

Land Matters and Rural Development: 2020

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Abstract

Covid-19 had a profound impact on South Africa, not only in relation to its health system but also in relation to matters such as access to land and adequate housing. This note discusses, amongst other, the case law focusing on evictions and housing reported during 2020. The note also indicates that restitution remains a complex matter that is not going to be resolved soon. The proposed 2020 amendments to the Constitution of the Republic of South Africa, 1996 and the proposed Expropriation Bill are further analysed. The proposed amendment legislation in relation to upgrading of land rights to give effect to Constitutional Court decisions is referred to. This note includes the most important 2020 land reform developments pertaining to section 25 of the Constitution and expropriation, land restitution, land reform legislation, unlawful occupation, housing, deeds, sectional titles land redistribution and rural development.

Keywords: Land reform; redistribution; tenure reform; restitution; Khoi-San and African customary law; land rights; unlawful occupation of land and eviction; access to housing

General

The year 2020 will be remembered for the devastating effects of the Covid-19 virus and the eventual lockdown. However, the virus also brought to the fore the inequalities still existing in South African society. During this period, the courts had to deal with evictions that were undertaken in the lockdown period and the right to housing. The expropriation debate and the amendment of section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution) continued. The complexity of land claims is illustrated where overlapping claims of communities led to the revoking of former formal restitution of land. A traditional council and community were barred from allocating claimed land to non-claimants, and in another case, it was made clear that a court cannot amend an existing land claim to add new claimants.

An Upgrading of Land Tenure Rights Amendment Bill [B6B-2020] (Upgrading Bill) was introduced in parliament to give effect to two court decisions that declared some of the sections of the Upgrading of Land Tenure Rights Act 112 of 1991 (Upgrading Act) unconstitutional. In the meantime, the courts still had to deal with issues raised in terms of the 1991 Act.

The Traditional and Khoi-San Leadership Act 3 of 2019 was put into operation. However, the Act is silent on how traditional leaders and their councils have to deal with land matters.

The aim of this note is to highlight some of the land-related issues that emerged in 2020. In this note, section 25 of the Constitution and expropriation, restitution, land reform legislation, the Extension of Security of Tenure Act 62 of 1997 (ESTA), unlawful occupation and eviction, housing, and land redistribution are discussed.

Section 25 of the Constitution and Expropriation

The review process that was embarked on in 2018 relating to section 25 of the Constitution continued throughout 2020, specifically focusing on the expropriation of land with nil compensation. In December 2019, the Draft Constitution Eighteenth Amendment Bill¹ was published for comment. However, due to the onset of the Covid-19-pandemic and the corresponding regulations issued under section 27(2) of the Disaster Management Act 57 of 2002, various processes were suspended, including public hearings. The term of the review committee furthermore expired, necessitating the committee to be re-constituted on 1 July 2020. Public hearings resumed in the second half of 2020, aiming to reach the deadline of 31 December 2020 to table a revised section 25. As it happens, that deadline was again extended to 31 May 2021 and again to 30 August 2021. At the time of writing, the process had not been concluded yet.

¹ GG 42902 (13 December 2019) GN 652.

In the course of 2020, another important development impacting on land reform occurred when the Draft Expropriation Bill² was published for comment, succeeding the 2018-Bill.³ While the Bill also resonates with section 25-review, the Bill deals with much more than expropriation with nil compensation. Yet, that dimension of the Bill is especially important for purposes of a discussion on land reform. Clause 12 deals generally with the determination of compensation. Notably, the point of departure under clause 12(1) remains unchanged, namely that the amount compensation payable must be just and equitable, reflecting an equitable balance between the public interest and the interests of the expropriated owner or holder, having regard to all relevant circumstances, including the five factors listed in section 25(3) of the Constitution. These include the current use of the property, the history of the acquisition and use of the property; the market value of the property, the extent of direct state investment and subsidy in the acquisition and the beneficial capital improvement of the property; and the purpose of the expropriation. There is also a list of factors contained in clause 12(2) that, when determining the amount of compensation, may not be taken into account unless there are special circumstances in which it would be just and equitable to do so. For land reform purposes, clause 12(3) provides that it may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including but not limited to certain categories of land set out in clause 12(3)(1)(a)-(e). The promotion of land reform is in the public interest, aligned with section 25(4)(a) of the Constitution. In this light, clause 12(3) provides for various categories of land: (a) where the land is not being used, and the owner's main purpose is not to develop the land or use it to generate income, but to benefit from the appreciation of its market value; (b) where an organ of state holds land that it is not used for its core functions and is not reasonably likely to require the land for its future activities in that regard, and the organ of the state acquired the land for no consideration; (c) notwithstanding registration of ownership in terms of the Deeds Registries Act 47 of 1937, where an owner has abandoned the land by failing to exercise control over it; (d) where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land; and (e) when the nature or condition of the property poses a health, safety or physical risk to persons or other property. Clause 12(4) provides further that when a court or arbitrator determines the amount of compensation under section 23 of the Land Reform (Labour Tenants) Act 3 of 1996, it may be just and equitable for nil compensation to be paid, having regard to all relevant circumstances.

It is important to note that the point of departure in the 2020-Draft Bill remained unchanged, namely that just and equitable compensation was payable in instances of expropriation of property or rights in the property, guided by the factors listed in section 25(3) of the Constitution and clause 12(1) of the Bill. Therefore, as a rule, expropriation would still be followed by the payment of just and equitable compensation. However,

2 GG 43798 (9 October 2020) GN 1082.

3 GG 42127 (21 December 2018) GN 1409.

where land is expropriated in the public interest, and all considerations had been taken into account, there may be instances where it would be just and equitable that nil compensation is paid. In this regard, two aspects are critical: the *land* is expropriated in the *public interest*. Accordingly, where expropriation of property for public purposes, like the building of roads, takes place, the payment of just and equitable compensation must follow, which amount cannot be nil. A very broad definition of ‘property’ is provided in the Bill, but no definition of ‘land’. That needs to be rectified. The categories set out specifically are furthermore not a closed list and also need further unpacking and elaboration. Apart from further unpacking, additional measures or guidelines would have to be drafted setting out which categories of land would be a priority in acquiring and why; as well as information as to who is to make such determinations, when and on which grounds. Overall, important criteria, guiding principles and processes are still outstanding. Although expropriation is a valuable tool in land reform generally, employing this tool will not solve all land reform-related problems—enduring underlying problems that hamper the land reform endeavour have to be addressed speedily.

Land Restitution

In *Mazizini Community v Minister of Rural Development and Land Reform*,⁴ the Court settled a dispute between the land claims of the AmaZizi and the Prudhoe communities. The land included the Fish River Sun Hotel and has a long history of possession and dispossession. The land was initially awarded to the AmaZizi in the Land Claims Court, but at the time, the Court was not informed of the Prudhoe Community’s competing claim. The land was state land, expropriated from white farmers to be consolidated into the former Ciskei.⁵

In *Luhlwini Mchunu Community v Hancock*⁶ Justice Meer confirmed the principle that new claims could not be produced outside the legal parameters of the Restitution Act. The applicant sought to adjust an existing community claim, lodged by the Mchunu Community in April 1998, to a claim in the alternative by individuals under sections 2(1)(a) and 2(1)(c) of the Act.

The Court confirmed that it was only able to deal with claims that were lodged in accordance with the strict requirements of the Act.⁷ The claim form, completed by two representatives of the community, both educated, sophisticated persons, and corroborated by evidence, clearly showed that a community claim was intended and

4 2020 (3) All SA 318 (SCA).

5 Paragraphs 2–14.

6 (LCC121/2017) 2020 (2) ZALCC (16 March 2020).

7 Paragraph 13.

was indeed lodged.⁸ In this regard, the LCC had in the past already held ‘that those who have not lodged timeous claims cannot piggyback onto other claimants.’⁹

*Nkoana-Mashabane v District Six Working Committee*¹⁰ follows on *District Six Committee v Minister of Rural Development and Land Reform*¹¹ in terms of which the then Minister of Rural Development and Land Reform, Minister Mashabane, was found to be in breach of her constitutional duties, resulting in a personal costs order against her. Whereas the application initially sought various orders, only the application for joinder was pursued in order to enable the applicant to finally apply for leave to appeal. The present application was accompanied by an application for condonation. The Court per Ngcukaitobi AJ first dealt with the condonation application and laid out the basic principles, namely that when there was a delay in instituting proceedings, there had to be an application for condonation.¹² That request had to be reasonable and acceptable when all circumstances were considered, there ought to be prospects of success on the merits, and if prejudice was established, then it had to be factored into the assessment whether condonation had to be granted or not. Therefore, a relatively short period of delay that caused no prejudice, with strong prospects for success, would enable a successful application. The converse would call for more convincing argumentation. Where a delay was at an instance of a member of the cabinet, constitutional obligations also became relevant as ministers should give effect to the Bill of Rights expeditiously.¹³

The explanation for the delay was found to be wholly inadequate.¹⁴ Two costs orders were made against the Minister in August 2019 and March 2020. From March 2020, the delay was laid at the foot of the declaration of the National State of Disaster.¹⁵ However, there was no explanation regarding the steps the applicant took after the judgment was delivered, eg, why consultation could not take place via electronic media. The delay was also not linked to any particular level or restriction under the disaster management regulations.¹⁶ In this regard, the Court found the explanation to be ‘inadequate and unreasonable. It is grounds to dismiss the application on its own.’¹⁷

The prospects of success were then turned to, should they be so overwhelming that the Court was persuaded to overlook the delay. It was claimed that a costs order could only be made lawfully if she had been joined in the proceedings.¹⁸ However, there was no

8 Paragraph 14.

9 Paragraph 19.

10 (LCC54/2018(B)) [2020] ZALCC 10 (5 October 2020).

11 2019 (4) All SA 89 (LCC).

12 Paragraph 5.

13 Paragraph 6.

14 Paragraph 7.

15 Paragraph 8.

16 Paragraph 8.

17 Paragraph 9.

18 Paragraph 11.

authority that in the absence of a joinder a costs order would be precluded, given *Public Protector v South African Reserve Bank*¹⁹ where a personal costs order was granted against the Public Protector, despite not being joined.²⁰ Provided there was a fair and adequate notice to an official that a personal costs order would be sought, a joinder as such was not required.

It was also claimed that the present applicant was treated differently from the current incumbent, Minister Didiza, regarding costs orders.²¹ Listing the acts of Minister Didiza, including the difficulties she faced and how she attended to deal with them, compared to the attempts to shift blame to junior officials by the applicant, the Court concluded that the complaint of unequal treatment was unfounded. The Court was ultimately not convinced of prospects of success to the extent that the long delay could be overlooked.²²

With regard to prejudice, three factors were considered specifically: (a) the Minister's right of access to court; (b) the unfairness and inconvenience of bringing the District Six Working Committee to court repeatedly; and (c) the court's duty to ensure the proper use of its resources and time and to consider whether or not a proper case for condonation had been made. Overall, the Court concluded that the application for condonation ought to be dismissed for lack of reasonable explanation.²³ Importantly, when the application for leave to appeal was first brought, the Court specifically invited the Minister to be joined in her personal capacity, which she refused.²⁴ In light of the above, the application for condonation was dismissed and costs granted on a party and party scale. The case sequence holds various lessons for government officials and members of the cabinet. Procedural rules and timelines apply to everyone and must be complied with. Furthermore, elected officials have specific constitutional duties to uphold.

*Bakgatla ba Mmakau Traditional Council v Maloka III*²⁵ dealt with an urgent application seeking an order committing the respondent to imprisonment for a period of three years for contempt of a 2019-LCC order; for an order setting aside the sale and/or allocation of claimed land without complying with the Restitution Act. The relevant order interdicted the community and traditional council from allocating sites and stands or land for any purpose on claimed land without complying with the Restitution Act. Any development on the claimed land was furthermore to be halted, pending compliance with the Restitution Act. The respondent was present in court when the order was granted by consent and was thus aware of its existence and the terms thereof.

19 2019 (6) SA 253 (CC).

20 Paragraph 11.

21 Paragraph 13.

22 Paragraph 15.

23 Paragraph 16.

24 Paragraph 17.

25 (LCC 107/2020) [2020] ZALCC 13 (2 October 2020).

Yet, the respondent proceeded through his office to sell and allocate sites and stands on the claimed land to various persons for residential and business purposes. For an order of contempt of court the following elements had to be proved:²⁶ (a) existence of a court order; (b) duly served upon or brought to the attention of the alleged violator; (c) non-compliance with the order; which (d) had to have been willful or *mala fide*. Proof beyond reasonable doubt was required where a sanction of committal was sought. However, where declaratory or other civil remedies were sought, proof on a balance of probabilities was then applied. Once the applicant had adduced sufficient evidence relating to (a), (b) and (c) above, the respondent bore the burden regarding element (d). Failure to adduce evidence that established a reasonable doubt as to whether the non-compliance was willful or *mala fide* meant that the civil contempt had been established beyond reasonable doubt. The respondent knew about the order and its content as he consented to it.²⁷ There was no denial of the sale of allocated land contrary to the court order. Elements (a) to (c) had thus been established.²⁸ Regarding willfulness or *mala fides*, the respondent had not adduced any evidence to establish reasonable doubt.²⁹ Accordingly, the Court concluded that all the elements for contempt of court had been complied with. However, the Court was of the view that the imposition of a fine as opposed to imprisonment would be a more suitable sanction for the respondent. The sale of land contrary to the Restitution Act was forthwith set aside. The sale of land is possible so long as the requirements of the Restitution Act have been complied with. Ultimately, these requirements are aimed at ensuring the integrity of the restitution process.

Land Reform

Interim Protection of Informal Land Rights Act 31 of 1996

The Act's application had again been extended until 31 December 2021.³⁰ It might be time to amend the Act to remove the need to extend the date on an annual basis.

Upgrading of Land Tenure Rights

Recent case law developments in relation to Upgrading Act, a tenure reform measure pre-dating the Constitution, included *Rahube v Rahube*³¹ and *Herbert NO v Senqu Municipality*,³² in terms of which certain provisions of the Act were declared to be unconstitutional, calling for legislation to be drafted to address the impasse.

26 Paragraph 7.

27 Paragraph 8.

28 Paragraph 9.

29 Paragraph 12.

30 GG 43981 (11 December 2020) GN 1323.

31 2019 (2) SA 54 (CC). See Juanita Pienaar, Willemien du Plessis and Ebrezia Johnson, 'Land Matters and Rural Development: 2019' (2020) 35(1) SAPL 1–30.

32 2019 (11) BCLR 1343 (CC).

Subsequently the Upgrading Bill was published aimed at amending sections 2, 4, 14 and 25A to give effect to these court decisions.

Section 2 lists the possible rights that may be affected and remove references to township registers and the need to open township registers. The proposed section 2(2) prescribes a notification procedure for such applications. Section 4 is amended to provide rights to persons who could not have been granted a right due to discriminatory practices. Section 14A, to be inserted, provides for applications to the Court should anyone be aggrieved by any conversion that took place from 27 April 1994 onwards. The section excludes bona fide transfers or land that was transferred in the name of a female. To give effect to the *Herbert* case, section 25A is inserted.³³

Herbert NO v Senqu Municipality,³⁴ however, continued the Upgrading Act saga in 2020 in that the applicants, in their capacities as trustees of the Teba Property Trust, sought an order declaring that their relevant permission to occupy (PTO) was a land tenure right referred to in item 2 of Schedule 2 of the Upgrading Act, to be converted into ownership. The relevant parcel of land, Erf 88, was located in the former Transkei in relation to which a PTO was granted to then Native Recruiting Corporation (NRC) under the Development Trust and Land Act 18 of 1936. In 1966 the NRC changed its name to the Mine Labour Organisation and in 1989 ceded its rights in and the PTO to the Teba Trust.³⁵

The applicant's point of departure was that the PTO, provided for under Proc R188 of 1969,³⁶ was a land right mentioned in Schedule 2 of the Upgrading Act that warranted automatic upgrading into ownership.³⁷ This contention was challenged on various grounds, including that the Trust was not using Erf 88 as contemplated in the PTO.³⁸ At the hearing, it was also submitted that the Trust did not fall into the class or group of persons in whose interest the Upgrading Act was enacted, given the above-mentioned CC-judgments. Instead, the Trust and its predecessors acquired the PTO in order to profit financially from migratory labour, one of the cornerstones of the previous apartheid system.³⁹ Reliance was especially based on the analyses in the previous CC-judgments, where it was specifically highlighted that the aim of the Upgrading Act was to make insecure land rights 'arising from discriminatory legislation in the past' more secure.⁴⁰ In contrast to the goals of the Upgrading Act, the Trust and its predecessors

33 'As from coming into operation of the Land Affairs General Amendment Act, 1998, the provisions of this Act, excluding sections 19 and 20, shall apply throughout the Republic.'

34 (2457/2016) [2020] ZAECGHC 45 (19 May 2020).

35 Paragraph 26.

36 GG 2486 (11 July 1969) Proc R188.

37 Paragraph 16.

38 Paragraph 17.

39 Paragraph 18.

40 Paragraph 23.

were actively involved in the implementation of apartheid policies.⁴¹ The Court was satisfied that the main purpose of the Upgrading Act was to provide for conversion into ownership of tenuous land rights that were granted to Africans.⁴² Neither the NRC nor the Trust were targets of discriminatory legislation and consequently systematically dispossessed of land or denied access to land. To allow the conversion into ownership would thus run counter to the purpose of the Upgrading Act, namely to reverse past wrongs and injustices committed in relation to land.⁴³ However, the finding did not go so far as to state that anyone who was not an African would be precluded from the conversion of rights under the Upgrading Act. The Court underlined that the finding was made within the context of the NRC specifically and these particular circumstances.⁴⁴ The validity of the PTO was thus not dealt with further.

This judgment underlined that an entity that benefited under racially discriminatory measures and whose business was enhanced on that basis could not be deemed to be previously disadvantaged and therefore did not qualify for remedial measures. Nevertheless, the Trust still holds a PTO that has to be dealt with going forward. This is a lacuna—not dealt with by the 2020 Upgrading of Land Tenure Rights Amendment Bill.

Traditional and Khoi-San Leadership Act 3 of 2019 and Customary Land Tenure

The Traditional and Khoi-San Leadership Act came into operation on 1 April 2019⁴⁵ and replaced the Traditional Leadership and Governance Framework Act 41 of 2003 and the National House of Traditional Leaders Act 22 of 2009. The Traditional and Khoi-San Leadership Act provides for the first time for recognition of the Khoi-San Leadership, communities and structures. In section 1, the Khoi-San community is defined as any person who lives in accordance with the customs and customary law of the Cape-Khoi, Griqua, Koranna, Nama or San people or any subgrouping thereof and is, therefore, a member of a particular Khoi-San community. The objectives of the Act are, amongst others, to transform traditional and Khoi-San institutions in line with constitutional imperatives⁴⁶ and the restoration of the integrity and legitimacy of these leadership institutions in line with customary law and practices.⁴⁷ The inclusion of these communities under traditional leadership structures are welcomed.

41 Paragraph 26.

42 Paragraph 29.

43 Paragraphs 34, 36.

44 Paragraph 38.

45 The Draft Traditional Affairs Bill introduced in 2013 was replaced in 2015 with the Traditional and Khoi-San Leadership Bill B23 of 2015.

46 Section 2(1) of the Act.

47 Section 1(2) of the Act. The Act endeavours to give recognition to the customs of the traditional and Khoi-San communities in that it provides that these members will not be precluded from addressing their leaders by their customary designations.

In the 2003-Act the functions of traditional leaders and authorities were spelt out, while section 15 of the 2019-Act merely states that traditional leaders and Khoi-San leaders' functions relate to functions '(a) in terms of customary law and customs of the traditional or Khoi-San community concerned; and (b) in terms of any applicable national or provincial legislation.' Sections 19 and 20 of the 2019-Act refer to the functions and powers of traditional councils. Section 20 relates to traditional councils other than the principal traditional council.⁴⁸ The traditional council has to administer the affairs of the council in terms of customs and traditions in accordance with the Constitution, assist municipalities to identify needs in the community and contribute to the integrated development plan of the specific municipality where the traditional community resides,⁴⁹ recommend interventions in terms of service delivery and development, participate in development programmes of all spheres of government, work towards 'cooperative governance, integrated development planning, sustainable development and service delivery' as well as to promote indigenous knowledge systems in relation to sustainable development and disaster management. The facilitative role of traditional councils is to ensure that communities benefit from government plans and programmes. The Act again refrains from specifying a particular role in the allocation of land, other than a reference to custom and tradition. By not prescribing specific roles, leaves the door open for the regulation of customary land tenure via legislation and to curb traditional customs and traditions in this regard. Notably, the application of traditions and customs are subject to the Bill of Rights. This has important implications for land allocation and uses in particular.

KwaZulu-Natal Ingonyama Trust Act 3 of 1994

Parliament's land reform portfolio committee requested the Minister of Agriculture, Land Reform and Rural Development to freeze the funding of the Ingonyama Trust Board due to its lack of financial reporting and the provision of a budget. Various members of the Board of Trustees were also suspended. Although the Trust obtained more than R90m from leases, a contentious practice, the funding was not used to the advantage of the community. Instead the Trust demanded additional development funding from the state.⁵⁰ In 2021 the payment of leases was challenged in court.⁵¹

48 These councils advise queens, kings and senior traditional leaders.

49 To be drafted in terms of the Local Government: Municipal Systems Act 32 of 2000.

50 Paddy Harper, 'Parliament Deals Blow to Ingonyama Trust Board' (*Mail & Guardian*, 29 May 2021) <<https://mg.co.za/coronavirus-essentials/2020-05-29-parliament-deals-blow-to-ingonyama-trust-board/>> accessed 30 August 2021.

51 This will be discussed in Land Matters: 2021.

Extension of Security of Tenure Act 62 of 1997

Matters relating to ESTA dealt mostly with automatic review under section 19(3) of ESTA and urgent relief. Under section 19(3) an automatic review process follows once a magistrate's court has granted an eviction order under ESTA.

*Tadvest Industrial (Pty) Ltd v Malan*⁵² was an application for leave to appeal against a review judgment handed down by Ncube AJ in terms of which an eviction order was set aside. The first respondent came to reside on the farm in question with her (now deceased) husband in 1974. After Mr Malan passed away in 2005, the landowner concluded a lease agreement with Mrs Malan in 2006. The applicant bought the farm in 2008. When Mrs Malan failed to pay rent, a notice was served in 2014 indicating that her right of residence was terminated. Following a relocation process on the farm, from one cottage to another, Mrs Malan's right of residence was terminated on the basis of a breach of the land owner – occupier-relationship. In the magistrate's court it was argued that Mrs Malan's occupation was linked to that of her husband and that she was not an occupier in her own right. However, that finding did not take account of *Klaase v Van der Merwe NO*⁵³ where it was confirmed that a woman who occupied land with her husband with the express or tacit consent of the landowner was an occupier in her own right. Accordingly, Mrs Malan's right of residence ought to have been terminated on a lawful ground, which termination had to be just and equitable.⁵⁴ The entering into of a lease agreement thus limited Mrs Malan's occupational rights, conduct that is prohibited by section 25 of ESTA.⁵⁵

The applicant listed eight grounds for appeal,⁵⁶ reduced to two issues: (a) whether the eviction was just and equitable under section 8(1) of ESTA; and (b) whether there was a fundamental breach of the relationship, which was not practically possible to remedy. While the magistrate made a finding that there was a breach of relationship, there was no finding as to whether that breach was fundamental. Nor was there a finding on whether it was practically possible to remedy the breach. In review proceedings, the LCC concluded that the finding that the source of Mrs Malan's right of residence was the lease agreement was incorrect,⁵⁷ but stated that it might be desirable for the SCA to pronounce on whether the breach of relationship was indeed a fundamental one and whether it was practically possible to remedy it. Leave to appeal to the SCA was thus granted.

52 LCC 30R/2019 (30 June 2020).

53 2016 (6) SA 131 (CC).

54 Paragraph 7.

55 Paragraph 8.

56 Paragraph 12.

57 Paragraph 14.

*De Jager v Mazibuko*⁵⁸ dealt with an urgent application for interim interdictory relief restraining the respondent from carrying out building operations on the applicants' farm. The respondent came to reside on the farm about twenty years ago, at which time the family (nine persons) were allowed to construct three structures within the homestead area. The family have since expanded to approximately twenty-eight members. The respondent averred that the existing three structures were in extreme disrepair, were not fit for human occupation and could not accommodate the family. The landowner denied that he had consented to any additional buildings. Justice Meer underlined that both landowners and occupiers had rights, duties and responsibilities under ESTA, but that the respective rights had to be balanced. The right to use the land was thus not open-ended or unlimited. It was clear that the respondent had consented to construct three buildings for use by her family.⁵⁹

The contention that the landowner had given her consent to construct additional buildings was not accepted by the Court on the basis that there had been no communication between the parties since 2018, at which time the respondent was specifically prohibited from erecting further buildings by order of court.⁶⁰ The Court thereafter turned to deal with the condition of the buildings and the respondent's right to dignity.⁶¹ A distinction on the facts was drawn between the present matter and *Daniels v Scribante*.⁶² Presently, the respondent was not improving an extant structure but was erecting new structures.⁶³ However, even if she were improving extant structures, the Court confirmed that neither ESTA, nor the *Daniels*-judgment, authorised building operations anywhere on the farm, without prior engagement with the owners.⁶⁴ Improvement of existing buildings was possible, but only after the engagement as conflicting rights required balancing.⁶⁵ In this light, the Court was also satisfied that any demolition of additional buildings already constructed by the respondent would not infringe any of her rights to residence.⁶⁶ The building materials so salvaged could then be utilised to improve existing buildings. The parties were not opposed to improving extant buildings, but after engagement.

Unlawful Occupation and Eviction

*South African Human Rights Commission v City of Cape Town*⁶⁷ dealt specifically with various unlawful evictions that took place in April-July 2020, during the Covid-19

58 (LCC57/2020) [2020] ZALCC 7 (25 August 2020).

59 Paragraph 15.

60 Paragraphs 15–17.

61 Paragraphs 18–25.

62 2017 (4) SA 341 (CC).

63 Paragraph 19.

64 Paragraph 20.

65 Paragraph 22.

66 Paragraph 24.

67 (8631/2020) [2020] ZAWCHC 84 (25 August 2020).

lockdown period, in contravention of the disaster regulations issued under the Disaster Management Act 57 of 2002.⁶⁸ The application is related to various parcels of land belonging to different entities and persons. Under Part A of the relief, the Anti-Land Invasion Unit (ALIU) was sought to be interdicted and restrained from evicting persons from and demolishing any informal dwelling, hut, shack, tent or similar structure, whether occupied or unoccupied, throughout the City Metropole, while the state of the disaster remained in place (2.1); to the extent that relevant persons and agents were authorised to evict and/or demolish structures in terms of court orders, they should do so in a manner that was lawful and respected and upheld the dignity of evicted persons and was expressly prohibited from using excessive force and/or destroying and/or confiscating material and property of the evictees (2.2); when the SA Police Service (SAPS) were present during the eviction and/or demolitions, they were directed to ensure that such eviction/demolitions were done lawfully and in conformity with the Constitution (2.3).

The first set of evictions took place in relation to land that belonged to the City, on 9–11 April (Kakhaza Khayelitsha).⁶⁹ Despite urgent relief sought and granted in the Western Cape High Court at that time, including an order handed down on 17 April 2020, unlawful evictions continued, namely on 15 May 2020 (Ocean View – private property);⁷⁰ 20 June (Hout Bay);⁷¹ 1 July (Ethembeni, Khayelitsha)⁷² and 13 July (Zwelethu, Mfuleni).⁷³ The first decision handed down in April 2020, therefore, did nothing to deter further evictions and/or demolitions. Although Justice Meer dealt with each of the specific evictions/demolitions in turn in detail, only the main points and/or trends are highlighted here. For example, on 15 July, dealing with the 20 June-unlawful evictions by City officials in Hout Bay, the Court declared the City’s conduct to be unlawful and unconstitutional and ‘harshly condemned the demolitions categorising them as inhumane, heartless. They felt they were done with scant regard to safety, security and health particularly in the light of the COVID-19 pandemic.’⁷⁴ Yet, unlawful evictions continued. Generally, the defences raised by the City were that the shacks and structures were illegally constructed; that only unoccupied structures were demolished;⁷⁵ and that counter-spoliation occurred—on the basis that unlawful occupiers spoliated land in possession of the City—which did not require an eviction order.⁷⁶

68 GG 43232 (16 April 2020) GN R465.

69 Paragraphs 10–14.

70 Paragraphs 24–25.

71 Paragraphs 15–16.

72 Paragraphs 17–23.

73 Paragraphs 26–37.

74 Paragraph 16.

75 Paragraph 25.

76 Paragraph 13.

The Court proceeded to deal with the requirements for an interdict, starting with the requirement of a *prima facie* right.⁷⁷ The City denied evicting and demolishing occupied shelters in contravention of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), on three main grounds: (a) unoccupied structures did not attract the protection of PIE;⁷⁸ (b) the City was entitled to counter-spoliation with respect to unoccupied structures, and (c) a structure in the process of being built or erected could not constitute a home within the meaning of section 26(3).⁷⁹ The Court did not accept the City's defence that occupied structures were not demolished as there was clear evidence that it had occurred (video material). The first requirement for interdictory relief was thus met, namely, the applicants had established a *prima facie*, if not a clear right, to relief in respect of occupied structures.⁸⁰

The applicants called for a purposive interpretation of PIE and contended that the City's reliance on counter-spoliation was unconstitutional.⁸¹ Given the broad approach to buildings or shelter in PIE, the Act required that if there was any doubt whether a structure was occupied for residential purposes, (or whether a structure was complete or fully built), an organ of state or private person had to obtain a court order before it could evict a person from or demolish that structure or building. The Court accepted that *prima facie*, the above argument passed muster and could take precedence over the City's reliance on the common-law remedy of counter-spoliation.⁸²

The second category of relief related to how the ALIU determined which structures were occupied.⁸³ City officials acted on their own discretion based solely on visual observations, and once that decision was made, persons affected thereby had no recourse to courts before the structure was destroyed. Members of the ALIU determined and singled out dwellings and structures for demolition in an arbitrary, capricious and unfettered manner. The Court further agreed that there was merit in the submission that the *nemo iudex in sua causa* rule of natural justice and section 34 of the Constitution were both infringed. Occupiers were deprived of structures by a City official who sat in judgment of his or own case.⁸⁴ The Court highlighted that 'Land invasions did not occur because of court orders or judicial oversight. Land invasions are driven by homelessness, poverty and desperation.'⁸⁵

77 Paragraph 38.

78 Paragraph 40.

79 Paragraph 40.

80 Paragraph 45.

81 Paragraph 46.

82 Paragraph 47.

83 Paragraphs 48–55

84 Paragraph 52.

85 Paragraph 54.

The last two requirements for interdictory relief were also met, namely that there was no alternative remedy in the particular circumstances⁸⁶ and that irreparable harm would result if the interdict was not granted.⁸⁷ Demolitions would continue, and thousands of people would be subjected to arbitrary demolitions. Accordingly, the balance of convenience was clearly in favour of granting the interdict and preventing so many people from being rendered homeless during the pandemic.⁸⁸

The final matter dealt with by the Court was the restoration of possession. Although building materials and possessions were also damaged or destroyed, lots of building materials and other possessions had also been seized. Because many evictees were unable to collect their possessions, the Court ordered the delivery thereof to the site they were removed from by the City.⁸⁹ The Court also made an order for compensation for the loss of personal possessions in the sum of R2 000 per person, calling for a list of affected persons.⁹⁰

While the judgment appears to be ground-breaking at first glance, it, in fact, accentuates and confirms basic approaches and human rights considerations, already well-established in South African law. Evictions from a home/shelter can only take place with a court order and only after all relevant circumstances have been considered. The judgment did not place a moratorium on all evictions in all instances. It merely required that the rule of law prevails. Unfortunately, the judgment again highlighted the fragmented approach to housing and settlement and how unsatisfactory it is to attend to housing needs in a piecemeal manner. Where hundreds of shelters are erected overnight, followed by sequential demolition and re-erection, the need for housing is abundantly clear.

However, the fact that municipalities struggle with increased land invasions is real, and Chief Albert Luthuli Local Municipality in Mpumalanga published a Prevention of Land Invasion and Management and Control of Informal Settlements By-law, 2020.⁹¹

Housing

Additional restructuring zones in terms of the Social Housing Act 16 of 2008⁹² and Priority Human Settlements and Housing Development Areas (PHSHDAs) in terms of

86 Paragraph 56.

87 Paragraph 57.

88 Paragraph 58.

89 Paragraph 77.

90 Paragraph 78.

91 PG 3209 (13 November 2020) Gen N 81.

92 GG 43726 (18 September 2020) GN 1004.

the Housing Act 107 of 1997⁹³ were identified. The PSHHDAs aim to address spatial injustice, amongst others.

The issue of spatial injustice was raised in the case of *Adonisi v Minister for Transport and Public Works Western Cape; Minister of Human Settlements v Premier of the Western Cape Province*.⁹⁴ The case dealt with the selling of provincial state land in Cape Town was contested. The land (referred to as Tafelberg land) was sold for R135m to a Jewish School.⁹⁵ It was argued, amongst others, that the land (which was a former school) should be made available as surplus land for the use of other state departments, such as housing.⁹⁶ It was argued that there was a dire need for affordable social housing⁹⁷ within the city. Housing in the city would prevent people from travelling vast distances to work or access health facilities and schools, for example.⁹⁸ The court referred to spatial injustice caused by apartheid.⁹⁹ The Court further dealt with the property clause and the right to housing as set out in the Constitution,¹⁰⁰ the Housing Act 107 of 1997,¹⁰¹ the Social Housing Act 16 of 2008,¹⁰² the Spatial Planning and Land Use Management Act 16 of 2003,¹⁰³ the 2014 Western Cape Provincial Spatial Development Framework and Cape Town's Spatial Development Framework of 2021,¹⁰⁴ as well as various applicable policy considerations.¹⁰⁵ The Court also referred to the duties of the different spheres of government as well as the Government Immovable Asset Management Act 19 of 2007.¹⁰⁶ The Court set out the protracted land acquisition process in question and the role of the different government spheres and departments in this regard.¹⁰⁷ One of the arguments raised was that the Tafelberg land should be regarded as surplus land, which should have been made available to other government departments before disposal thereof.¹⁰⁸ The Court discussed in length the various arguments the different parties raised. In the end, it set aside the contract of sale, the deed registration and the decision to sell the land. The Court ordered the relevant government departments to give effect to the Constitution and the Social Housing

93 GG 43316 (15 May 2020) GN 526. Also see North West Provincial Department of Human Settlements: Allocation to Matlosana Local Municipality of conditional grant for the N12 National Catalytic Human Settlements Project – GG 43591 (7 August 2020) Gen N 420.

94 (7908/2017; 12327/2017) [2020] ZAWCHC 87 (31 August 2020).

95 Paragraphs 2–5.

96 This had to be done in terms of the Government Immovable Asset Management Act 19 of 2007.

97 Paragraphs 39–46.

98 Paragraphs 34–38.

99 Paragraphs 95–103.

100 Sections 25–27, 60–113.

101 Paragraphs 76–77.

102 Paragraphs 78–80, 308–311.

103 Paragraphs 81–83.

104 Paragraphs 84–87.

105 Paragraphs 88–94.

106 Paragraphs 104–131, 278–280.

107 Paragraphs 132–212.

108 Paragraphs 281–308.

Act.¹⁰⁹ This case illustrates, amongst others, that in the future, courts will hold government departments accountable to first address the injustices caused by apartheid or at least consider it before making final decisions. It further stressed the importance of cooperative governance between different spheres of government and government departments.

Land Redistribution and Rural Development

The Minister of Agriculture, Land Reform and Rural Development published Proposed Land Donations Policy for comment.¹¹⁰ This Policy allows donors (private and public) to donate land either for specific beneficiaries or without identified beneficiaries for agriculture (for example, if someone emigrates and wants to donate his or her land). In the last instance, the Department will give priority to ‘farm dwellers, labour tenants, small families and cooperative farmers, the landless in informal settlements, women, youth, and persons with disabilities.’ If the land is donated for human settlement, the relevant department will deal with that land. The Policy foresees a land audit to determine state land that may be available for land redistribution. The Policy proposes that due process and ordinary land registration procedures are to be followed. It sets out principles and objectives, amongst others, to expedite land redistribution. The Policy identifies possible donors as large institutional landowners, such as agri-business, mining companies, financial institutions and churches. The Policy does not refer to the possibility of land donated in wills.¹¹¹

In January 2020, the Minister of Agriculture, Land Reform and Rural Development indicated in parliament that only half of the land acquired for redistribution is leased or used productively.¹¹² By October 2020, the Department made 900 farms available to emerging farmers.¹¹³ Hopefully, this embodies new life blown into a defunct land redistribution process.

Conclusion

In the previous ten years the Department was seemingly dragging its feet. Despite grave concerns and problems within the land reform context, it seems as if the Department of Agriculture, Land Reform and Rural Development implemented some interesting initiatives in 2020. Land was made available for redistribution and the Department immediately proposed amendments to existing legislation where the courts declared

109 Paragraphs 308–530.

110 GG 43004 (7 February 2020) GN 117.

111 See for an analysis of the Policy, Tina Kotzé and Juanita Pienaar, ‘Reconceptualising Redistribution of Land in South Africa: a Possible Legal Framework Going Forward’ (2021) 2 SALJ 287–322.

112 Anon, ‘Land Reform: Half of Farms not Productive, Admits Minister’ (*Legalbrief*, 20 January 2021).

113 Ed Stoddard, ‘SA Government Makes Almost 900 Farms Available for Emerging Farmers’ (*Daily Maverick*, 2 October 2020) <<https://www.dailymaverick.co.za/article/2020-10-02-sa-government-makes-almost-900-farms-available-for-emerging-farmers/>> accessed 30 August 2021.

sections of the Upgrading Act unconstitutional. There was also progress in the land restitution process.

It is further clear from the discussion that the courts would not tolerate the breaching of people's rights in terms of housing and in the *Adonisi* case went so far to declare a contract as well as a deed registration that was already effected, void. Evictions during the lockdown period were not tolerated.

The review of section 25 of the Constitution and the corresponding promulgation of the Expropriation Bill is still ongoing. Inevitably, land reform will remain contentious for the foreseeable future. Despite some positive developments in 2020, much of the aims and motivations underlying the 1990's developments linked to restitution, land tenure reform and land redistribution have unfortunately fallen by the wayside. It may be time to reopen the discussion on land reform again.

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