to do so. It is noteworthy, however, that although the court quotes the test for wrongfulness from *Loureiro* (*Loureiro and others v Imvula Quality Protection (Pty) Ltd* 2014:par 53) at the commencement of its judgment, it then does not consider the test when it later actually deals with wrongfulness. As quoted in Loureiro, the wrongfulness enquiry focuses on "the [harm-causing] conduct and goes to whether the policy and legal convictions of the community, constitutionally understood, regard it as acceptable. It is based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability."

Although the court found that the non-compliance of a court order by the City of Johannesburg was wrongful *per se*, it would have been more helpful if it had considered the different conflicting rights in this matter before deciding on the reasonableness of imposing liability. Particularly in cases of pure economic loss, it must be found that there had been a legal duty on the municipality to prevent financial loss to Changing Tides. Changing Tides incorrectly places the right of the occupiers to adequate housing on their side of the scale when it contends that the City of Johannesburg's failure to comply with the Claassen Order caused financial damages, infringement of their right to property in terms of section 25 and an infringement of the occupiers right to adequate housing in terms of section 26 of the Constitution. This, in my opinion, is an incorrect application of the conflicting rights in the balance. The court did not consider that the poor and homeless occupants residing on the property years before Changing Tides acquired the property, and that their right to housing was actually opposed to Changing Tides' right to property in the eviction application. The duty of the City of Johannesburg was not, in the first place, or at all, to prevent economic loss to Changing Tides but to provide temporary relief to people in urban and rural areas who find themselves in emergencies as described by the National Housing Code (Part 3, Volume 4 – Emergency Housing Programme). It is further important to note that, when statutory provisions are taken into account to determine the existence of a legal duty, the purpose of the particular provision will be significant in determining whether the governmental body or state institution had a duty to prevent damage (*Minister of Law and Order v Kadir* 1995: 317).

It is, in any event, not a fair or honest presentation by Changing Tides to allege that the City of Johannesburg's delay in providing temporary emergency accommodation caused the wrongful infringement of the occupier's right to adequate housing in terms of section 26(1) of the Constitution when this was an eviction that was foreseen by Changing Tides when they acquired the property.

When considering the vision of law and its impact on legal reasoning and legal culture, Van der Walt's reflection on the *boni mores* test for wrongfulness comes to mind (Van der Walt 1995: 184). Van der Walt states that, although this criterion is presented as an objective standard that can evolve with society's changing values, it is inherently essentialist and operates within a conceptualist framework. It relies on a particular kind of conceptual reasoning to resolve individual cases through broad, abstract principles. This reflects the broader methodological character of the civil-law tradition and how it attempts to adapt to shifts in moral and social context. Van der Walt further claims that one consequence of this traditional private-law approach is that a set of largely implicit private-law values is deeply embedded in the overall structure of South African law. These values, framed as neutral and scientific through established legal concepts and methods, actually promote a specific vision of individuals, society, and their interrelationship. Lawyers trained in this system typically accept a strict separation between public and private spheres, as well as between law and politics, with private-law rights forming a kind of barrier that shields individuals from collective or state interference. Under this view, rights are not merely tools for protection; they are treated as absolute safeguards, largely immune to public interests, and only subject to minimal, unavoidable state intervention (Van der Walt 1995: 184).

I return to Van der Walt's argument when I consider the result of formal reasoning opposed to substantive reasoning in paragraph 3 below.

Negligence

In its assessment of the negligence element in determining the existence of a delict, the court found that the City of Johannesburg foresaw or should reasonably have foreseen that its failure to comply with the Claassen Order would deprive Changing Tides of the use of its property, preventing it from carrying out renovations, leasing the premises for student housing, and earning income. The court found that this harmful conduct was wrongful, and both public policy and the legal convictions of the community, guided by the

Constitution, required that the City be held accountable for the losses Changing Tides incurred (*Changing Tides 74 (Pty) Ltd v The City of Johannesburg 2025*: 279, par 32).

As explained above, I disagree with this interpretation. The Emergency Housing Programme of the National Housing Code creates an obligation in favour of households who, for reasons beyond their control, find themselves in an emergency housing situation. Assistance in terms of the Emergency Housing Programme takes the form of grants to municipalities to enable them to respond rapidly to emergencies by means of the provision of land, municipal engineering services and shelter. It includes the possible relocation and resettlement of people on a voluntary and cooperative basis in appropriate cases (Part 3, Volume 4 – Emergency Housing Programme: p.9). The Claassen Order, which determined that the City of Johannesburg had to provide temporary emergency accommodation, must be read in line with these regulatory provisions and the Constitution when the legal duty of the City of Johannesburg is considered.

Even if the economic loss to Changing Tides was reasonably foreseeable and preventable, the question remains whether the City of Johannesburg had a legal duty to prevent it. In my opinion, they did not. The City's continued failure to comply with the court order rather constituted an infringement of their legal duty towards the occupants of the building, which left them to live in increasingly squalid and dangerous conditions (*Changing Tides 74 (Pty) Ltd v The City of Johannesburg* 2025: 279, *par* 11).

The court did not go as far as to investigate what a reasonable municipality would have done in the circumstances, but it would have been a useful exercise to consider the City of Johannesburg's responsibilities in terms of the Emergency Housing Programme and whether they applied for project assistance based on its assessment of the emergency housing situation and its own resources (Part 3, Volume 4 – Emergency Housing Programme: p.11). It must further be noted what may and may not be funded by the programme in terms of project funding by the Minister, in consideration of what can be expected from the reasonable municipality in the circumstances (Part 3, Volume 4 – Emergency Housing Programme: p.18).

Damages

The final element considered by the court, after establishing harm-causing conduct, wrongfulness and negligence, was damages, the reasonable compensation for the damage suffered by Changing Tides. The court found that Changing Tides was entitled to be placed in the position it would have been had it not been for the City of Johannesburg's failure (*Changing Tides 74 (Pty) Ltd v The City of Johannesburg* 2025: 279, par 33). Based on the evidence, if the City of Johannesburg had not acted wrongfully, Changing Tides would have regained possession of the property by the end of January 2013, completed renovations by 31 December 2013, and begun renting it to students from 1 February 2014. Since it only began earning rental income on 1 February 2017, it experienced a three-year loss of income. The court found that Changing Tides, therefore, was entitled to compensation for that period, in line with the principles of fairness and justice that underpin the law of delict (*Changing Tides 74 (Pty) Ltd v The City of Johannesburg* 2025: 279, par 37).

The court finally ordered that the City of Johannesburg pay Changing Tides damages in the amount of R12,374,933.00, together with punitive costs, including the costs of two counsel (one of whom is a senior counsel).

The obvious concern is that the court awarded damages for pure economic loss to a profitable property company with an extensive property profile, while the gross human rights violation was rather committed against the homeless occupants of the building, who had to be relocated to temporary emergency accommodation and whose tenure remains insecure. This must also be considered in light of the fact that the emergency was created by Changing Tides when it acquired the property, knowing that the eviction procedure would be lengthy and costly and still considered it worthwhile.

Aside from the above concern, attention must be paid to the Supreme Court of Appeal and the Constitutional Court's judgments in the so-called *Blue Moonlight* case, which was only mentioned in passing in the Changing Tides matter (*City of Johannesburg Metropolitan Municipality v Blue Moonlight (338/10) [2011] ZASCA 47* and *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another (CC) [2011] ZACC 33*).

In the matter before the Supreme Court of Appeal, the City of Johannesburg appealed against an order by the South Gauteng High Court, which ordered the eviction of the occupiers of a building owned by Blue Moonlight Properties.

In addition to the order of eviction, the High Court ordered the City of Johannesburg to pay Blue Moonlight Properties an amount equivalent to the fair and reasonable monthly rental of the premises from 1 July 2009 until 31 March 2010 (*City of Johannesburg Metropolitan Municipality v Blue Moonlight* 2011: 47, par 3). The remainder of the order and the appeal against it are not considered here.

With regard to the compensation order, or the so-called constitutional damages granted to the property owner, the Supreme Court of Appeal found it to be notably far-reaching. It appeared to have been based on this court's decision in *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (with Agri SA and the Legal Resources Centre as amici curiae); President of the Republic of South Africa and others v Modderklip Boerdery (Pty) Ltd (also with Agri SA and the Legal Resources Centre as amici curiae),* 2004. The court reasoned, however, that the unique circumstances of *Modderklip* made that case distinguishable, and that it could not be relied upon as authority for the idea that constitutional damages were always available, or even typically appropriate, whenever a constitutional right was violated. One of the reasons highlighted by the court why the *Blue Moonlight Properties* case was distinguishable from *Modderklip Boerdery* case was that Modderklip Boerdery was the innocent victim of a land invasion and that it took all reasonable steps to safeguard its interests. Blue Moonlight Properties, on the other hand, bought the property in the full knowledge that it was occupied by a number of persons. The court found that *Modderklip Boerdery* could not be considered as authority for the granting of the compensation order in the circumstances of the matter of *Blue Moonlight Properties* and that compensation could not be said to be appropriate relief in the matter.

The City of Johannesburg then further appealed against the judgment of the Supreme Court of Appeal to the Constitutional Court. The court confirmed that in deciding what is just and equitable, it had to weigh a flexible range of factors. In this case, the key considerations included the following: the occupiers had lived on the property for more than six months, with some residing there for an extended period. Their occupation was initially lawful. Blue Moonlight Properties was aware of the occupiers' presence when it purchased the property. Evicting them would result in homelessness, while Blue Moonlight faced no such risk, unlike in cases where a private family sought eviction to move into a home. When property is bought for commercial use, and the buyer is aware of long-

term occupiers, it would be reasonable to expect that the buyer might have to tolerate their presence for a time. The court found that, while no property owner is required to provide free housing indefinitely, in some situations, they may need to exercise patience and accept temporary limitations on their property rights. According to the Constitutional Court, *Blue Moonlight's* case demonstrated that an owner's common-law right to use and enjoy property could be limited in pursuit of a just and equitable outcome under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (*Blue Moonlight Properties 39 (Pty) Ltd and Another* 2011: 33, par 39-40).

It is untenable for a court to grant a delictual claim for pure economic loss to a property company after the eviction of occupiers from its property, while the Supreme Court of Appeal and Constitutional Court have found in a similar case that compensation for the infringement of the right to property in these matters would not be appropriate relief. It is important to be reminded of Justice Chaskalson's finding in the matter of *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (2000: 241, par 49):

> That there are rights beyond those expressly mentioned in the Constitution *does not mean that there are two systems of law*. Nor would this follow from the reference in section 35(3) of the Interim Constitution and section 39(2) of the 1996 Constitution to the development of the common law. The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims – thus, the command that law be developed and interpreted by the courts to promote the "spirit, purport and objects of the Bill of Rights". This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. *There is, however, only one system of law, and within that system, the Constitution is the supreme law with which all other law must comply*." [own emphasis].

The finding with the implication that one could claim for pure economic loss with a delictual claim but not damages for the infringement of property rights creates the impression that constitutional principles and private law are considered to be two systems of law, or at least distinctly separate.

The need for substantive reasoning

It can be concluded from the above that a more substantive reasoning by the court in Changing Tides would have led to a more reasoned and careful consideration of the law and politics in this matter. The horizontal application and weighing of the conflicting interests and rights of the opposing parties could also have contributed to a more comprehensive approach or constitutional vision of property law. Even though the occupiers of the building were not a party to the case, substantive reasoning was necessary to recognise that granting an order in delict would be contradictory to the court's finding in *Blue Moonlight Properties* that the right to use and enjoyment of property could be limited in pursuit of a just and equitable outcome in eviction matters. I will return to this argument in the following paragraph.

Transformation of our vision of law and substantive reasoning

The contention I make in this paragraph is that the transformation of our vision of law starts with substantive reasoning by increasingly acknowledging the interconnection between law and politics in our research and practice of law. This, in turn, would break down the strict divide between private and public law and encourage the direct application of Constitutional rights in private litigation. The aspiration is that we would move closer to a legal culture that is more self-conscious about how our traditional culture has shaped our professional beliefs and practices to enable us to play a more significant role in the constitutional democracy that was once envisioned.

According to Froneman, the Constitution necessitates an engagement with substantive as opposed to formal reasoning and that this would require a shift in the South African legal culture. He further states that such a shift would entail a substantive vision of law that acknowledges the unavoidability of the interplay of law and politics as opposed to the traditional formal vision of "law as law" (Froneman 2005: 4).

Froneman explains that a formal vision of law tends to apply legal rules without considering their deeper, substantive foundations and generally excludes broader substantive reasoning from its understanding of "law as law". In contrast, a more substantive legal culture applies rules with consideration of the underlying purpose they serve within the legal system, recognising

broader legal principles and values as integral to the law itself. The aim of formal reasoning is to limit decision-makers to authoritative rules, avoiding direct engagement with substantive arguments. This approach has its strengths, such as being efficient, reducing the likelihood of mistakes, and promoting legal certainty. However, it can also be limiting, as it may prevent better outcomes that could be reached by considering substantive reasons. Most legal systems, to varying degrees, incorporate both formal and substantive reasoning – applying established rules and precedents where they are clear, and turning to deeper principles where they are not. Crucially, formal reasoning on its own cannot justify why it should be used in any given situation (Froneman 2005: 6-7).

In paragraph 2 above, I argue that a more substantive legal reasoning in the *Changing Tides* case could have led to an outcome that would have been more aligned with Constitutional values. Instead, the court followed a very narrow and formal approach to the elements of a delict and came to a finding that does not consider our political context or its relationship with the law.

In this regard, Froneman states that South African lawyers cannot rely on the reassurance of a unified legal tradition. Still, many continue to praise the Roman-Dutch civil law heritage for its adaptability and fairness, suggesting it can be aligned with the values of the current constitutional order. However, achieving this alignment requires substantive legal reasoning – that is, rethinking and reshaping the meanings and relationships of private law concepts and rights. Simply applying the existing definitions through formal reasoning will not bring about this transformation (Froneman 2005: 8).

Van der Walt explains formal reasoning with regard to private law rights as follows: The reasoning behind private-law rights functions effectively only when those rights are understood as elements within an abstract, universal framework of distinct and competing zones of individual autonomy. However, this logic starts to break down when the interests of society as a political whole, and the state's actions aimed at advancing social and political objectives, are brought into play. As a result, he states, the civil-law approach draws a sharp line between the private and public domains. Personal rights and freedoms are seen as part of the private domain, where individuals seek moral independence within their own autonomous space. In contrast, state actions, such as welfare programmes (such as social housing), fall within the public domain and are expected to remain separate from private life. Van der Walt states that a civil-

law method entails that unavoidable interference with the private sphere must be legally justified, and that any resulting harm should be compensated. Within the private realm, private law holds authority, while political matters are expected to remain confined to the public sphere, where they naturally belong (Van der Walt 1995: 180).

Froneman similarly argues that unless one acknowledges that law and politics are inherently intertwined, and that this connection does not threaten the integrity or survival of the legal system, it is unlikely that one will abandon a deeply held formal understanding of the law. He emphasises that clinging to a purely formal view of law often serves to conceal from public scrutiny the underlying social or political decisions made not just by judges, but by all legal practitioners involved in the legal process (Froneman 2005: 4-5).

The interconnection between the law and politics is illustrated by Van der Walt's proposal of a "comprehensive approach" to property, which would compel us to reconsider how we understand the relationship between individuals and the communities to which they belong. This shift would move us away from the traditional rights-based view of property as a boundary separating the individual from the collective, and towards a new understanding of property as a means through which individuals engage with and participate in the collective. In this view, property is no longer a tool for exclusion or dominance, but rather a bridge that connects individuals to society. This perspective makes it both possible and necessary to acknowledge the social origins and role of property (Van der Walt 1995: 204).

In a later work, Van der Walt conceptualises a constitutional vision of property which expands on the comprehensive understanding of property (Van der Walt 2012). This vision suggests that the concept of constitutional property can extend beyond the traditional doctrinal model, which centres on the subject-object-third-party relationship, and instead emphasises the relational and social dimensions of property ownership. These include issues such as fair access to property; securing property rights (like housing) that uphold personal dignity and identity; and finding an appropriate balance between regulating and protecting financial, personal, and societal property interests, without necessarily altering the technical rules of private property law. Van der Walt finds particular interest in this last point, as it illustrates how socially-oriented, relational, or duty-based understandings of property can meaningfully influence constitutional interpretation and contribute to the evolution of private property law in South Africa (Van der Walt 2012: 144).

This constitutional understanding of property would justify the direct horizontal application of constitutional rights, allowing for the conclusion that it may be reasonable to require a property owner to tolerate temporary restrictions on their property rights without receiving compensation. It could even be argued that it would be reasonable to expect property owners to engage with the relevant municipality when a planned property acquisition is likely to result in evictions and potential homelessness. Such engagement could help secure suitable alternative housing in advance, rather than triggering an unanticipated housing crisis. It is striking that, in the *Changing Tides* judgment, where a claim for pure economic loss was upheld, no connection was drawn between a private individual or company's right to purchase property for rental purposes, the broader issue of homelessness in South Africa, and the State's duty to progressively realise socio-economic rights, including the right to housing.

The Supreme Court of Appeal, in its *Blue Moonlight Properties* judgment, remarks that: "The right of access to adequate housing cannot be seen in isolation. It has to be seen in the light of its close relationship with other socio-economic rights, all read together in the setting of the Constitution as a whole" (*City of Johannesburg Metropolitan Municipality v Blue Moonlight 2*011: 47, par 2). In the same matter, the Constitutional Court summarises the practical questions as follows: "The practical questions to be answered in this case are whether the Occupiers must be evicted to allow the owner to fully exercise its rights regarding its property and, if so, whether their eviction must be linked to an order that the City provide them with accommodation. The City's position is that it is neither obliged nor able to provide accommodation in these circumstances. The owner wishes to exercise its right to develop its property and wants no part in the dispute about the City's responsibilities or the plight of the Occupiers. And the Occupiers do not want to end up homeless on the street. All parties rely on the Constitution, statutory law giving effect to the Constitution and judgments of this Court" (*City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2011: 33, par 3).

Considering South Africa's particular history and context, it seemed like an opportunity to display a constitutional vision of property, but after everything, private property ownership still appears to be the right that trumps all others.

Conclusion: 20 years of transformation or conservation of our vision of law

Twenty years after Froneman's observation, it still appears to be valid: "If we did not realise it earlier, now is the time to look at our unexamined legal lives. We might be surprised, sometimes unpleasantly, by what we find" (Froneman 2005: 18).

Our largely untransformed vision of law is still evident in the words we use, in our research and in our practice of law. There still seems to be a disconnect between the prevailing legal culture and the transformative aspirations of the Constitution.

Returning to the wording of the conference, I think it is fair to say that the Constitution has had an influence on private law and that there have been some intersections between the principles of the Constitution and private law, but that these are still very much regarded as separate systems of law.

We can confidently claim that we have been doing constitutional work, but we have not yet reached a point where we can claim that our reasoning truly reflects the values and aspirations of the Constitution or that we have a Constitutional vision of the private law. Achieving this alignment would require deeper self-reflection and substantive legal reasoning, rethinking and reshaping the meanings and relationships of private law concepts and rights. Simply applying the existing definitions through formal reasoning will not bring about this transformation.

I conclude with a quotation from the recent publication by Davis and Klare in which they state that: "The transformative project did not fail, nor was it blocked by the 1994 settlement. The transformative project was never seriously attempted." (Davis and Klare 2024: 494)

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