

SPATIAL JUSTICE, RELATIONALITY AND THE RIGHT TO FAMILY LIFE: A DISCUSSION OF HATTINGH V JUTA 2013 3 SA 275 (CC)*

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1 Introduction

Subsequent to the 2013 decision of the Constitutional Court, in *Hattingh v Juta* (“*Hattingh*”),¹ there have been engagements with the case in the context of evictions and security of tenure, with some attention in the field of legal pluralism.² The narrow angle of this case discussion is an analysis of the case based on feminist theories of spatial justice.³ Spatial justice refers to the concept as introduced through the spatial turn in law. The concept looks at the inextricable link between law and space. Three central notions underpin a feminist reading of the concept of spatial justice: rights as relationships, space as relational, and property as a spatially contingent relation of belonging. Rights as relationships rely on the work of Jennifer Nedelsky and are unpacked in more detail in this article.⁴ Feminist geographer Doreen Massey views space as primarily relational.⁵ Instead of seeing space as fixed

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¹ *Hattingh v Juta* 2013 3 SA 275 (CC).

² See for example J Pienaar *Land Reform* (2014); M Dafele “The negative obligation of the housing right: an analysis of the duties to respect and protect” 29 (2013) *SAJHR* 591 and JD Mujuzi “Legal pluralism and the right to family life, and the transfer of offenders who are nationals of African countries, within Africa and to Africa” (2013) *The Journal of Legal Pluralism and Unofficial Law* 267.

³ The notion of “spatial justice” is part of a global spatial turn in law. This spatial turn in law took hold in the social sciences and humanities roughly since the mid-eighties. The spatial turn calls for greater attention to space and spatiality (space as relational) in academic engagements with the social, and by extension with the law. S Keenan *Subversive Property: Law and the Production of spaces of belonging* (2015) 5. On spatial justice, the spatial turn and the influence of legal geography and law and architecture on the development of these concepts see for example A Philippopoulos-Mihalopoulos *Spatial Justice: Body, Landscape, Atmosphere* (2015); I Braverman, N Blomley, D Delaney & A Kedar Alexandre (eds) *The Expanding Spaces of Law: A Timely Legal Geography* (2014); C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012); EW Soja *Seeking Spatial Justice* (2010); D Delaney *Nomospheric Investigations: The Spatial, the Legal and the Pragmatics of World-making* (2010); S Arias Santa & B Warf *The Spatial Turn: Interdisciplinary Perspectives* (2009). The concept of spatial justice has only recently entered the South African legal discourse. Spatial justice is taken up in the Spatial Planning and Land Use Management Act 16 of 2013 (“SPLUMA”) and policy documents such as the Integrated Urban Development Framework: Cooperative Governance Traditional Affairs “Integrated Urban Development Framework (IUDF)” (15-09-2017) *COGTA* <<http://www.cogta.gov.za/?programmes=the-integrated-urban-development-framework-iudf>> (accessed 13-02-2017). According to section 7(a) of SPLUMA, spatial justice involves a number of key aspects, including redressing past spatial and other developmental imbalances through greater and more equal access to land.

⁴ “[W]hat rights do and always have done is construct relationships” J Nedelsky *Law's Relations: A relational theory of self, autonomy, and law* (2011) 236.

⁵ “the spatial is social relations ‘stretched out.’” D Massey *Space, place and gender* (1994) 2.

and abstract, she conceives of space in terms of relations. Space only exists in relationships between entities. This gives rise to the concept “spatiality” – space as relationality. Abstract space stands in contrast to relational space. Abstract space is space as a mere container in which bodies can be placed. Relational space is space that exists in the relationships between bodies.⁶ Property as a spatially contingent relation of belonging means that property is regarded in terms of the nested relations of belonging that accompany it, as argued by Sarah Keenan.⁷

The series of cases in *Hattingh*,⁸ because of the very clear relational nature of the matter, aptly illustrates the way in which relationships produce and reproduce space. The initial power relationships between Mr Juta (as landowner) and Mr and Mrs Hattingh (a farm- and domestic worker) produced, structured and determined the terms of Mrs Hattingh’s accommodation on Mr Juta’s smallholding. These relationships endured and the space reproduced those relationships to the detriment of her family relations.

The question that I pose here is whether the *Hattingh* matter can be cited as an example of spatial justice that embraced space as relational or whether an opportunity to acknowledge the layered and gendered relations of space was missed. After a brief overview of the case, I situate this discussion within the broader discourse around the *Hattingh* case with reference to some of the main texts that referred to it. Thereafter I sketch the terrain of spatial justice by unpacking the theories of Nedelsky, Massey and Keenan. I turn to the judgment and the pleadings presented in the Constitutional Court in order to evaluate it from a spatial justice perspective that is understood in terms of relationality.

2 *Hattingh v Juta*

2.1 The facts of the case

In 2012, Magrieta Hattingh (67) was living in a cottage with her three sons: Michael Hattingh (29), Pieter Hattingh (37) and Ricardo Hattingh (the youngest adult son).⁹ With them lived Michael’s wife Edwina Junita Hattingh (29) and their two minor children Micayla Hattingh (12) and Elvino Hattingh (6), as well as an adopted daughter Lédre Fourie (9).¹⁰ They had been living

⁶ Lefebvre *The production of space* 363; Massey *Space, place and gender* 261.

⁷ “All spaces are socially regulated in some way, holding up particular relations of belonging” S Keenan *Subversive Property: Law and the Production of Spaces of Belonging* (2014) 165.

⁸ The matter was also heard in the Magistrate’s Court, the Land Claims Court and the Supreme Court of Appeal. *Juta v Hattingh* 30-03-2011 case no LC 145/2010 and *Hattingh v Juta* 2012 5 SA 237 (SCA).

⁹ His exact age at the time that the proceedings were instituted is not given. Because everyone has the same surname, I include full first names instead of only referring to Mr or Mrs Hattingh. On a related note, the legal representative of the Hattingh children, Marion Hattingh of the Stellenbosch University Legal Aid Clinic, deposed to the founding affidavit used in the Constitutional Court. Conscious and wary of the importance of family, and the surname as signifier of such, in the case, she disclaimed:

“Although I share the same surname as the applicants, it is coincidental and I am not related to them”. Founding affidavit in the Constitutional Court para 3 <<http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/vkbgBVIvlt/MAIN/286350011/503/13327>> (accessed 09-02-2017).

¹⁰ Applicants’ founding affidavit in the Constitutional Court para 15. Ages given are the ages at the time of the Constitutional Court hearing in 2012. <<http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/vkbgBVIvlt/MAIN/286350011/503/13327>> (accessed 09-02-2017).

together in the cottage since December 2002. The cottage has two bedrooms. It is situated on a smallholding, called Fijnbosch, in Stellenbosch. At the time when they moved into the cottage, Michael Hattingh senior, Magrieta Hattingh's husband, was still alive and they all lived together until he passed away in 2006 from lung cancer.¹¹ Laurence Edward Juta, the owner of the smallholding Fijnbosch, employed Magrieta Hattingh as a domestic worker since 1994. She initially worked in his Stellenbosch house and continued working for him when he bought Fijnbosch in 2002. Ricardo Hattingh, the youngest of the children of Magrieta Hattingh,¹² did not live with the family from the start, but moved in later. It was only after Ricardo finished school, that he did not have any accommodation with his employer any longer.¹³

Magrieta Hattingh at the time of the institution of the proceedings was not healthy. She suffered from high blood pressure, had difficulty moving around and was frequently ill. Due to her deteriorating health, she stopped working for Juta.¹⁴

At some stage after the Hattinghs had already moved into the cottage on Fijnbosch, Juta employed a new farm manager, one Gert Willemse ("Willemse"). Juta wanted to accommodate the farm manger on the smallholding instead of having him travel sixteen kilometres with his bicycle to and from work every day.¹⁵

When the Hattingh children moved in with their parents in 2002, Juta converted the cottage. The cottage initially consisted of two units linked by a wall and Juta joined the units by installing a door in the wall. He wanted to restore the cottage to two separate units once more, so that Willemse could occupy one of the units. He therefore applied for the eviction of the Hattingh children from the cottage. Magrieta Hattingh's continued occupation of the cottage was never at issue and Juta did not attempt to evict her.¹⁶

The eviction procedures commenced in July 2006 when Juta served the Hattingh children with eviction notices.¹⁷ It is not clear from the judgments and papers whether this was before or after the death of Michael Hattingh Senior. The application for evicting the Hattingh children was brought in June 2008. It was first heard in the Stellenbosch Magistrate's Court, where it was dismissed on 10 May 2010. Juta appealed to the Land Claims Court where the decision of the Magistrate's Court was overturned and the Hattingh children were ordered to evacuate the premises by 20 May 2011.¹⁸ On 30 May 2012, the Supreme Court of Appeal dismissed the appeal of the Hattingh children, where after they turned to the Constitutional Court. Their eviction was

¹¹ *Laurence Edward Juta v Michael Hattingh* 30-03-2011 case no LC 145/2010 para 7 (Land Claims Court judgment).

¹² *Hattingh v Juta* 2013 3 SA 275 (CC) para 2. Ricardo's exact age at the time that the proceedings were instituted, is not given.

¹³ Paras 1-4.

¹⁴ Para 3.

¹⁵ Paras 10-12.

¹⁶ Paras 7 and 42.

¹⁷ *Laurence Edward Juta v Michael Hattingh* 30-03-2011 case no LC 145/2010 para 8 (Land Claims Court judgment).

¹⁸ Paras 17-18.

finalised when the Constitutional Court delivered judgment in Juta's favour on 14 March 2013, almost seven years after the initial proceedings commenced.¹⁹

2.2 The courts' decisions

The central question considered by the various courts in the *Hattingh* case related to the right to family life. In particular it concerned the interpretation, meaning and extent of the "right to family life in accordance with the culture of that family" as contained in section 6(2)(d) of the Extension of Security of Tenure Act 62 of 1997 ("ESTA"). The different forums approached the right to family life in divergent ways. Only the Magistrate's Court found that the right to family life indeed extended to the adult children and grandchildren of Magrieta Hattingh and that this entitled them to continue living in the cottage.²⁰

The finding of the Magistrate's Court was based on a report in terms of section 9(3) of ESTA.²¹ The report stressed the lack of alternative shelter, the need for housing in Stellenbosch and the absence of appropriate housing and care for the elderly. It also highlighted the negative impact that the eviction will have on the academics of the minor children, as well as the willingness of the Hattingh children to pay rent.²² Neither the Supreme Court of Appeal, nor the Constitutional Court referred to the report.

The respondents successfully appealed to the Land Claims Court and the order of the Magistrate's Court was set aside on 30 March 2011. In terms of the new order, the Hattingh children had to vacate the premises by 20 May 2011. The Land Claims Court found the central issue to be whether an occupier under ESTA, whose eviction is not sought, could prevent the eviction of her major children by relying on her right to family life.²³ The Land Claims Court considered what the content of the right to family life in section 6(2)(d) of ESTA entails and whether this enabled Magrieta Hattingh's adult children to continue living with her on property that belongs to Juta. The Land Claims Court referred to the *Certification* judgment and other Constitutional Court cases that concerned the right to family life,²⁴ but maintained that despite these references to family life, there appeared to be "no definition of the substance of the right and hence no insight as to the content of this right".²⁵ It seems that

¹⁹ *Hattingh v Juta* 2013 3 SA 275 (CC).

²⁰ *Laurence Edward Juta v Michael Hattingh* 30-03-2011 case no LC 145/2010 para 8 (Land Claims Court judgment); *Hattingh v Juta* 2012 5 SA 237 (SCA) para 1; *Hattingh v Juta* 2013 3 SA 275 (CC) paras 11-13.

²¹ Section 9(3) of ESTA requires a report that must assess whether the requirements of sections 10 and 11 of ESTA are met. The report must be compiled by a probation officer. Several references to the report can be found in the Applicants' Heads of Argument in the Constitutional Court: <<http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/vkbgBVIv1t/MAIN/286350011/503/13562>> (accessed 09-02-2016).

²² See para 24 of the Applicants' Heads of Argument in the Constitutional Court: <<http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/vkbgBVIv1t/MAIN/286350011/503/13562>> (accessed 09-02-2016), which deals with the content of the section 9(3) report.

²³ *Laurence Edward Juta v Michael Hattingh* 30-03-2011 case no LC 145/2010 para 1 (Land Claims Court judgment).

²⁴ N 2. See *Ex parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC) para 99; *Du Toit v The Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* ZQ03 2 SA 198 (CC) para 19.

²⁵ *Laurence Edward Juta v Michael Hattingh* 30-03-2011 case no LC 145/2010 para 12.

the Hattingh children's biggest problem in the Land Claims Court was a lack of evidence. The court identified three aspects on which the Hattingh children failed to produce sufficient proof: Firstly, insight into the right to family life, secondly that their culture entails adult children living with their parents, and thirdly that their mother was ill and needed them to care for her.²⁶

The Land Claims Court conceded that the concept of "family" in the right to family life might extend beyond merely a spouse and dependants. Despite this concession, it found that, in addition to the lack of evidence in the current case, the right of the landowner and that of the occupier must be balanced. Accordingly, the restriction of family members to dependants and spouses was "an equitable formulation".²⁷ In reaching this conclusion, it relied on section 8(5) of ESTA, which refers specifically (only) to the protection offered to a "spouse" and "dependants" after the death of an occupier. The intention of the legislator, it found, could not have been to place an "onerous and intolerable burden" to house the adult members of an occupier for an indefinite period.²⁸

The Supreme Court of Appeal's interpretation of the right to family life followed that of the Land Claims Court, but focused more on the meaning of the concepts "culture of a family" and "cultural practice".²⁹ The right to family life was said to be inherent in the fundamental right to human dignity enshrined in the Constitution of the Republic of South Africa, 1996 ("Constitution").³⁰ As far as "culture" was concerned, the Supreme Court of Appeal relied on the judgments in the case of *MEC for Education, KwaZulu-Natal v Pillay* ("Pillay").³¹ It concluded that an individual's personal practice clearly does not constitute culture as envisioned by the Constitution; instead, culture is constituted through associations and practices that are followed by a community or a number of people.³² The Supreme Court of Appeal described the right to family life in accordance with the culture of that family in ESTA, as a right that gave content and extended the sections 30 and 31 Constitutional rights. Sections 30 and 31 guarantee the rights to participate in the cultural life of one's choice and to enjoy one's culture with other members of a cultural, religious or linguistic community.³³ Cultural rights must be associative and not, as the Hattinghs claimed, "non-associative" and must be established only by looking at the way in which Magrieta Hattingh, her children, grandchildren and other relatives conducted their lives.³⁴ The Supreme Court of Appeal, therefore, required a family life culture to be shared with a community in order for it to be recognised in terms of ESTA.³⁵ The Supreme Court of Appeal

²⁶ Para 13.

²⁷ Para 14.

²⁸ Para 15.

²⁹ Paras 18-21.

³⁰ Para 17; s 10 of the Constitution.

³¹ *Hattingh v Juta* 2012 5 SA 237 (SCA) paras 18-21. Leach JA referred to Langa CJ's majority judgment as well as to O'Regan J's partial dissent in *MEC for Education, KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC). *Hattingh v Juta* 2012 5 SA 237 (SCA) para 20.

³² Para 21.

³³ Para 21.

³⁵ This relates to the determination of whether something constitutes a "practice" in terms of the Rental Housing Act 50 of 1999 and Labour Relations Act 66 of 1995 in establishing unfair

dismissed the appeal and gave the Hattingh children until the end of August 2012 to vacate Fijnbosch.

The Constitutional Court did not give much consideration to the concepts of “family life” or “culture of that family”. ESTA grants the right to family life in accordance to the culture of *that* family, meaning the very particular, unique and specific family in question, and not in accordance with *a* family. The Constitutional Court merely indicated that families come in all shapes and sizes, need not be limited to the nuclear family and in the context of ESTA could not be restricted to spouses and dependants.³⁶ At first glance, this remark favours the Hattingh children, but the Constitutional Court ultimately found that it was unnecessary to determine the meaning of “in accordance with the culture of that family”. This was because the only relevant question was whether it would be just and equitable for the occupier to live with her family when the landowner’s rights were balanced against the occupier’s right to family life.

Even though the Constitutional Court ostensibly extended the meaning of family further than the Supreme Court of Appeal and the Land Claims Court, by expressly stating that it extends beyond the nuclear family, the idea of family was restricted. Family was defined with reference to the rights of the landowner and thereby the definition of family was subjected to the relations of property. I return to this idea later, with reference to the work of Keenan. Before I look at her work on property as spatially contingent relation of belonging, I turn to some engagements with the *Hattingh* case since the judgment of the Constitutional Court. Juanita Pienaar argues that the Constitutional Court in *Hattingh* effectively avoided the “check-list” approach to the right to family life that was followed in the Land Claims Court and the Supreme Court of Appeal.³⁷ By moving away from this approach, she claims the Constitutional Court left the rights to family life and culture more fluid than they were in terms of the very technical tick-box approach of the preceding courts. For her, the shift to balancing the opposing rights in the matter is what avoided the “technical *proforma* approach”.³⁸ Her reading of the balancing in the Constitutional Court as opposed to an attempt to give content to the right to family life and culture is therefore a positive one. This, she explains, means that the age of children, their dependence or self-sufficiency, whether the parents are married or in a partnership, and if the children are grandchildren become irrelevant in determining family life and culture.³⁹ These factors however, remain relevant in the act of balancing the right of the occupiers and the rights of the owner. Therefore, these considerations retain their value in the context of considerations of equity and fairness.⁴⁰ I consider this argument with reference to the work of Keenan, Nedelsky and Massey. The different approaches of the courts can be summarised as follows: the

³⁶ *Hattingh v Juta* 2012 5 SA 237 (SCA) para 19.

³⁷ 430. The “check-list” approach would be one that is highly technical and formalistic without the necessary regard to the substantive content of important concepts.

³⁸ 430 “To some extent, family life is thus open-ended”.

³⁹ 430-431.

⁴⁰ 430.

Stellenbosch Magistrate's Court acknowledged the right to family life; ruled that it extended to the Hattingh children and grandchildren; and that they could stay on with Magrieta Hattingh at Fijnbosch. The Land Claims Court focused on failure of the Hattinghs to prove that living with their mother was in fact in accordance with their culture. The Land Claims Court further ruled that restricting family to spouses and children in the context of ESTA is an equitable reading. The Supreme Court of Appeal analysed the interpretation of "culture" and, with reference to former Constitutional Court decisions, found that the fact that the Hattingh family functioned in a particular manner, was insufficient to establish a culture. In addition to this fact there also had to be recognition of this family structure by a broader community.

The judgments in the Magistrate's Court, Land Claims Court and Supreme Court of Appeal all engaged with the meaning and extent of the right to family life in accordance with the culture of that family. In the Constitutional Court however, the emphasis was shifted away from the family, the right to family life and the meaning of the culture of that family. More weight was afforded to Juta's rights as landowner in the determination of whether it would be just and equitable for Magrieta Hattingh to continue living with her children and grandchildren in the cottage.

One reading of the judgment of the Constitutional Court is that it is positive that the notion of family was not thoroughly defined or engaged with, because the meaning of family was not unnecessarily curtailed. Another reading is that, by ruling that "what matters is what is just and equitable when the rights of the occupier are balanced with those of the landowner",⁴¹ the Constitutional Court effectively found that the concept of family is not of primary importance. On such a reading, the Constitutional Court's decision means that the culture of family matters less than established relations of ownership and thereby existing unequal social relationships and structures of belonging were reproduced. Before I elaborate on the production and reproduction of structures of belonging, I turn to engagement with the case in the context of property and occupiers' rights. While the case has received some attention in the area of family law,⁴² it is mainly in the area of property and occupiers' rights that the *Hattingh* case has had an influence. Juanita Pienaar in her book, *Land Reform*,⁴³ refers to the *Hattingh* case several times. She points to the connection between dignity and unlawful occupation evictions. The *Hattingh* case, for Pienaar, along with the *Dawood v Minister of Home Affairs*

⁴¹ *Hattingh v Juta* 2013 3 SA 275 (CC) para 40.

⁴² See J Heaton "Family Law" in *Juta Annual Survey of SA Law* (2012) 374:

"For purposes of family law, the statements by the Supreme Court of Appeal on the right to family life should be mentioned briefly."

466:

"For purposes of family law, the dictum of the Constitutional Court on the meaning of the term 'family' in s 6(2)(d) of the Extension of Security of Tenure Act 62 of 1997 should be noted."

On the case's relevance for family law there is also an online presentation by Ann Skelton: *A Skelton Developments in Family Law relating to Children: A review of the 2012 case law* presented at the Miller du Toit conference, 11 and 12-04-2013 <<http://www.millerdutoitcloeteinc.co.za/family-law-cape-town-ing/Conf2013/Conf2013/Paper%20-%20Skelton%20A.pdf>> (accessed 08-08-2015). It would be both interesting and important to consider the case's implications for family law, more broadly speaking.

⁴³ Pienaar *Land Reform* (2014). A detailed engagement with the case is found on 425-431 of the book.

case (“*Dawood*”),⁴⁴ group the right to family life under the broader right to dignity and relate it in this way to exercising property or occupational rights.⁴⁵ In *Hattingh*, the *Dawood* case is referenced stating that “families come in different shapes and sizes”. This supports the point that there is no basis for suggesting that the “family” in ESTA should be limited to the nuclear family.⁴⁶ Furthermore, she points out that the *Hattingh* case emphasised the importance of considering fairness and equity when ESTA is used and applied.⁴⁷ The act sets out specific requirements, but fairness serves as a general requirement. The right to family life, as captured by the *Conradie v Hanekom* (“*Conradie*”) and *Wicham v Lange* cases was further outlined and given more specific content in the *Hattingh* case.⁴⁸

The right to family life was one of the first issues that the Land Claims Court had to adjudicate. It came before the court through the *Conradie* case, but the court did not fully unpack the right in this case. Pienaar is of the opinion that the right to family life was also only delineated “to some extent” in the *Hattingh* case.⁴⁹ She argues that the right to family life has still not been technically delineated, but that the Constitutional Court in *Hattingh* merely provided some guidance on how it should be approached and what the considerations are when approaching the right.⁵⁰ My argument entails that it is not the failure to demarcate the right in a technical sense, but the inability to perceive rights as relational that lead to the evasive manner in which the Constitutional Court dealt with the right to family life in the *Hattingh* case.

The practical result of the approach laid down by the Constitutional Court, according to Pienaar, is two-fold.⁵¹ Firstly, the focus shifts to the balancing of rights. Although it might have been easier for an occupier to show that certain living arrangements resort under family life, it is not a guarantee that they would be able to enforce the right to family life. In her view, the Constitutional Court provided certainty on how the right to family life should be approached, but this does not mean that the outcome will be predictable, since a balancing act between the competing rights is still required. The second implication for her, as also stated in the Constitutional Court, is that the phrase “in accordance with the culture of that family” becomes superfluous.⁵² Because any kind of family qualifies under ESTA, the cultural background is no longer important. She describes this as an “even-handed approach” that also considers and

⁴⁴ *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC).

⁴⁵ Along with the case of *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC). Pienaar *Land Reform* 190, n 138 and n 139.

⁴⁶ *Hattingh v Juta* 2013 3 SA 275 (CC) para 34.

⁴⁷ Pienaar *Land Reform* 405, n129.

⁴⁸ *Conradie v Hanekom* 1999 4 SA 491 (LCC) and *Wicham v Lange* 2006 1 SA 102 (LCC). See Pienaar *Land Reform* 418, n 202.

⁴⁹ Pienaar *Land Reform* 423. She points out that the Land Claims Court and Supreme Court of Appeal attempted to delineate the right to family life by drawing up a list of criteria with corresponding components that can be measured and calculated.

⁵⁰ 429-430.

⁵¹ 430-431.

⁵² *Hattingh v Juta* 2013 3 SA 275 (CC) para 41; Pienaar *Land Reform* (2014) 429 and 431.

weighs the rights of landowners and persons in charge of property.⁵³ In summary, her suggestion seems to be that an approach that balances the rights of the owner and the occupier is preferable to an approach in which specific content is given to the occupier's right to family life.

3 Spatial justice and relationality

A radical concept of spatial justice is inseparably linked to a relational understanding of space. To understand space as that which produces and is produced by (unequal) social relationships requires an insistence on space as political and departs from a view of space as neutral and abstract.⁵⁴ Doreen Massey insists on thinking of space as always, already connected to time.⁵⁵ Viewing space as relational is based on acknowledging the link between space and time (space-time).⁵⁶ Spatial justice should be more than just social justice in spaces.⁵⁷ It should also open up to a radically different view of space. In the context of this note, I suggest that such a different view should encompass a feminist view of space as relational. Social relationships, explains Massey, are never static; they change and shift constantly.⁵⁸ Accordingly, "the spatial" (space as relational) should not be seen as dead or still, but as inherently dynamic.

The way in which I approach spatial justice with regard to the *Hattingh* case, is a feminist endeavour. The claim that my approach is feminist is in step with Nedelsky's assertion that relational analyses are feminist.⁵⁹ Her central thesis in *Law's Relations* is that law and rights structure relationships.⁶⁰ The *Hattingh* case did structure relations, but the central focus falls on which relationships were fostered, emphasised, reproduced and encouraged.

Nedelsky argues against a liberal conception of rights and self in favour of an approach that focuses on a relational self. Every time rights are interpreted and applied, she asks what kind of relationships the rights create when they are interpreted and applied. The necessary underlying assertion of this theory is that the relationships in which a human being participates, determine her identity. Human beings are what and who they are because of their relationships.⁶¹ In the case of Mrs Hattingh, Mr Juta was very clear

⁵³ Pienaar *Land Reform* 431.

⁵⁴ On abstract space see H Lefebvre *The Production of Space* (1991) translated by D Nicholson-Smith and for its applicability to law see C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012).

⁵⁵ D Massey *For Space* (2005) 17-18.

⁵⁶ 9.

⁵⁷ A Philippopoulos-Mihalopoulos "Law's Spatial Turn: Geography, Justice and a Certain Fear of Space" (2010) 7 *Law, Culture and Humanities* 189.

⁵⁸ Massey *For Space* 9.

⁵⁹ Nedelsky *Law's Relations* 85.

⁶⁰ 85.

⁶¹ This also echoes the notion of *Ubuntu* as captured through the Zulu proverb "umuntu ngumuntu ngabantu" or the Setswana equivalent "motho ke motho ka batho babang". Even though *Ubuntu* could be a valuable theoretical framework for thinking about family and relationality, it is not the focus of this contribution. For notions of the extended family and *Ubuntu* see for example A Shutte *Ubuntu: an ethic for the new South Africa* (2001) 29; D Sullivan & L Tiffit (eds) *Handbook of Restorative Justice: A Global Perspective* (2006) 165. See also the tri-ontic of being as captured by Ramose in PH Coetzee & APJ Roux (eds) *The African Philosophy reader* (2004) as well as M Ramose *African Philosophy through Ubuntu* (1999) 39.

that he did not seek her eviction from the smallholding. In accordance with this understanding of identity, Mrs Hattingh's identity is determined by her relationship to Mr Juta, but also her relationships with her family. Nedelsky cautions that she does not propose how rights should work, but rather suggests a new way of representing rights, namely as relationships.⁶² Her work presents new ways of looking at, describing and conceptualising rights.

The best way to think about law and rights is through the way in which they structure relations.⁶³ Since rights and law structure relations, they have an impact on autonomy. Rights and law either inhibit or enhance autonomy.⁶⁴

I suggest that viewing the law in terms of relationships constitutes a radical spatial turn. This is because it allows one to think in terms of connectedness and not separateness. It makes one understand space as the relations between entities (human and non-human, animate and inanimate) and does not view space as an abstract void, within which things exist.⁶⁵ For the *Hattingh* case, this means not viewing the Hattingh household in terms of fragments suspended in the abstract space, which is Juta's smallholding, and in terms of which he has rights of ownership. The household should rather be viewed in the context of the intersecting racial, gendered, class and power relations – all the “throwntogetherness” on Fijnbosch.⁶⁶ On the one hand, the smallholding in the *Hattingh* case can be perceived of in terms of abstract space: its borders can be traced, its surface and circumference can be described in hectare and its buildings and grounds will be visible on “Google Earth”. This view of space is not connected to a specific time and can at any stage be filled (or emptied) with a family in a cottage, an owner and his wife, a farm worker on a bicycle and other elements. On the other hand, one can also think of Fijnbosch in terms of relations. This means that Fijnbosch, at the time of the eviction, exists because of, and is constituted by, the relationships between the Hattinghs and the Jutas, their neighbours, the other inhabitants of Stellenbosch and these role players' place in the world.

Nedelsky's theory conceives of being together in the world as opposed to abstract concepts disconnected from time and space. Instead of the liberal individual, autonomous and independent self, Nedelsky insists on the relational self. Relationships, she emphasises, can enhance, or undermine autonomy. The *Hattingh* case concerns not only family relations, but also the relationships between employees and employers, landowners and occupants, people and the places they inhabit. Reading the *Hattingh* case against the backdrop of spatial

⁶² Nedelsky *Law's Relations* 4.

⁶³ Nedelsky uses law and rights interchangeably and when she talks about rights, she means legal rights.

⁶⁴ 85.

⁶⁵ See in general the work of Henri Lefebvre, who relies on a Leibnizian notion of space. Massey uses the work of Lefebvre and in the context of law, Australian scholar Chris Butler has expanded on Lefebvre's idea of space. C Butler *Henri Lefebvre: Spatial Politics, Everyday Life and the Right to the City* (2012).

⁶⁶ For more on the concept of “throwntogetherness” see Massey *For Space* 149-162. Massey connects the concept of simultaneity to her distinction (non-distinction) between space and place and also to what she terms our “throwntogetherness”. If space is rather a simultaneity of stories so far, says Massey, then places are collections of those stories, articulations within the wider power-geometries of space. Place as an ever-shifting constellation of trajectories poses the question of our “throwntogetherness” as the chance of space may set us down to the unexpected neighbour

justice entails an insistence on the notion of relationality.⁶⁷ The “spatial” regards space not in terms of geographical location or physical place only, but also as that which produces and is produced by social relationships. Nedelsky thinks of rights in terms of structures of nested relationships.⁶⁸ The term nested relationships, corresponds to Keenan’s complex webs of relations of belonging.⁶⁹ Nedelsky does not restrict relationships to friendships or familial ties.⁷⁰ In fact, a large part of what the law does is to structure relationships between strangers.⁷¹ Relationships are also not necessarily caring, kind, or good. Feminists are acutely aware of the possible dangers and destructive power of relationships and a relational approach is therefore not one that romanticises community or relationships.⁷² This has two implications for the *Hattingh* case: The first is that the family relationships are not necessarily the only relationships to be considered or fostered or reproduced and secondly, the right to family life does not automatically imply a loving family. Therefore, it is not obvious that the family relations in the case of *Hattingh* should have been fostered. The argument is rather that both the right to family life and the right to ownership imply certain relations and, following Nedelsky’s relational approach to rights, an awareness of these relations is important in applying these rights.

The relational approach to rights can be summarised in four steps. Firstly, one should consider which relationships initially gave rise to the problem, that is, what are the relationships that need to be altered or amended through applying the right?⁷³ This means thinking about disputes as being caused by certain relationships and these relationships as produced by certain conditions. Secondly, one must think of which values are at stake in the dispute.⁷⁴ The third step combines the first two steps because it asks what kind of relationships will foster the values that are at stake. In other words, how should the relations change in order to promote the values that were lost or are being lost because of the dispute? Fourthly, one should give due regard to the way in which different and competing versions of a right structure relationships differently.⁷⁵ In this analysis, rights are not only viewed in relation to one another, that is, rights are not only balanced or weighed against other rights. Instead, rights are viewed within the broader context of the relationships that they structure. The act of weighing and balancing competing rights therefore happens by looking at

⁶⁷ Massey *Space, place and gender* 4:

“‘The spatial then’... can be seen as constructed out of the multiplicity of social relations across all spatial scales, from the global reach of finance and telecommunications, through the geography of the tentacles of national political power, to the social relations within the town, the settlement, the household and the workplace. It is a way of thinking in terms of the ever-shifting geometry of social/power relations, and it forces into view the real multiplicities of space-time.”

⁶⁸ Nedelsky *Law’s Relations* 264.

⁶⁹ Keenan *Subversive Property* 165.

⁷⁰ Nedelsky *Law’s Relations* 264.

⁷¹ 76.

⁷² 32.

⁷³ Nedelsky has in mind any right and does not limit her notion of rights as relationships to human rights or constitutional rights.

⁷⁴ By values, Nedelsky implies values more generally and in the case of *Hatting* these could include, but are definitely not limited to the values underlying the Constitution.

⁷⁵ 236.

how these competing rights structure relationships differently, how they foster or undermine different values and how these rights should be interpreted in order to give rise to relationships that will alter the dispute.

Viewed in this way and applying the four steps of the relational approach, the relations between Magrieta Hattingh and her immediate family definitely should have been part of the balancing of the rights and could not have been dismissed as briefly as the Constitutional Court had done. Michael Dafel suggests that, during the balancing process in *Hattingh*, the court looked favourably at the commitments of the landowner.⁷⁶ Dafel considers the obligation of non-state actors in realising the right to access to adequate housing. He suggests that, despite the fact that the role of non-state actors is in general typified as a negative obligation, it is a lot more complex than merely inhibiting interference with someone else's housing or housing resource. In support of this greater complexity, he references the *Hattingh* case to illustrate his proposal that courts will, at the very least, be sympathetic towards owners who enter into meaningful engagement with occupiers in order to mitigate potential hardship caused by the eviction. Although there is no final confirmation from the Constitutional Court on this point, his sense is that owners who show conduct that can be construed as accepting a more affirmative obligation as non-state owner in eviction cases, will be treated more favourably.⁷⁷

Dafel makes this suggestion with specific reference to the factors that the Constitutional Court took into account in considering whether it would be just and equitable to grant the eviction order.⁷⁸ Of these factors, thirteen were in favour of Juta and two were in favour of the Hattingh family. I suggest that the way in which these factors were placed in the balance, failed to acknowledge the relational nature of space, rights and property. Accordingly, the court upheld the existing power relations between the landowners and occupiers. By failing to open relational rights up to spatial justice, it did not challenge the *status quo*. In other words, to disregard the full complexity of the nested relations that structured belonging on Fijnbosch, the dominant relation (namely the relationship of a property owner to his property) was reproduced. Below I list these factors in order to later question the way in which the relationality of the factors was not sufficiently taken into account. I also return to one of them later in the conclusion within the framework of spatial justice.

The factors in favour of Juta included that Juta was not seeking to evict Magrieta Hattingh, that Ricardo Hattingh will also not be evicted and that he can look after Magrieta Hattingh. A third factor taken into account was that Juta, at some stage in the past, was willing to pay R22 000 so the applicants can find alternative accommodation. This, however, did not realise because the joint income of Magrieta Hattingh's children did not qualify them for a loan.

⁷⁶ M Dafel "The negative obligation of the housing right: An analysis of the duties to respect and protect" (2013) 29 *SAJHR* 591.

⁷⁷ 611. For a view to the contrary, ie that there is not a positive duty on non-state owners, see the case of *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA).

⁷⁸ Dafel (2013) *SAJHR* 594-595 with reference to *Hattingh v Juta* 2013 3 SA 275 (CC) para 42.

A further factor was that Juta sought to evict Magrieta Hattingh's children and grandchildren because he needed the space to accommodate Willemse.

The fifth factor that the Constitutional Court took into account, is the fact that "neither the first applicant nor the third applicant has ever worked for Juta in any serious way" even though Edwina Junita Hattingh worked for him for a short while.⁷⁹ This suggests that the relationships between Juta and the Hattingh children are more complex than merely the fact that they are living with their mother's erstwhile employee. Privilege Dhlwayo acknowledges the complexity of these employee-employer relationships and its relation to evictions when he references the *Hattingh* case in arguing that the "complex link between land tenure and employment status, established under ESTA," is one of the main reasons of farm evictions.⁸⁰

A sixth aspect in Juta's favour was the willingness of Juta and his wife to transport Magrieta Hattingh to hospital and the doctor when she needed it. The facts that the children of Magrieta Hattingh could only call on her right to family life and had no other right of their own to rely on in order to continue living in the cottage and that they were looking for alternative accommodation were listed as the seventh and eighth aspects weighing in favour of Juta. The applicants were adults and not dependants of Magrieta Hattingh and they would be able to visit her after they moved out.⁸¹ The applicants lived in the cottage for quite some time (since December 2002) Juta could then not use it for anything else. Juta incurred high costs in legal representation while the Legal Aid Clinic represented the applicants. The fact that the applicants were working and earning money was also something that the court considered in Juta's favour.

The only two aspects listed in favour of Magrieta Hattingh's children were the fact that they had been on a housing waiting list and that there was a housing shortage in the area.⁸² The Constitutional Court highlighted that all relevant factors must be taken into account in order to make a value judgment of whether it can be said to be just and equitable for Magrieta Hattingh to remain living in the cottage with her children.⁸³ I now turn to theories on spatial justice and rationality to challenge the way in which these factors were weighed up without sufficiently recognising the family or the relationships that are produced through these factors that the court weighed up.

A more thorough engagement with the right to family life would have signalled a relational approach to rights and one in which other, usually less prominent than owner/occupier relationship, relations (such as family ties), are also given consideration and can even be deemed to be more important. Nedelsky argues against the dominant twentieth century American discourse of rights as trumps and uses the example of South Africa to show how a

⁷⁹ *Hattingh v Juta* 2013 3 SA 275 (CC) para 42.

⁸⁰ P Dhlwayo "Tenure security and farmland: Will recent policy and legislative developments improve the plight of rural dwellers?" (2014) 25 *Stell LR* 143 149.

⁸¹ *Hattingh v Juta* 2013 3 SA 275 (CC) para 42 (i) and (j).

⁸² Para 42 (n) and (o).

⁸³ Para 42.

model of rights as trumps has been eroded.⁸⁴ The question in the first place is therefore not how the rights weigh up against one another, but how the relationships structured by the rights are held up and weighed up. Nedelsky argues that the Canadian and South African constitutions, in requiring courts to sensibly consider when the limitation of rights can be justified, prevents the treatment of rights as trumps.⁸⁵ Because rights are “collective decisions about the implementation of core values” she calls for rights not to be seen as “trumps” but instead as “triggers” that can invite democratic conversation on accountability.⁸⁶ In the case of *Hattingh* this will invite a conversation about the different power relations at play. I support Pienaar’s positive regard for the way in which the Constitutional Court went beyond a tick-box approach, but in terms of a relational approach the right to family life requires even more. In terms of Nedelsky’s approach, property rights are not, in the first instance, about “things”. In fact, property rights are primarily about “people’s relations to each other as they affect and are affected by things”.⁸⁷ In this reading, the questions of Juta’s property rights and rights as an owner could not have been considered without fully appreciating the relations between the members of Hattingh family and between Juta. The right to family life could have defined his ownership rights instead of the other way around. The effect of this would have been a situation where the right to family life is prioritised properly in terms of important relations of belonging. This possibility of a different prioritisation of the relationships in the *Hattingh* case illustrates Nedelsky’s relational approach. The question is one of a point of departure: does the right to property define the Hattingh’s family relations or does the Hattingh’s right to family life define the relation of ownership. Below, Keenan’s expression of this distinction in starting point in terms of belonging and belongings is discussed.

Massey insists on the inherent dynamism of the spatial. She insists on viewing space as the coming together of stories thus far. Instead of viewing space as abstract, Massey calls for space to be understood as a collection of narratives and the concurrent existence of stories. Massey insists on such a view of space not because such it is more consistent with physics or more correct, but because it has key features that contribute a particular “appropriateness” for current issues.⁸⁸ She challenges the view of space as merely the “other” of time and insists that space must be connected to the social and to power. This views time not as the absence of space, but sees space as intricately connected to time: space-time is the term that Massey uses. Space seen as “stretched-out social relations” provokes a pivotal issue of the

⁸⁴ Nedelsky *Law’s Relations* 232.

⁸⁵ “Rights as trumps” refers to Dworkin’s account of individual rights as political trumps. R Dworkin *Taking Rights Seriously* (1977).

⁸⁶ Nedelsky *Law’s Relations* 235-236.

⁸⁷ 237.

⁸⁸ Massey *Space, place and gender* 4.

“spatiality of power itself”.⁸⁹ Strikingly absent from the *Hattingh* judgments (in all the courts) are the accounts of the other complex relationships at play in the connections between the Hattinghs and Juta. The race, class and gendered power relationships that mark the history of property in colonial and apartheid South Africa are mostly absent from the judgments. The Constitutional Court admittedly acknowledges this when it refers to the preamble of ESTA.⁹⁰

There must be a strong relationship between Magrieta Hattingh and Juta. This is evident from one of the factors, which played to Juta’s favour, namely that he and his wife were willing to transport Margieta Hattingh to and from hospital when needed. Court judgments are too limited to illustrate the subtle social relationships underlying the decisions and detract from the political nature of the judgments on space and the social relations that produce them. If spaces are seen not as abstract, but as relational, the power imbalances that produce and maintain these spaces and the subsequent power imbalances that are produced by these spaces become visible. There are relations that are not addressed through the judgments, such as those between the family members themselves, the family and their position in the broader community and then the structural relations of poverty, politics and power that shaped their belonging.⁹¹ The effect of addressing these relations would be that the court (the law) views the right to family life not simply as a right to be weighed up, but as complex, nested relations within a broader network of relations.

The heads of argument and founding affidavit of the applicants in the Constitutional Court clarify why Magrieta Hattingh was not a party to the proceedings. It explains that:

“[t]he application was to evict the applicants in their capacities as occupiers, not in their capacity as members of Magrieta Hattingh’s family. The respondent did not make out a case against the Hattingh children in their capacity as family members of Magrieta Hattingh, which would have required the joinder of Magrieta Hattingh because her right to family life is protected by section 6(2)(d).”⁹²

The founding affidavit reveals that the older Hattingh children did not think that Ricardo could look after their mother and they insist that she is

⁸⁹ She expands:

“[F]rom the global reach of finance and telecommunications, through the geography of the tentacles of national political power, to the social relations within the town, the settlement, the household and the workplace”.

⁹⁰ *Hattingh v Juta* 2013 3 SA 275 (CC) para 35. The preamble states:

“WHEREAS many South Africans do not have secure tenure of their homes and the land which they use and are therefore vulnerable to unfair eviction; WHEREAS unfair evictions lead to great hardship, conflict and social instability; WHEREAS this situation is in part the result of past discriminatory laws and practices ...”

⁹¹ In following a relational approach, some questions regarding the relations of Magrieta Hattingh and Ricardo Hattingh come to mind when reading the pleadings. Why was Magrieta Hattingh not joined as a party? How does she feel about the applicants’ claim to their right to a family life? What is the nature of the relationship between Juta and Ricardo Hattingh that led to Juta, firstly, laying a criminal charge of trespassing against him and then not only withdrawing the charge, but also not pursuing any eviction action against him? How did attitudes toward the Hattingh children change after Michael Hattingh senior passed away? How is the relationship between the Jutas and Magrieta Hattingh gendered? What role does her working for them as a domestic worker play? What is the relationship between the Hattingh children? How do race and class affect the relations between Juta and the other Hatting children?

⁹² Applicants’ Heads of Argument in the Constitutional Court para 25.

dependent on their care.⁹³ There are several unspoken relations of power and subordination underlying the *Hattingh* case (gender, class, race) that are neither explicitly surfaced in the pleadings, nor in any of the judgments of the different courts.

What Massey defines as “the spatial” is constructed by a multiplicity of social relationships; “it forces into view the real multiplicities of space-time”.⁹⁴ The danger of viewing space as the opposite of history (time) is that space is then depoliticised. It becomes flat and stagnant. The spatial, she writes, is invites and is an essential part of politics broadly speaking.⁹⁵ Politics in this broad sense refers to underlying power imbalances. To view the *Hattingh* case from a perspective of spatial justice is to acknowledge the power and social relationships that shaped the issues in the *Hattingh* case, even though they were not explicitly mentioned in the judgment. The hierarchy that was set up between the family relationship and the owner-occupier relationship is a highly politicised relationship. Reducing these relationships to rights has a depoliticising effect.

The ideas in Massey’s work underlie Keenan’s *Subversive Property: Law and the Production of Spaces of Belonging*.⁹⁶ Keenan also insists that space is politically important. The spatial turn in the context of property involves shifting the focus from the subject to the spaces inhabited by the subject.⁹⁷ While conceding that legal geographers, such as David Delaney and Nicholas Blomley, have brought the spatial turn to law, Keenan goes further and draws chiefly from critical geography and phenomenology.⁹⁸ Her biggest theoretical contribution is to challenge any suggestion that the subject can be seen as separate from her context. She therefore calls for acknowledging the embedded subject, not as discreet actor, but in fact as inseparable from the spaces from which she moves. She writes compellingly on how a subject “takes space with her when she moves”.⁹⁹ What this means is not that the subject carries all her movable property with her, but instead that her subject-object relations of belonging follows her around in the sense that it determines where she belong in other, more metaphysical contexts. Another key concept that underpins Keenan’s work is an assertion that property must be seen as a relation of belonging that is dependent on space. The belonging relation, she explains, can exist between a subject and an object or between a part and a whole. A relation of belonging between a subject and object is how property

⁹³ Applicants’ founding Affidavit in the Constitutional Court para 23:

“There is no evidence as to whether Ricardo is capable of caring for Mrs Hattingh or whether that is her wish.”

⁹⁴ Massey *Space, place and gender* 4.

⁹⁵ 4-5.

⁹⁶ Keenan *Subversive Property* 17-18.

⁹⁷ 6.

⁹⁸ She relies in particular on Sarah Ahmed’s feminist work on the intimacy of bodies and their dwelling places in her book *Queer Phenomenology: Orientations, Objects, Others* (2006).

⁹⁹ Keenan *Subversive Property* 15. If space is not seen as abstract, but as relational, then these relations follow one. One is always embedded in the relations that structure your identity and structure the spaces one inhabits.

is traditionally understood. The term “belong” also connotes ownership. Belonging in this sense indicates the property that one owns.¹⁰⁰

Part-whole relationships of belonging points to the ways in which individuals’ identities are shaped through the groups that they belong to and shape in their turn. Examples are the relationship between a man and masculinity, as well as a white person and whiteness. In the *Hattingh* case, an example of a part-whole relationship is the relationship between a member of the Hattingh family and the rest of the Hattingh family and equally the Hattingh family and other families, as well as the idea of “family”. In this context, the term “belonging” is used to signify a person’s place within a broader group. Keenan, by insisting on the connection between “belonging” and “belongings”, explains that the “property of the subject (her belongings) and properties of the subject (characteristics that determine where and/or to what social group she belongs)” function in similar ways and that the one flows into the other.¹⁰¹ Someone’s property (her belongings) and her properties (those attributes that determine to which group she belongs) are closely linked and mutually dependant. This also links property and propriety in new and interesting ways. In families, both property and propriety are handed down from one generation to another.¹⁰² Belongings are passed on through inheritance (this is referred to as subject-object belonging) and members of a family share certain values and ideas because they find themselves in the same time and space (part-whole belonging).¹⁰³ Belonging is handed down in similar ways as belongings. Corresponding terms in the South African context would be “intergenerational wealth” and “intergenerational trauma”. Not all relations of belonging are however honoured.¹⁰⁴ In the case of the Hattingh children, their membership to the Hattingh family and their connection to Magrieta Hattingh were outweighed by Juta’s subject-object relation of landownership and his subject-subject relation to Magrieta Hattingh. The Hattingh family’s belonging (or lack of belonging) was determined and dependant on their belonging to the family, but also on their belongings (property) or rather their lack of property and proper rights over the cottage.

Keenan illustrates that “legal connections ... between space and the subject do not accurately reflect the lived conceptual, social and physical connections that subjects in fact have and through which they live”.¹⁰⁵ The law is often a contradiction of the actual lived space/subject relation. Keenan highlights the possibility that law and legal processes can lead to property as a relationship of belonging. The law produces relationships of belonging in very similar

¹⁰⁰ 16-18.

¹⁰¹ 17.

¹⁰² 45. With reliance on O Lobel “Family Geographies: Global Care Chains, Transnational Parenthood, and New Legal Challenges in an Era of Globalization” in J Holder & C Harrison (eds) *Law and Geography* (2003).

¹⁰³ Keenan *Subversive Property* 45-46.

¹⁰⁴ 165.

¹⁰⁵ 30. See also Nedelsky *Law’s relations* 32: “People are relational”. Nedelsky notes specifically that she does not mean that only women are relational, but that she includes men when she refers to “relational selves”.

ways to how politics, space and culture produce belonging relations.¹⁰⁶ The *Hattingh* case is an appropriate example of the way in which the law shapes relations of belonging. The outcome of the *Hattingh* case entailed that one of the children, Ricardo, could stay on the smallholding and could remain a part of the family home, whereas the other children and grandchildren had to move out. This shapes the family relations of the Hattinghs because it gave one child access to the home where their mother lives to the exclusion of the other.

Property, as a relationship of belonging, draws attention to the role that law plays in enforcing cultural and social particularity of orthodox understandings of property.¹⁰⁷ Law's tendency to produce and reproduce "dominant networks of belonging" is very clear in postcolonial contexts, but, as Keenan shows, the inclination of law to bring about and maintain belonging networks that are dominant can also be discerned in contexts where there are "competing networks of belonging".¹⁰⁸ This means that in countries such as South Africa, New Zealand and Australia the law assists in strengthening and confirming existing (power) relations and thereby reinforces the status quo by upholding established relations. In the *Hattingh* case property ownership was the dominant network of belonging. Keenan's example is postcolonial New Zealand where the Maori property regime was largely based on use-rights and not a determinate physical space. The Anglicisation of the Maori property regime was at the heart of the colonial project and it produced a certain relation between the Maori people and the land. This relation greatly influenced their political, social and cultural organisational structures. Rituals and societal structures are closely connected to the land. This is also the case in South Africa. Because the colonial property system is largely maintained, it still perpetuates a position of subordination of the Maori people.¹⁰⁹ This requires an approach where plural systems of law are acknowledged. To bring this back to the *Hattingh* case, Jamil Mujuzi, with reference to the broader African context, insists that the right to family life should be taken seriously. Writing on criminal justice in Africa, he argues that this right should play an important role in decisions on the rehabilitation and reintegration of offenders into society.¹¹⁰ He compares the right to family life in constitutions of different African countries. The *Hattingh* case is relevant to his discussion to the extent that human dignity was referred to in the context of the right to family life.¹¹¹

¹⁰⁶ Keenan *Subversive Property* 9

¹⁰⁷ 428.

¹⁰⁸ 429.

¹⁰⁹ 122.

¹¹⁰ JD Mujuzi "Legal pluralism and the right to family life, and the transfer of offenders who are nationals of African countries, within Africa and to Africa" (2013) *The Journal of Legal Pluralism and Unofficial Law* 267.

¹¹¹ N 82. He also refers to *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC), in which the Constitutional Court pointed out that there is not a universal right to family life and marriage in the South African Constitution and that human dignity, freedom and equality will play an important role in the protection of marriage and family life and prevent arbitrary state interference. He relies on Clark 156 (B Clark "Family Law" in CG van der Merwe & JE du Plessis (eds) *Introduction to the Law of South Africa* (2004) 135–168) who reads this absence of and explicit right to family life avoidance of the tricky arguments regarding the protection of the extended or nuclear family by the framers of the Constitution. He continues and highlights the

Mujuzi points out that the right to dignity can be emphasised in lieu of an explicit right to family life in the South African Constitution. He lists the *Hattingh* case alongside cases pertaining to the renewal of temporary permits of applicants awaiting permanent residence permits, where the Constitutional Court referred to human dignity in interpreting the meaning of “family life”.¹¹² A pluralist approach to the right to family life, as Mujuzi suggests, will be useful, as argued below, only if it gives due regard to the complex simultaneity of the relations produced by rights and space.¹¹³

Keenan also uses the example of the Aboriginal town camps in Australia, where leasing terms prohibit open fires and large groups. These terms prevent Aboriginal people from practicing their traditional cooking methods and keep them from having contact with their families who “live out bush”.¹¹⁴ In the *Hattingh* case, the dominant narrative on property in postcolonial and post-Apartheid South Africa defined the extent of family relations. Instead of giving preference to subject-subject relations in the form of family ties, the established subject-object relation (property ownership, title) was considered more important. The relationship between the subject and space must be reconsidered. One way in which the relation could have been reconceived is by prioritising relations and producing structures of belonging other than the dominant landowner-occupier network. Although it is not a guarantee that a different approach would have led to a different outcome, that is, that the Hatting children would not have been evicted, it would have set a different precedent for the status and import of the right to family life as a relational right. If the extended family relations were thoroughly considered and fully taken into consideration, the outcome would have probably been that the entire Hatting family has made Fijnbosch their home and could stay on.

4 Conclusion

The relational nature of rights and space lie at the heart of the *Hattingh* case. The case commenced in the Magistrate’s Court and ended in the Constitutional Court. It concerned the right to “family life in accordance to the culture of that family” of occupiers in terms of ESTA.¹¹⁵ The lower courts all took issue with the meaning and ambit of the right to family life, the definition of family and the meaning of culture, but the Constitutional Court interpreted family life with reference to the landowner’s rights.

Constitutional Court’s emphasis on the role of the right to dignity in this regard. He refers to cases on permanent residence permits where dignity was invoked: *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 36; In *Hattingh v Juta* 2013 3 SA 275 (CC) the Constitutional Court referred to human dignity in interpreting the meaning of “family life” in the context of the rights of the land occupiers. In *C v Department of Health and Social Development, Gauteng* 2012 2 SA 208 (CC) para 23, the Constitutional Court observed that:

“Uninvited intervention by the state into the private sphere of family life threatens to rupture the integrity and continuity of family relations, and even to disgrace the dignity of the family, both parents and children, in their own esteem as well as in the eyes of their community.”

¹¹² Mujuzi (2013) *The Journal of Legal Pluralism and Unofficial Law* 290.

¹¹³ See section 3 below.

¹¹⁴ 123.

¹¹⁵ S 6(2)(d) of ESTA.

An approach that takes spatial justice seriously will be acutely conscious of the way in which rights and space produce and reproduce relationships. A spatial justice approach could not only take cognisance of the ways in which relationships are structured by rights and space, but could also challenge dominant spatial structures and systems of belonging produced and reproduced by the status quo. The *Hattingh* case has received some attention in the context of property law and little in the field of family law. In Pienaar's valuable contribution, she suggests that the Constitutional Court, by avoiding a technical tick-box approach to family and the family life, kept the right to family life more fluid and open. Although I agree that an approach that keeps the notion of and right to family life open, rather than set down a technical list of criteria, is preferable, the Constitutional Court in *Hattingh* did not keep the right to family life fluid. The judgment instead limited the right to family life by defining it primarily with reference to the right of the landowner. In a system with competing systems of belonging, the court firmly upheld the status quo and gave preference to the subject-object relation of the landowner and property. The Constitutional Court emphasised the fact that the Hattingh children were of the age of majority and had their own children. In defining the term "family", the Constitutional Court remarked that being an independent, major child does not detract from the extent of which a person would be considered as part of her parents' family.¹¹⁶ This observation was repeated in the discussion of the meaning of family life.¹¹⁷ Against the backdrop of this remark, if the family relations were considered the primary relations in the case, the age of the children should not have been a factor.¹¹⁸ However, since the main consideration was instead whether it was just and equitable to evict the occupiers, this opened a gap for the age and independence of the children to count against the Hattinghs. Zondo J cited the fact that the applicants were adults and independent of Magrieta Hattingh as one of the factors that counted in Mr Juta's favour.¹¹⁹

By avoiding a discussion of the "the culture of that family", the right to family life was limited and not kept fluid. Even though it was not limited through a tick-box technical process, it failed to acknowledge space as complex and layered relations of power and property as a structure of belonging. In drawing on Nedelsky's work, it becomes clear that the court could have restored or produced different relations through applying the right of an occupier to family life. This means that the right to family life and the nested associated relations could have been protected against the established property right of title and the subsequent power relations associated therewith. The outcome would have set a precedent in which the right to family life is politicised and defined and considered as a nested relationship. In other words, the relation between the family members would have been seen within the broader networks of power

¹¹⁶ *Hattingh v Juta* 2013 3 SA 275 (CC) para 34.

¹¹⁷ Para 40.

¹¹⁸ Owner/occupier relations are well established and therefore, to use Keenan's term, a dominant relation in law. Family relations are not dominant relations and therefore giving primacy to other relations can challenge the status quo.

¹¹⁹ Para 42(i).

relations that enable or preclude a feeling of belonging. The way in which the Constitutional Court applied this right weighed in favour of the landowner's relation to property (subject-object relation in Keenan's terms). The fluidity of the meaning of family was curtailed by the parameters of ownership. It was furthermore limited by the extent to which existing landowner-land relations fail to contain and accommodate the extended family in postcolonial South Africa. In the context of South Africa, there are several historical relational structures produced and reproduced through rights and space. These include race, gender and class relations, relations of subordination and relations of belonging. It is with this in mind that a pluralist approach, which gives regard to human dignity and the complex and layered simultaneity of spatial relations, will be valuable.

SUMMARY

The *Hattingh v Juta* case raised the question of the right to family life in the context of Extension of Security of Tenure Act 62 of 1997 ("ESTA"). This contribution considers the judgments that decided this case from a spatial justice perspective. In particular, it follows a feminist approach to spatial justice. As such, the notions of rights as relational, relational space and nested relations of belonging stand central to the considerations in the article. These concepts are explored with reliance on the work of Jennifer Nedelsky, Doreen Massey and Sarah Keenan. The central argument entails that the courts failed to fully acknowledge the relationality of both space and rights and accordingly the nested power relation of ownership took preference over that of family life. It looks critically at how space and belonging are produced and reproduced through rights.