

Land Matters and Rural Development: 2021

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Abstract

While the report period was dominated by the review process of the property clause, aimed at enabling the expropriation of land for land reform purposes at nil compensation, various other important developments occurred in 2021, dealing with land. Included herewith was the publication of various bills, dealing inter alia, with the Land Court and housing-related matters; the publication of the long-awaited Upgrading of Land Rights Amendment Act, as well as the handing down of critical judgments within the domains of redistribution, tenure reform and restitution respectively. Given that the review process did not result in an amended property clause, the underlying difficulties in land reform continue to be addressed holistically under the extant, unchanged section 25 of the Constitution.

Keywords: land reform distribution; tenure reform; section 25 of the Constitution; Land Court Bill; housing; rural development and land reform; unlawful occupation of land and eviction

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General

In 2021 the amendment to section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution) did not pass parliamentary muster. However, a Land Court Bill was introduced to provide for a permanent land court that could adjudicate matters on land and hopefully expedite land restitution matters, amongst others. Land restitution remains a contentious issue and various challenges marred the process. The land claims court had to deal with the interpretation of just and equitable compensation and provides valuable input in this regard.

Various land reform matters came to the fore. The Interim Protection of Informal Land Rights Act 31 of 1996 was extended for another year. The Upgrading of Land Tenure Rights Amendment Act 6 of 2021 gives effect to a Constitutional Court judgment in relation to permissions to occupy. The mismanagement of communal property associations hampers this instrument to effect land reform, while the High Court limited the powers of the *Ingonyama* Trust. The court had to interpret the interrelationship between the Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. Similarly, the definition of 'labour tenant' was re-investigated. The interpretation of these Acts remains an issue. The courts criticised land grabbing but protected the rights of the vulnerable that were evicted during Covid-19 as well as living in the inner City of Cape Town. In relation to housing, regulations, policies and strategies were published, while the Minister of Rural Development and Land Reform announced additional land reform programmes.

The aim of this note is to highlight the most important land-related developments in the course of 2021. In this article, the review process of section 25 of the Constitution, as well as the Land Court Bill, restitution, matters linked to the Extension of Security of Tenure Act 62 of 1997 (ESTA), unlawful occupation and eviction, housing, land redistribution and other relevant land reform legislation, are discussed.¹

Review of Section 25 of the Constitution, the Property Clause

The Draft Constitution Eighteenth Amendment Bill² was published for comment in December 2019, aimed at enabling the expropriation of land at nil compensation for land reform purposes. Boggled down by the Covid-19 pandemic, the review process took roughly three years, during which time various amendments to section 25 were put forward. Apart from the obvious amendment to enable nil compensation in some instances, further amendments included placing all land under state custodianship (the

1 The word limitation of the journal does not allow an exposition of all applicable 2021 case law. The note will therefore focus on the discussion of a few notable cases only and provide references to others.

2 GG 42902 (13 December 2019).

May 2021 version), later adjusted to place only ‘certain land’ under state custodianship (August 2021 version).

The Preamble to the Bill underlined that ‘the hunger for land amongst the dispossessed is palpable and very little is being done to *redress the skewed land ownership pattern*’ and that an amendment of the property clause would ‘ensure ... the majority of South Africans *to be participants in ownership*, food security, agricultural and other land reform programmes’ (own emphasis). In this light section 25(5) was amended to also ‘foster conditions which enable state custodianship of certain land in order for citizens to gain access to land on an equitable basis.’

Despite replacing ‘all’ before ‘land’ by ‘certain’ regarding custodianship, the scope of land to be placed under custodianship remained unclear. General concerns against such an act prevailed, including that a new ‘category of land control form’ would be created as some land would be extracted from private control and be placed in state custodianship. Notably, this land control form was not the same as state land or public land because the power, authorisation, duties and responsibilities in relation to these categories of land control differed. With custodianship, no ownership entitlements emerged for the State. Instead, only regulatory and managerial duties emerged. Accordingly, custodianship of land had touching points with the new water and mineral dispensations post 1994. Ultimately, land ownership patterns would *not* change, despite the Preamble, alluded to above. The only land ownership pattern change would be *less land in private control*, which would not change the *profile of land or property owners*.

Apart from the above, other concerns included the formulation of specific criteria regarding how particular parcels of land (‘certain land’) would be identified, by whom and when? Further, were there specific time frames and priorities as to which parcels of land would be categorised first and why? Relevant, practical other considerations also emerged, specifically focused on state capacity and budgeting; economic and financial considerations (eg the impact on existing limited real rights, mortgages and access to credit/security); the general impact of such a step on extant land reform projects (eg whether land restored or redistributed could also be placed under custodianship); and the impact on food security, generally.

Overall, it was highly unlikely that such a step, in isolation or even in combination with expropriation at nil compensation, would necessarily address the problems and obstacles that continue to plague the South African land reform programme.

The first phase entailed amending the property clause, whereas the second phase embodied the parliamentary process, which took place on 7 December 2021. A two-thirds majority in the National Assembly was required for the constitutional amendment to pass. The vote did not pass, failing to get the required 267 out of the total of 400 votes, because the Bill was either too radical (eg no compensation) or did not go far enough (eg the Economic Freedom Fighters demanded *all land* to be placed in

custodianship). While underlying problems prevailed and as the property clause remained unchanged, the review process was effective in the sense that land reform was placed in the spotlight, alongside critical discussion and debate in this domain.

Land Court Bill

A Land Court Bill [B11-2021] was announced in 2021, introducing a Land Court³ and Land Court of Appeal, as well as all administrative matters related thereto.⁴ Such a step was apparently necessary to speed up land reform,⁵ prevent long and protracted litigation and promote redress and land justice. The Bill is the result of a recommendation of the Final Report of the Land Panel⁶ of May 2019. A very vague description of the jurisdiction of the court is set out, as ‘all matters ... [referred to] elsewhere in this Act or in terms of any other law to be determined by the Court.’⁷ As the Bill only refers to the Restitution of Land Rights Act 22 of 1994 (Restitution Act), one has to consider the schedule to the Act to see which legislation would be amended, possibly impacting on jurisdiction. Notably, the following measures are not mentioned: the Land Administration Act 2 of 1995, the Property Valuation Act 17 of 2014 and the Land Reform: Provision of Land and Assistance Act 126 of 1993, amongst others.⁸

The Land Claims Court (LCC) will be replaced by the Land Court with permanent judges; a step that is welcomed. Notably, the Restitution of Land Rights Act only established the LCC for a temporary period. Given the complexity of land claims and matters linked therewith, placing the court on a more permanent footing was long overdue. While permanent judges would be appointed, no requirement of specialisation is set out.

The Bill also provides for court-ordered mediation and arbitration.⁹ Clause 7 refers to land disputes. The Bill echoes the constitutional clause on *locus standi*.¹⁰ Any person may approach the registrar, who will refer the matter to the Judge President (JP), who will then decide on whether a hearing or whether mediation or arbitration should ensue.¹¹ The decision of the JP is impacted by all relevant considerations, including the

3 Clauses 3-7. The judges and other officers of the court to be appointed in terms of cls 8-12.

4 Clause 46.

5 Preamble and clause 2.

6 An explanatory summary of the Bill and prior notice of its introduction was published in GG 44480 (23 April 2021).

7 Clause 7.

8 Elmien du Plessis, Willemien du Plessis, Thuli Madonsela, Juanita Pienaar and Johan Lorenzen, ‘Written and Oral Submissions to the Portfolio Committee: Justice and Correctional Services on the Land Court Bill, 2021’ (23 July 2021).

9 Clause 2(2)(c).

10 Section 32 of the Constitution of the Republic of South Africa, 1996 (Constitution) and cl 13(1) of the Bill.

11 Clause 13(2).

personal circumstances of the parties and whether the outcome will develop judicial precedent or jurisprudence in land law.¹²

In chapter 5 the establishment of the Land Court of Appeal is provided for.¹³ That court would thus be the court of final instance in respect of all judgments and orders made by the Land Court regarding matters that fall within its exclusive jurisdiction. The Land Court of Appeal is to be a court of record, a superior court with authority, inherent power and standing, similar to that of the Supreme Court of Appeal (SCA).¹⁴

Land Restitution

Land restitution in District Six in Cape Town remained challenging: in 2019 the Department of Rural Development and Land Reform (DRDLR) established a separate committee to determine the eligibility of land claimants of Hanover Street specifically, which was met with complaints of further delays in 2021.¹⁵ It is, however, envisaged that the remaining verified 1062 claimants would be able to access the housing project in 2023 April 2022.¹⁶

The Covie community received 764 000 hectares of land.¹⁷ The Umgungundlovu community and the Umgungundlovu Communal Property Association (UCPA), which received land on which a Sun International casino and hotel was situated, were fighting about the proceeds. The DRDLR applied for a court order to place the UCPA under administration. The community complained that they did not benefit from the compensation that was to be paid to them on a regular basis.¹⁸

The misappropriation of funds received in the restitution process was further illustrated by the case of *Moletete Community and Others v Mnisi, Khoza, Sbuyana and Munisi Communities/Tribe Members/Families*.¹⁹ The community and the court noted that despite steady income, productive land and access to a third of the water of the Blyde River dam for irrigation, the community still received indigent allocations and funding for litigation. The financial statements also indicated some discrepancies leading to the court ordering an audit by the Auditor-General and Director-General of DRDLR.²⁰

12 Clause 13(4).

13 Clause 34-48.

14 Clause 34

15 Anon, 'Land Claims: Another Delay in District Six Restitution' *Legalbrief* (12 March 2021).

Anon, 'Land Reform: District Six Claims Process Moves Forward' *Legalbrief* (13 April 2021) also see the discussion under Unlawful Occupation and Eviction below.

17 Anon, 'Land Handed to Covie Community' *SANews* (30 April 2021).

18 Chris Makhaye and Nce Mkhize, 'The Battle for the Ground Sol Kerzner used for Wild Coast Sun is still Raging' *Daily Maverick* (9 September 2021).

19 (LCC206/2010; LCC 20/2012) [2020] ZALCC 11 [3 July 2020].

20 Paragraphs 50-56.

In KwaMhlanga in Mpumalanga, the Mmotoaneng Community Trust struggled to utilise their restituted land due to land invasions (apparently fuelled by a traditional leader that allegedly ‘sold’ portions of the land) and illegal sand miners. Although the Community Trust obtained court orders, neither the sheriff nor the police acted thereon.²¹

*Moloto Community v Minister of Rural Development and Land Reform*²² dealt with the critical issue of determining the amount of just and equitable compensation for land reform purposes. *In casu*, was a restitution claim relating to a farm that had been subdivided into multiple parts, resulting in a variety of title deeds and registered owners. A process of acquisition of the subject properties was underway, resulting in the court determining just and equitable compensation as contemplated by section 25(3) of the Constitution.

The landowners sought compensation to be determined as the market value. The Minister contested the market value basis and instead, contended that both market value and ‘current use value’ had to be considered. The latter referred to the value that the owner derived from the property by virtue of its beneficial use. These two values were to be added together and divided by two to arrive at just and equitable compensation. Under this approach, the two values carried the same weight. Where applicable, adjustments could be made in light of other considerations, like direct state subsidy and investment. In the present matter, the Minister argued that a just conclusion could be reached by merely applying the above formula.

Critical for the issue at hand, was the interpretation of section 25(3) of the Constitution.²³ Importantly, the court highlighted that ‘under section 25, the protection of property as an individual right ‘is not absolute but subject to societal consideration.’²⁴ Concerning the factors listed in section 25(3) the court further underlined that the Constitution did not give any of the listed factors any particular prominence or significance greater than the others.²⁵ That was followed by a consideration of specific expert evidence and the different approaches and correspondingly different end results of expert witnesses’ evidence.²⁶ Four expert witnesses provided evidence – two for each of the parties, dealt with in detail in the judgement. Generally, the expert witnesses failed to recognise the Constitution’s requirement that market value was only *one factor* relevant to the just and equitable compensation exercise.²⁷

21 See Lucas Ledwaba, ‘State’s Failure to Act Leaves Mpumalanga Community at Land Grabbers’ Mercy’ *Mail & Guardian* (7 March 2021).

22 [2022] ZALCC 4 [11 February 2022].

23 Paragraph 20 and further.

24 Paragraph 20.

25 Paragraph 21.

26 Paragraph 37 and further.

27 Paragraph 49.

While the court agreed that it could not determine economic policy, ‘it must be appreciated that matters concerning just and equitable compensation are steeped in social and economic issues that may ultimately implicate policy.’²⁸ That was relevant because concerns were raised about the systemic economic impact of deviating from market value compensation in circumstances where banks secured loans on the strength of such valuations.²⁹

Could a numerical value be attached to ‘current use’ of property under section 25(3)(a) of the Constitution? This enabled a quantitative approach, as the Minister contended, as opposed to only a contextual consideration of the current use of property (a contextual approach).³⁰ The court agreed that courts in the past frequently applied a contextual approach regarding section 25(3)(a).³¹ Two extant views on the issue of quantification were then highlighted: one view was that valuers (and in turn courts) had regard to current use when quantifying the market value of property, showing that the current use was often instrumentally and integrally connected to how the market value was quantified.³² The other view was that market value and the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property were the only factors in section 25(3) which were readily quantifiable. Ultimately, the court was satisfied that while it may be that factors listed in section 25(3)(c)-(d) were most readily capable of quantification, there was nothing in the Constitution, which precluded a party from seeking to persuade a court that a numerical value could/should be attached to another relevant factor, specified or not.³³ Accordingly, a proper interpretation of section 25(3)(a) required a contextual analysis of the current use of property but did not preclude a court from also attaching a numerical value thereto, either as an instrument in determining the market value or independently.³⁴ Whether a value could be attached would ultimately depend on the evidence before the court. Such a value and what it represented could be considered as relevant in arriving at just and equitable compensation.³⁵

The court then turned to the ‘two-stage approach’ as applied in instances where no statutory parameters were set for determining compensation.³⁶ This approach has been utilised many times before, especially within a restitution context.³⁷ It entailed determining market value as a first stage and thereafter adjusting it either upwards or downwards, depending on the particular circumstances. Would this impact on the

28 Paragraph 50.

29 Paragraph 5.

30 Paragraph 53 and further.

31 Paragraph 54.

32 Paragraph 58 eg *Msiza v Director-General, Department of Rural Development and Land Reform* 2016 (5) SA 513 (LCC) paras 39–52.

33 Paragraph 59.

34 Paragraph 60.

35 Paragraph 60.

36 Paragraph 63.2.

37 Paragraph 64.

‘current use value’ as proffered by the Minister? Ultimately the court was satisfied that on the evaluation of the evidence a consideration of current use value could not assist the Minister.

Essentially the absence of sufficient information, emphasised a few times throughout the judgment, led to the following conclusion:

In the absence of any other information and satisfactory evidence upon which just and equitable compensation can be assessed, this Court is constrained to conclude that market value is, in the circumstances of this case, just and equitable compensation as the landowners contend.... [I]f courts are helpfully to engage the vexed questions relating to the place of market value in an assessment of just and equitable compensation, they need to be supplied with information and evidence upon which they can do so rationally.³⁸

The court further concluded that as just and equitable compensation was the agreed market value in this particular instance and in the absence of other information or indications, there were no upward or downward adjustments thereto.³⁹ Importantly, the court emphasised throughout that the judgment reflected the *specific facts and circumstances* of this particular matter. While experts are relied on for their approach to and ultimately their valuations, thus assisting in explaining the *application* of the property clause, they cannot provide expert evidence concerning its *interpretation*.

The court has gone to great lengths to explain, step by step, very systematically, how it reached its conclusion. In this regard, the judgment is very detailed, which will go a long way in providing guidance going forward. While the court repeatedly highlighted that insufficient information was before it, the court did not go into detail as to what additional information would have been useful. Worded differently, the court did not spell out specifically what information was critical but lacking, that should have been placed before the court.

In *Cindi Family v Minister of Rural Development and Land Reform*⁴⁰ the court underlined the benefits of inspections in loco in relation to land restitution matters. The case of *Nzimande and 129 Others v The Director General of the Department of Rural Development and Land Reform*⁴¹ illustrates that beneficiaries of the Settlement Land Acquisition Grant (SLAG) programme (that formed a trust with another person) were not protected against insolvency proceedings where land was not transferred into their names.⁴²

38 Paragraph 96.

39 Paragraph 97.

40 (LCC115/2008; LCC026/2007) [2021] ZALCC 7; 2021 (6) SA 133 (LCC) [19 May 2021].

41 (LCC 41/2011) [2021] ZALCC 26 [18 October 2021].

42 Also see Broughton Tania, ‘Millions of Rands in Suspicious Transactions Found in Accounts of Limpopo Land Claimants’ GroundUp (18 August 2021).

Land Reform

Interim Protection of Informal Land Rights Act 31 of 1996

The Act's application had again been extended until 31 December 2022.⁴³ Twenty-six years onwards, the Act remains temporary with no legislation (other than the Upgrading of Land Tenure Rights Act 108 of 1991) in place to upgrade informal land rights to more secure rights. However, as has been pointed out before, the Act was instrumental in protecting the rights of people with informal land rights.

Upgrading of Land Tenure Rights Act 108 of 1991

The Upgrading of Land Tenure Rights Amendment Act 6 of 2021⁴⁴ amends the 1991 Upgrading Act. This was necessary to give effect to specific Constitutional Court (CC) decisions declaring some sections of the Upgrading Act unconstitutional.⁴⁵ The Act has not been put into operation yet.⁴⁶ From the long title of the Bill it is clear, that when enacted, the Act will predominantly deal with the conversion of insecure land tenure rights into ownership, on application. Land rights earmarked for upgrading and conversion into ownership are listed in two Schedules to the Bill, including leasehold; quitrent; deed of grant; and various permissions to occupy.

The heading of section 2 is adjusted by replacing 'conversion of' with 'application for', indicating that the upgrading process is no longer an 'automatic' process, but one that has to be applied for specifically. Such a step was necessary as former 'automatic upgradings' essentially benefit male holders of land rights only, as confirmed in *Rahube v Rahube*. Now also persons who 'could have been a holder of that land tenure right had it not been for laws or practices that unfairly discriminated against such person' may also apply to the Minister for the conversion. A notice will be published to inform all interested parties of the application for conversion, while also providing for interested parties to object to such conversion. Other amendments include an inquiry to assist the Minister to determine facts relating to the application for conversion or the objection to the conversion. Section 14A is inserted to allow someone who disputes a conversion in the name of a certain person, to set aside such conversion from 27 April 1994 onwards. However, transfers of land that was purchased in good faith, inherited or that was registered in the name of a woman remain in place. Clause 4 of the Upgrading Bill seeks to amend section 25A of the Upgrading Act by providing that section 3 of the Upgrading

43 GG 45687 (20 December 2021) GN 1635.

44 GG 44649 (1 June 2021).

45 *Rahube v Rahube* 2019 (2) SA 54 (CC) and *Herbert NO v Senqu Municipality* 2019 (11) BCLR 1343 (CC), see Pienaar Juanita M, Du Plessis Willemien and Johnson Ebrezia. 'Land Matters and Rural Development: 2020' (2020) Southern African Public Law <<https://doi.org/10.25159/2522-6800/7389>>

46 By September 2022.

Act applies throughout the Republic. This insertion is done specifically to give effect to the CC-judgment of *Herbert N.O and Others v Senqu Municipality*.⁴⁷

In the course of 2021 pre-constitutional land rights, specifically permission to occupy (PTO), emerged again in *Herbert NO v Senqu Municipality*.⁴⁸ This entailed an appeal against the judgment handed down in *Herbert NO v Senqu Municipality*⁴⁹ regarding the refusal to upgrade an PTO under section 3 of the Upgrading Act, alluded to above, on the basis that the TEBA Trust was not the kind of beneficiary that the Upgrading Act intended to benefit. In this regard the SCA focused on section 3, noting specifically the context within which legislation was drafted and its apparent purpose.⁵⁰ Part-and-parcel of this process, was the relevant legislative framework, particularly section 25(6) of the Constitution, dealing with security of tenure.

When interpreting section 3, it was also relevant that the Trust was established for a specific purpose and that the PTO was granted to perform that purpose. The specific background of the Trust was thus also relevant to the interpretation process. So too was the legislative historical background, including the Native Trust and Land Act 18 of 1936 and the specific racist approach to land and the granting of land rights.⁵¹

The Trust argued that it was entitled to the upgrade to ownership as section 3 of the Upgrading Act referred to ‘any’ right, and not a right limited to a defined category or group of persons.⁵² That argument was rejected as it focused only on the text of the Upgrading Act and ignored the context, purpose and role it was intended to play in the transformation of society.⁵³ In that light section 3 was interpreted purposively,⁵⁴ having regard of its intention to provide redress to those who were affected by apartheid legislation, mainly black families, whose full title to land was replaced with tenuous land rights. Section 3 was a mechanism by which those persons and families could achieve title (freehold).⁵⁵ Ultimately, the Court found that the interpretation of the section contented for by the Trust placed too much emphasis on the text, undermining the objective of the Upgrading Act.⁵⁶ The appeal was thus dismissed with costs.

47 (2019 (11) BCLR 1343 (CC).

48 [2021] ZASCA 177 [14 December 2021]; *Herbert N.O. and Others v Senqu Municipality and Others* (742/2020) [2021] ZASCA 177 [17 December 2021].

49 [2020] ZAECGHC 45 [19 May 2020].

50 Paragraph 10.

51 18 of 1936, later renamed the Development Trust and Land Act. See paras 23–26.

52 Paragraph 27.

53 Paragraph 29.

54 Paragraph 32.

55 Paragraph 32.

56 Paragraph 41.

Communal Property Association Act 28 of 1996

*Dawson v Sidney on Vaal CPA*⁵⁷ is illustrative of how disastrous it could be for the beneficiaries of a communal property association (CPA) if its executive committee mismanaged the funds to benefit themselves. In this case the court placed the CPA under administration of the Director-General of DRDLR who had to appoint a receiver from the CPA to administer the activities and finances of the CPA until a new committee had been appointed.

KwaZulu-Natal Ingonyama Trust Act 3 of 1994

In *Council for the Advancement of the South African Constitution v The Ingonyama Trust*⁵⁸ the Pietermaritzburg High Court indicated that the *Ingonyama* Trust violated the Constitution (ss 25(1), 25(7) and 7(2)) and that it could not conclude residential lease agreements with (a) people who live on their ancestral land under Zulu customary law, (b) are the holders or could have been the holders of permissions to occupy or (c) who are or could be protected in terms of the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA); (d) have agreements in relation to commonages or arable land, and (e) members of traditional communities.⁵⁹ The court ordered that all payments should be reimbursed.⁶⁰ The Minister was further ordered to implement chapter IX of the KwaZulu Land Affairs Act 11 of 1992 and the KwaZulu Land Affairs (Permission to Occupy) Regulations⁶¹ and had to report to the court on a three-monthly basis until the parties agreed that the Act and regulations had been implemented.⁶² The court stressed that the concept of leasing was unknown to customary law.⁶³ The court discussed the inherent challenges in that the lessee was not properly protected if the lease expired after 40 years. There was no security of tenure while the Land Affairs Act allowed for an PTO to be registered.⁶⁴ The court then compared customary rights to leases⁶⁵ and stressed that ‘the Zulu customary law right to land, as compared to leases, provides strong and secure rights to residential, arable land and commonage (grazing land and woodlands) to families and to individuals within the family, which are inherited from generation to generation.’⁶⁶ The decision is welcomed as the Act was a political decision and that did not take into account the negative effect it would have on the lives of the people living on the land.

57 [2021] 2 All SA 429 (NC); 2021 (6) SA 167 (NCK) para 1.

58 2021 (8) BCLR 866 (KZP); [2021] 3 All SA 437 (KZP); 2022 (1) SA 251 (KZP).

59 Paragraphs 1–3.

60 Paragraph 4.

61 KwaZulu GN 32 of 1994.

62 Paragraph 5.

63 Paragraphs 81, 95–98.

64 Paragraphs 106–112.

65 Paragraphs 122–132.

66 Paragraph 122.

Extension of Security of Tenure Act 62 of 1997

In the report period a number of judgments were handed down dealing with occupiers under the Extension of Security of Tenure Act 62 of 1997 (ESTA). In *Grobler v Phillips*⁶⁷ the interrelationship of ESTA and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) was probed specifically. Mrs Phillips, an 84-year-old widow, occupying the relevant property with her disabled son, had been in occupation of the property for roughly seven decades. An eviction order was granted in the magistrate's court and was set aside by the High Court, leading to the appeal to the SCA where the following issues were dealt with: (a) the interrelation between the PIE and ESTA; (b) the effect, if any, of relying on an oral right of *habitatio*; and (c) whether it would be just and equitable not to grant an order of eviction in the present instance.⁶⁸

The appellant purchased the property in 2008 at which time he was informed that a previous owner of the property had granted Mrs Phillips a lifelong right of occupation (*habitatio*).⁶⁹ When that agreement could not be furnished on request, the appellant was successful with eviction proceedings, which were later set aside by the High Court.

The SCA had to deal with the following: whether the respondent was an occupier under ESTA; whether unlawful occupation was established (under PIE) and whether the court had a discretion not to order an eviction order.⁷⁰ The SCA first contextualised the relevant historical background.⁷¹ The house was originally on land that formed part of a larger farm, which was later subdivided, with parts thereof sporadically sold off as erven for township establishment. As to whether ESTA or PIE applied here, there was sufficient proof that urban development had occurred over a long period of time and that the parcel of land had been encircled by such urban development since 1991. As ESTA applied to rural land,⁷² whereas PIE applied generally to all land, the court was satisfied that there was a balance of probability in favour of finding that section 2(1)(b) of ESTA did *not* apply.⁷³

The High Court did not consider Mrs Phillips to be an unlawful occupier as the period of notice to vacate the property was deemed not a reasonable period.⁷⁴ Yet, from the outset the appellant wanted to terminate the respondent's occupation and did in fact

67 Unreported, referred to as [2021] ZASCA 100 [14 July 2021].

68 Paragraph 3.

69 Paragraph 6.

70 Paragraph 17.

71 See paras 1–15 for more detail.

72 See the detailed discussion of the scope and application of ESTA in Juanita M Pienaar, 'Land Reform' (Juta 2014) 395–399 and Gustav Muller and Sue-Mari Viljoen, *Property in Housing* (Juta 2021) 435–441.

73 Paragraph 36.

74 Paragraph 37.

withdraw his consent, resulting in her unlawful occupation.⁷⁵ In resisting the eviction order, the respondent averred ‘another right in law’—an oral right of occupation of the property, for life, conferred upon her and her late husband by a previous owner. The appellant argued that it was not enforceable against successive owners, because it was not registered against the title deed.⁷⁶ Because the respondent believed that she would be able to live in the house for the rest of her life, she took no precautions against eviction or extra measures to ensure that the agreement would be honoured by successive owners.⁷⁷

As consent was withdrawn and as the habitation could not be enforced against the appellant, the respondent was indeed an unlawful occupier. But what constituted a just and equitable order? The High Court considered various factors, including the length of time of her occupation (over seven decades); the respondent’s advanced age; that she occupied the property with her disabled son; as well as the purpose for which the appellant bought the property and what he intended doing with it.⁷⁸ The SCA highlighted that ESTA, a measure that was drafted specifically to protect vulnerable persons, was not applicable here because of the particular facts. Yet, Mrs Phillips remained a very vulnerable person:

... it is difficult to conceive that the circumstances of this case would not justify a refusal of an order of eviction in the interest of justice and equity. In my view, the high court was correct to find that an order for the eviction ought not to have been granted by the magistrate’s court.⁷⁹

The order of the High Court was confirmed. Because of township expansion and urban development, ESTA and corresponding protective measures were not available to Mrs Phillips. Although a previous owner endeavoured to provide Mrs Phillips with occupational rights for her lifetime, that agreement was never formalised. The doctrinal approach to limited real rights and their enforcement against all third parties, meant that an oral arrangement embodied personal rights only in the absence of registration. Despite this reality, the new eviction paradigm enabled by section 26(3) of the Constitution and the commencement of PIE in practice meant that oral, personal rights could be enforced when weighed and balanced with the rights of a landowner—according to what is just and equitable in the particular circumstances.

Nimble Investments (Pty) Ltd v Malan,⁸⁰ was an appeal against a judgment and order of the LCC, which on automatic review under section 19(3) of ESTA set aside an eviction order granted by the magistrate. Unlike the *Phillips* case above, the eviction order was

75 Paragraph 39.

76 Paragraph 41.

77 Paragraph 44.

78 Paragraph 46.

79 Paragraphs 49–51.

80 [2021] ZASCA 129 [30 September 2021].

confirmed by the SCA on the basis that in these particular circumstances the granting thereof was indeed just and equitable. That was the case because of the specific conduct of the respondent (and members of her family) that resulted in the relationship between them, and the landowner being irretrievably broken down. When relocating from one cottage to another, members of Mrs Malan's family unlawfully removed building materials and constructed an additional building alongside the cottage, to be occupied by her family members.⁸¹ As the eviction was based on a material breach in the relationship, the SCA considered the following factors: the history of the relationship of the parties; the seriousness of the occupier's conduct and its effect on the parties and the present attitude of the parties to the relationship, as shown by the evidence.⁸² Prior to the incident when the relocation occurred, the relationship between the parties was one of mutual respect, trust and co-operation.⁸³ Thereafter the police was involved, various profanities were voiced, criminal charges of theft were laid and the respondent allowed further family members to move onto the farm and occupy the illegally constructed structure, contrary to regulations and instructions. All of that constituted a breach of section 6(3)(d) of ESTA.⁸⁴ Despite various notifications, the illegal structure had still not been dismantled, two years later. While the reason for the eviction application was the non-payment of rent, ultimately, the events on the day of relocation and Mrs Malan's corresponding conduct ultimately culminated in the breakdown of trust - to the extent that the relationship could not be restored.⁸⁵

As to whether an eviction order would be just and equitable, the court considered the conduct of both parties, highlighting that the appellant offered to assist the respondent financially to relocate to serviced plots and that the other respondents had been occupying property rent-free, for many years despite the fact that they were employed and received an income.⁸⁶ The court found that the LCC had failed to consider the evidence of the appellant's interests in not permitting unlawful conduct, the erection of the illegal structure on the farm and the continued unlawful occupation thereof.⁸⁷ The appeal thus succeeded and the eviction order was re-instated.

In this particular case, tenure security was tied to the underlying relationship: a strained, unsustainable relationship would ultimately lead to insecure tenure. That would remain the case for so long as tenants, especially vulnerable portions of society, remain dependent on someone else providing housing and shelter.

81 Paragraph 37.

82 Paragraph 47.

83 Paragraph 49.

84 Paragraph 51.

85 Paragraph 53.

86 Paragraph 66.

87 Paragraph 67.

*Greeff v Eskom Holdings SOC Ltd*⁸⁸ confirmed the scope of ESTA as a legislative measure that applies generally to rural areas and not to townships or land proclaimed as townships. In this regard the relevant parcel of land was located in Redan village, a township formerly established by Eskom to house employees. Given the historical background of the village, the court concluded that ESTA did not apply to Redan, being a town established under law. That result meant that the LCC did not have jurisdiction to deal with the matter further as it was essentially a PIE matter.⁸⁹

Labour Tenants Act

*Adendorff NO v Kubheka*⁹⁰ dealt with labour tenancy for purposes of the Land Reform (Labour Tenant) Act 3 of 1996. Regarding the definition of labour tenant the court highlighted that paragraphs (a), (b) and (c) of the definition set out in section 1 of the Act had to be read conjunctively and that further, if a person satisfied these three jurisdictional requirements on 2 June 1995 (the date the Act was published), that person was presumed *not* to be a farmworker, unless the contrary was proved.⁹¹

The SCA first dealt with the personal background of the respondent,⁹² highlighting that the respondent was 73 of age, that he had lived with his parents (who were buried on the farm) and siblings, from birth, on Glenbarton farm and that his parents provided labour on the farm, for which they were not paid predominantly in cash.⁹³ The respondent started working on the farm at the age of 11, later relocated to Cadie, got married and built a home there. Over the years he worked for different landowners and lessors.⁹⁴

‘Labour tenant’ was dealt with first,⁹⁵ focusing on to whom the respondent provided services. While the farm was registered in the name of Mrs Adendorff, the respondent believed Mr Adendorff was the owner. Of importance, as highlighted in the LCC, was that a holistic and continuous approach to the definition of labour tenant had to be adopted.⁹⁶ Overall, Mr Kubheka provided services for a cumulative period of eighteen years.

The moment the notice of a labour tenant claim was received, the respondent’s status was immediately contested by the land owner, stating that he was a farmworker instead,

88 [2021] ZALCC 22 [17 September 2021].

89 Paragraph 37.

90 [2022] ZASCA 29 [24 March 2022].

91 Paragraph 7.

92 Paragraph 8–11.

93 Payment predominantly in cash usually points to farmworkers and not to labour tenants.

94 Paragraphs 9–11.

95 Paragraphs 12–19.

96 Paragraph 15.

on the basis that payment was predominantly in cash and not in residential rights.⁹⁷ The SCA was satisfied that evidence of the respondent's employment as well as the fact that the respondent's parents also resided in Glenbarton and provided services, complied with paragraphs (b) and (c) of the definition.⁹⁸ The onus then shifted to the Adendorffs to prove that the respondent was a farmworker. Interference with the LCC's findings necessitated a misdirection on the facts, which could not be shown.⁹⁹ Further, due to certain contradictions and improbabilities between the evidence of Dr Adendorff and his witnesses, the SCA was satisfied that the findings of the LCC could not be faulted.¹⁰⁰ Accordingly, as the appellants had failed to prove that the respondent was paid predominantly in cash, they also failed to prove that he was a farmworker.¹⁰¹

Next was whether a valid labour tenant claim had been lodged under section 17 of the Act. While the respondent was an unsophisticated witness and despite incomplete files being produced by the Department, it was clear that the landowner had indeed received the required section 17 notice.¹⁰² Despite the files being in disarray, evidence supported the fact that the respondent had lodged his application before the cut-off date, even though the Department may have failed to gazette the claim timeously.¹⁰³ Regarding the further requirements for labour tenancy, the court thereafter focused on the use of land on Cadie by the first respondent, confirming that the respondent had the use of certain land, including two camps on the farm.¹⁰⁴

In light of all of the above, the appeal was dismissed. This judgment highlights the main elements of labour tenancy and the process of determining such status, which also warranted a discussion on the shift of onus, when relevant. It is in line with earlier judgments highlighting that this category of claimants is often unsophisticated, rendering them generally vulnerable. While this necessitates assistance and support by the relevant Department, the service and guidance provided by the Department are routinely either lacking or when provided, rather dismal.

Overall, the stance taken by the LCC and confirmed by the SCA that *a holistic approach* has to be followed concerning the provision of labour, is welcomed: whether a person rendered services to the lessor thinking it was the owner or person in charge should not be the deciding factor if it is perfectly clear that services had been provided, by the tenant and parents or grandparents, over a period of time.

97 Paragraph 16.

98 Paragraph 19.

99 Paragraph 22.

100 Paragraph 23.

101 Paragraph 24.

102 Paragraph 29.

103 Paragraph 32.

104 Paragraph 33.

Unlawful Occupation and Eviction

In *City of Cape Town v Those persons attempting and/or intending to settle on the erven in District Six the details of which are identified in Annexure A to notice of motion*,¹⁰⁵ the City obtained an interdict preventing people to settle on land and in housing earmarked for restitution. The Court stated that the City had an obligation to ensure that the restitution process was completed and that people who were not satisfied about the provision of housing in the City could not take the law into their own hands.¹⁰⁶ The court stated as follows:¹⁰⁷

The effect, if these unlawful invasions are permitted to continue, is that the District Six claimants will be dispossessed for a second time. The only difference is that this time around it will be as a result of the unlawful actions of their fellow citizens and not the disgraceful apartheid regime.

The court also uttered its disgust in that unlawful occupiers used children and the elderly to achieve their aims.¹⁰⁸

In *Commando v Woodstock Hub (Pty) Ltd*¹⁰⁹ the Western Cape High Court declared Cape Town's emergency housing programme and its implementation that resulted in evictions, unconstitutional.¹¹⁰ According to Sher J '[it] brings to the fore the stark realities of the circumstances which persons who are evicted within the inner-City surrounds face in terms of the emergency accommodation which is offered to them by the State in the discharge of its constitutional obligations, and highlights complex and competing social problems and vexing legal issues which abound in this area of the law.'¹¹¹ The court extensively dealt with the social housing policies and issues in the Cape Town area (paras 4–84, 127–136). The court stressed that its decision should not be interpreted to constitute rights: 'Before I continue, I must make it clear that, as a matter of law, neither the applicants nor any other evictees in the City have a right to demand to be placed in temporary emergency housing in the area or location in which they live.'¹¹² The decision was based on:

whether it is rational or reasonable for the applicants to be told that they must take up emergency housing either in a TRA or an IDA¹¹³ on the outskirts of the City, or alternatively in an informal settlement, whilst other similarly-placed persons do not face

105 7349/2021) [2021] ZAWCHC 98 [19 May 2021].

106 Paragraph 22.

107 Paragraph 29.

108 Paragraph 25.

109 [2021] 4 All SA 408 (WCC).

110 Paragraph 161.

111 Paragraph 1.

112 Paragraph 159.

113 Temporary relocation areas and incremental development areas (para 53).

the same choice, because they may have the good fortune of being afforded “transitional” housing or ... ‘temporary’ housing, in the inner City and its surrounds.¹¹⁴

The effect of the stay of an eviction order due to the Covid-19 lockdown regulations that restricted evictions was illustrated in the case of *Rathabeng Properties (Pty) Ltd v Mohlaoli*.¹¹⁵ The applicant applied for an eviction order against the respondent whose sectional title property was sold in execution. Even before the advent of the Covid-19 lockdown regulations, the respondent refused to vacate the property. However, due to the lockdown regulations and the possible third wave of Covid-19, the court ordered that the respondent needed to vacate the property within two weeks from the end of adjusted Level 3 (or Levels 4 and 5 whatever the case may be).

Housing

The Minister announced in Parliament that she will make R10 billion available to upgrade informal settlements.¹¹⁶ Corruption marred the development of housing projects. For example, it is alleged that the Eastern Cape Government paid R22 million for land that was evaluated for R2 million in 2013. The housing development never took place although a company was paid R61 million for the project. The land was also subject to a land claim at the time for which the community received R20 million in 2017. However, in 2021 the housing department alleged that it would proceed with the development once the land claim is finalised.¹¹⁷ Similar investigations were undertaken against the City of Cape Town and the Housing Development Agency.¹¹⁸

Several housing-related laws and regulations were published in the reporting period. Proposed Rental Housing Tribunal Regulations of 2018, issued in terms of the Rental Housing Act 50 of 1999 were published for comment.¹¹⁹ The Regulations deal with the serving and filing of complaints with the Tribunal (ch 2), mediation (ch 3), dispute hearings (ch 4 and 5) and appeals (ch 6). Chapter 7 prescribes norms and standards that need to be complied with by the landowner and tenant. The Schedules to the Regulations include complaint forms, a pro forma subpoena, a standard call for nominations of appeal adjudicators, as well as a code of conduct for the members of the Tribunal or Appeal Adjudicator Tribunal.

The Housing Consumer Protection Bill [B10-2021] was tabled in Parliament. The Bill envisages the repeal of the ineffective Housing Consumers Protection Measures Act 95

114 Paragraph 160.

115 (18957/2019) [2021] ZAGPJHC 8 [15 February 2021] paras 44–61.

116 Jason Felix, ‘R10bn to be Spent on Upgrading Informal Settlements, Sisulu tells Parliament’ *Fin24* (18 May 2021).

117 Khaya Koko, How the Eastern Cape blew R23m on land it could never own’ *Mail & Guardian* (21 August 2021).

118 Siphokazi Vuso, ‘City Slated for “dodgy” Land Deal’ *Cape Times* (12 May 2021).

119 GG 44333 (26 March 2021) GN 262; GG 44383 (1 April 2021) GN 296.

of 1998 and establishes a National Home Building Regulatory Council (Ch II). It further provides for the registration of home builders and developers (Ch III). According to the Memorandum ‘the Bill seeks to ensure adequate protection of housing consumers and effective regulation of the home building industry by, inter alia, strengthening the regulatory mechanisms, strengthening the protection of housing consumers, introducing effective enforcement mechanisms and prescribing appropriate penalties or sanctions to deter non-compliance by homebuilders.’

The Western Cape Province published a Housing Policy Framework¹²⁰ for comment in order to ‘help municipalities in the Western Cape to facilitate the inclusion of more affordable housing units in developments in their municipal areas. This will be done in partnership with the private sector—creating more opportunities for people to live in better locations.’

The KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Amendment Bill, 2020, repealing section 16, was published for comment.¹²¹ The Bill gives effect to *Abahlali Basemjondolo Movement SA v Premier of the Province of Kwazulu-Natal*¹²² that declared section 16 of the KwaZulu-Natal Elimination and Prevention of Reemergence of Slums Act 8 of 2007 unconstitutional.

Land Redistribution and Rural Development

In 2021 the Deputy President indicated that government obtained 5 million hectares of land that culminated in over 5000 projects, while 1800 farms were leased for 30 years (with an option to buy) to emerging farmers.¹²³ Reported in May 2021, 436,563 hectares of land were released under the land distribution programme.¹²⁴ However, criticism as to the slow pace of land reform remained.¹²⁵ Minister Didiza announced that former South African Development Trust land would be transferred into ownership for agricultural purposes.¹²⁶ She further confirmed that land rights enquiry has been completed in all provinces, except in the North West and Mpumalanga.

120 DEA&DP, ‘Deadline for Western Cape Inclusionary Housing Policy Framework Process Approaches’ (16 June 2021), <<https://www.westerncape.gov.za/eadp/news/deadline-western-cape-inclusionary-housing-policy-framework-process-approaches>> accessed 18 September 2022.

121 PG 2256 of 5 March 2021 PN 2.

122 2010 (2) BCLR 99 (CC).

123 Anon, ‘Five Million Hectares Acquired Since Inception of Land Reform’ *SANews* (12 March 2021).

124 Anon, ‘436,563 Hectares Released under Land Distribution Programme’ *Bizcommunity* (13 May 2021).

125 Tembeka Ngcukaitobi, ‘Political Rhetoric to Speed up Land Reform is not Matched by Action’ *Business Day* (12 April 2021).

126 Babalo Ndenze, ‘Deft Pressing ahead with Land Reform - Minister Didiza’ *EWN* (10 February 2021).

Conclusion

The report period was again dominated by the review of section 25, the property clause. While the main focus was on whether land should be expropriated for land reform purposes at nil compensation on the one hand or whether land (either all land or certain land only) should be placed under state custodianship, the business of land reform and all matters connected thereto, continued. In that regard underlying difficulties prevailed. As indicated above, eviction still occurred, corruption in the housing sector and in restitution process continued and strife and unrest emerged within CPA structures. It is in this light that the publication of the Land Court Bill is noteworthy: while a permanent court and permanently appointed judges, with specialised knowledge and expertise in land reform matters is welcomed, it is unrealistic that this step, in itself, will fast track the tempo of land reform and as such, deliver redress and land justice. The Land Court is an important part of the necessary mechanics, but is only one part thereof, after all. The reporting period has again underlined that proactive conduct is critical, in that sufficient and suitably located land is made available for settlement to curb informal settlement and unlawful occupation of land, that housing schemes have to be effective and managed well, that restitution projects cannot lag behind, three decades after the process was embarked on, that vulnerable occupiers need assistance and guidance and that tenure security, especially in the former homelands and self-governing territories, remains a critical obstacle for equality, dignity and prosperity. Likewise, legislation needs to be effective and has to be drafted meticulously and implemented efficiently. Given that the property clause remained unchanged, it is imperative that all the mechanisms embodied therein, be harnessed holistically and effectively, going forward.

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