

Land Matters and Rural Development: 2022

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Abstract

The contribution deals with the most important 2022 developments linked to land in South Africa from a legal perspective. In this regard, the overarching land reform programme's three sub-programmes, redistribution, tenure reform and restitution, are dealt with, reflecting on legislative developments and case law. Despite several land claims being finalised, numerous are outstanding, while the new claims have not been investigated yet. In the case of *N'Wandlamharhai Communal Property Association v Westcourt*, the court found that the shareholder agreements do not indicate that previous servitudes bind successors-in-title. Two cases dealt with the historical upgrading of informal land rights in urban areas, namely *Gauteng Provincial Government: Department of Human Settlements v Pogatsi* and *Gauteng Provincial Government: Department of Human Settlements v Motasi*. In the first case, the court took the passing of time into account, while in the latter case, the occupiers were evicted to give effect to the right to housing of the descendants of the original occupiers. Several cases dealt with the Extension of Security of Tenure Act 62 of 1967, such as *Frannero Property Investments 202 (Pty) Ltd v Selapa*, where the court clarified who has to prove what about ESTA and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). In the Constitutional Court case of *Grobler v Phillips*, the court focused on only one aspect of the considerations that should be considered for eviction. Developments in the pipeline, in the format of Bills, are also analysed briefly, namely the Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill [B6-2022], Unlawful Entering on Premises Bill, 2022, Housing Consumer Protection Bill [B10-2021], Deeds Registries Amendment

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Bill [B28-2022] and the Preservation and Development of Agricultural Land Bill [B8-2021]. Housing, eviction, unlawful occupation of land, and developments linked to deeds and registries are also commented on. The Interim Protection of Informal Land Rights Act 31 of 1996 is extended. The picture concerning land reform remains bleak, although some strides have been made in redistribution, rural development, and the finalisation of restitution claims.

Keywords: land reform; redistribution; tenure reform; restitution; housing; unlawful occupation of land and eviction; rural development and land reform; deeds and registries

General

Land remains a contentious issue, with access to housing and land high on the agenda.¹ However, some progress was made on land restitution and the granting of title deeds in urban areas.² In other instances, the ghost of apartheid still reigns concerning the upgrading of insecure rights. Extortions continue in the rental, government housing and construction space, hampering people's right to housing and land.³ The Socio-Economic Rights Institute (SERI), in a 2022 report, indicated that the Johannesburg Magistrate court often deviates from the law in inner-city eviction cases as the availability of alternative housing is not considered.⁴ Eviction remains prevalent, as is reflected in the various matters discussed in this note, emanating from the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and the Extension of Security of Tenure Act 62 of 1997 (ESTA).

This commentary highlights the most important land-related developments in 2022, including restitution, matters linked to ESTA, unlawful occupation and eviction, housing and land redistribution. Recent developments in land reform-related legislation are also discussed.⁵

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- 1 G Arde and E Enoch, 'The Bloody Battle for Land and Rights in Cato Manor' *GroundUp* (11 October 2022).
 - 2 Four hundred title deeds were handed over in an area established in terms of the Less Formal Township Establishment Act 113 of 1991, see Anon, 'Almost 400 Title Deeds Handed Over to Orange Farm Residents' *SA News* (21 October 2022).
 - 3 See eg Anon, 'Criminal: 25 WC Housing Projects Affected by Extortionists' *Legalbrief* (12 January 2023).
 - 4 SERI, 'An Analysis of Eviction Applications in the Johannesburg Central Magistrate's Court and their Compliance with the Law' in *Just and Equitable? Evictions Research Series Report 1, Socio-Economic Rights Institute (SERI)* (January 2022).
 - 5 The word limitation of the journal does not allow an exposition of all applicable 2022 case law. The note will, therefore, focus on discussing a few notable cases only and provide references to others.

Land Restitution

Although we celebrate the finalisation of one of the oldest land claims instituted since 1994, that of the Bakubung ba Ratheo,⁶ and other finalised claims,⁷ the overall process is still hampered by corruption.⁸ The provinces with the most claims include those where either corruption occurred or those with overlapping claims. By July 2022, 6 685 claims of the first round of claims lodged in 1998 were still outstanding (2125 KwaZulu Natal, 1588 Mpumalanga, Limpopo 1349, Eastern Cape 657, Western Cape 338, Gauteng 379, North West 208, Northern Cape 37 and Free State 5). One hundred sixty-three thousand three hundred eighty-three new claims were lodged between 2014 and 2016 that still need to be dealt with.^{9 10}

*N'Wandlamharhi Communal Property Association v Westcott*¹¹ dealt with rights of access and occupation about the land that had been transferred into ownership after a successful land claim was concluded.¹² The first appellant, the communal property association (CPA), is the registered owner of several immovable properties, including MalaMala, Charleston South and Charleston North. The second appellant, MalaMala Game Reserve (Pty) Ltd, operates MalaMala in terms of a lease agreement with the first appellant. At issue was whether the respondents, the former owners, had access and occupational rights to overnight camps on Charleston North and South, respectively.¹³ The former owners averred that they could demand registration of servitudes; alternatively, if the rights were personal in nature, the rights were enforceable via the doctrine of notice.¹⁴ The appellants, however, claimed that no servitude rights had been granted and that requirements of section 3 of the Subdivision of Agricultural Land Act 70 of 1970 had not been complied with. The court a quo found that these 'rights' were neither servitude nor enforceable against the appellants under the doctrine of notice.¹⁵ The respondents thereafter appealed successfully to a full bench,¹⁶ leading to the appeal in the Supreme Court of Appeal (SCA).

6 A Van Niekerk, 'Watch: Half-A-Century later, these Apartheid Victims have got their Land back' *GroundUp* (18 January 2022).

7 South African Government, 'Minister Patricia de Lille: Title deeds handover to Thornhill Farms Communal Property Trust' (25 November 2022).

8 K Bloom, 'Revealed: David Mabuza, Fred Daniel and the Missing Crime Dockets' *Daily Maverick* (7 August 2022).

9 Anon, 'Land reform: Nearly 7 000 Old Claims Outstanding – Minister' *Legalbrief* (2 July 2022).

10 See eg, K Bloom, 'Case number 35402/2010 – the Mabusas and the Giant Mpumalanga Land Claims "Scam"' *Daily Maverick* (19 March 2022); *Nyavana Traditional Authority v MEC for Limpopo Department of Agriculture and Others* [2021] 1 All SA 237 (LCC).

11 [2022] ZASCA 129 (3 October 2022).

12 See for more detail JM Pienaar, *Land Reform* (1st edn, Juta 2014) 594–601.

13 See paras 2–12 of the judgment.

14 Paragraph 21.

15 Paragraph 23.

16 Paragraph 24.

On appeal, the court was satisfied that the occupation and viewing rights constituted subtraction from *dominium* and that the appellants always had knowledge of the respondents' claims to these rights. However, the court found *no indication* in the shareholders' agreements of an intention to bind respective successors in title.¹⁷ Furthermore, because there was no intention to bind successors in title, all rights were terminated when the Charleston properties were sold.¹⁸ The appeal was upheld, with costs. The judgment highlights how historical development would ultimately impact the kinds of rights that remain. It also underlines that if the intention is that successors in title ought to be bound, that intention must be reflected in the specific agreement. Therefore, the feasibility of these rights is determined by the substantive law of property rules and not by the fact that the land had been restored under a successful land claim. Land restored under finalised land claims can indeed be the object of servitudes or other limited real rights as long as the basic principles of property law and/or the contract law have been complied with.

Land Reform

Interim Protection of Informal Land Rights Act 31 of 1996

The Act's application has been extended for 27 times since its inception until 31 December 2022.¹⁹ The Act still provides security of tenure to communities whose rights may be impacted by mining and development without their consent.

Upgrading of Land Tenure Rights

Two decisions of 2022 illustrate that tenure rights based on apartheid permits and certificates continue.²⁰ *Gauteng Provincial Government: Department of Human Settlements v Pogatsi*²¹ deals with an application to rectify a deed of grant.²² Briefly, the case entails an original housing permit, issued under GN R1036,²³ in the name of the late William Pogatsi, indicating that his three brothers and sister could also occupy the house. The respondent's name (his wife, Elizabeth) was later recorded.²⁴ The permit was first upgraded to leasehold and, in 1998, to ownership, reflecting the names of both William and the respondent.²⁵ When William passed away, the deed was issued in her

17 Paragraph 30.

18 Paragraph 33.

19 GG 46991 (30 September 2022) GN 2553.

20 See also JM Pienaar, 'Living in the Shadow of Apartheid: The Continued Struggle for Tenure Security in Former National States and Self-Governing Territories' in ZT Boggenpoel (ed), *Law, Justice and Transformation* (1st edn, LexisNexis 2022) 215–244.

21 (2020/19559) [2022] ZAGPJHC 762 (7 October 2022).

22 Paragraph 1.

23 GG 2096 (14 June 1968) GN R1036.

24 Paragraph 4.

25 Paragraphs 8, 11. In terms of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988. It should be noted that Ch VI and VII of the Black Communities Development Act 4 of 1984

name in 2006.²⁶ In 2004, William concluded a Family House Rights Agreement with his late sister and the second applicant. It was noted on the document that the respondent refused to sign, but she denied having any knowledge of this agreement.²⁷ William was referred to as custodian, although he and Elizabeth were owners of the house at the time.²⁸ The court found that the agreement did not give the second applicant any real right, only a temporary right to stay until he could find suitable accommodation.²⁹ The court indicated that the respondent was not part of the agreement and that no permanent rights were conferred to the second applicant and his family.³⁰ The court states: ‘It may well be that in 1998 a better process of consultation should have taken place before the house was transferred to William and Elizabeth – but that has long passed, and if there was to be a review, it should have taken place then.’³¹

In *Gauteng Provincial Government: Department of Human Settlements v Motasi*,³² the court did not consider the long lapse in time. An application was made for the cancellation of a deed of transfer.³³ The first applicant issued a certificate of occupation to Zikalala in 1973. The second applicant is the executor of the late Zikalala’s estate.³⁴ The second and third respondents claimed they bought the land in 1989. Regarding the Conversion Act, the Department had to investigate to determine who the ‘owner’ or rights holder of the land in question was. The Department alleged they made a *bona fide* mistake in transferring the land to the above respondents.³⁵ The Department did not hold an inquiry, and the second and third respondents did not dispute that Zikalala was the original rights holder. Accordingly, the court cancelled their title deeds.³⁶ The fact that the two respondents had been in possession of the house for thirty-three years by the time the judgment was handed down was not raised or discussed by the court, depending on when the certificate of occupation was brought to light and their knowledge of whether their occupation was *bona fide*, the respondents could have relied on a prescription.

Extension of Security of Tenure Act 62 of 1997

Various interesting and important judgments were handed down in the reporting period dealing with ESTA. The first judgment attended to the interaction of PIE and ESTA and

introduced leasehold that could later be upgraded to ownership. These chapters have not been repealed but assigned to the provinces.

26 Paragraphs 6, 11.

27 Paragraphs 14–15.

28 Paragraph 16.

29 Paragraphs 17–20.

30 Paragraphs 21, 27.

31 Paragraph 23.

32 (2021/42636) [2022] ZAGPJHC 663 (8 September 2022).

33 Paragraph 1.

34 Paragraphs 3 and 9.

35 Paragraphs 16, 19–23.

36 Paragraphs 26–29.

the importance of applying the correct statute. *Frannero Property Investments 202 (Pty) Ltd v Selapa*³⁷ dealt with the onus to prove the application of ESTA, the corresponding evidence that must be tendered, including concerning the various presumptions and exclusions in the Act. At issue was whether a community of about 300 people occupying the applicant's property were occupiers under ESTA or PIE.

Initially, rooms were let to mine workers, whereafter, in 2012, an industrial township was established on the land in question, and rezoning followed suit. Various events occurred in the period 2012–2015, including a new purchase agreement with the applicant, transfer of property and eviction proceedings against the respondents, relying on inter alia, the cancellation of lease agreements, the non-payment of rentals and the hazardous conditions in which the occupiers were housed. The respondents argued that they were occupiers under ESTA, upheld by the full bench of the High Court. The application for special leave to appeal was premised on the grounds that the respondents had failed to prove they were occupiers under ESTA.³⁸ On appeal, the court confirmed the general point of departure, namely that the burden to prove that ESTA applied rested on the relevant occupier who invoked the application of the Act.³⁹

Various presumptions also emerge, including that for purposes of civil proceedings under ESTA, a person who continuously and openly resided on land should be presumed to have consent unless the contrary was proved. Furthermore, a person who has indeed continuously and openly resided for a period of three years should be deemed to have done so with the knowledge of the owner or person in charge.⁴⁰ Section 2(2) of ESTA provided that land in issue in any civil proceedings under ESTA should be presumed to fall within the scope of the Act unless the contrary was proved. While it was clear that the respondents consented to occupy, the onus to prove that they were not disqualified under the exclusions remained unsatisfactory. The relevant exclusion here was the specific income of occupiers. Merely stating that the amount of income did not exceed the prescribed limit was insufficient as the amount was a matter within the knowledge of the occupiers personally.⁴¹

Only fifteen occupiers out of several 300 placed themselves within the ambit of ESTA by providing the necessary evidence.⁴² Because the initial proceedings were lodged under PIE, it was the respondents' duty to respond in full to all allegations.⁴³ Only forty-eight affidavits were submitted, and no further evidence was placed before the court to deal with the matter effectively.⁴⁴ The court was thus satisfied that the applicant made

37 Unreported, referred to as [2022] ZASCA 61, 29 April 2022.

38 Paragraph 19 and further.

39 Paragraph 24.

40 Section 3(4) and (5) of ESTA—see para 25.

41 Paragraph 29.

42 Paragraph 30.

43 Paragraph 32.

44 Paragraph 32.

a proper case for granting special leave. The application was referred back to the High Court for final determination. This judgment goes a long way in providing much-needed clarity regarding who has to prove what and how to delineate respective PIE and ESTA applications.

*Loskop Landgoed Boerdery (Pty) Ltd v Moeleso*⁴⁵ dealt with the concern of overgrazing and the respective remedies of the landowner and the occupier under ESTA. Initially, consent was granted to keep cattle in two camps because the overgrazing camps required a two-year rehabilitation.⁴⁶ Only the respondents approached the Land Claims Court (LCC) for relief when grazing was reduced to one camp. In the meantime, the appellants obtained a report from an ecological specialist stating that the camps were seriously overgrazed, calling for the removal of the cattle. When that demand was refused, the appellants relocated the cattle from the two camps to another camp on the same farm, based on the Conservation of Agricultural Resources Act (CARA).⁴⁷ An application for removal of said cattle was lodged at the magistrate's court, which was still pending. In December 2020, the LCC granted an order that the reduction of grazing without a court order was unlawful and that the appellants had to restore the right to graze on a camp of at least similar capacity.⁴⁸

Various issues were dealt with by the SCA, including whether the reduction of grazing was unlawful or wrongful. The court found that CARA placed duties on land owners and occupiers and that the removal of cattle was possible, subject to the cattle being returned after the rehabilitation period. The court focused on the LCC-finding that reducing the grazing area amounted to an eviction attempt.⁴⁹ It was highlighted that cattle were not removed but were relocated. The landowner and occupiers' respective rights were important, which necessitated balancing.

The SCA stated that the real dispute was whether the respondents were in peaceful and undisturbed possession of the grazing camps prior to being spoliated and not whether the respondents' possession was based on any right. The respondents sought a restoration order, thus, the *mandament van spolie*.⁵⁰ Without investigating or unpacking whether there had indeed been unlawful dispossession, the court found that spoliation occurred, confirming the LCC order partially, highlighting that possession of the camps had to be restored.⁵¹ Notably, the two requirements of the *mandament van spolie* were not unpacked; the court briefly alluded to the first requirement—peaceful and undisturbed possession. The second requirement was not unpacked, and the court did not indicate specifically how the relocation of cattle from one part of the farm to another

⁴⁵ Unreported, referred to as [2022] ZASCA 53, 12 April 2022.

⁴⁶ Paragraph 4.

⁴⁷ 43 of 1983.

⁴⁸ Paragraph 9.

⁴⁹ See paragraph 12.

⁵⁰ Paragraph 19.

⁵¹ Paragraph 21.

part on the same farm, as authorised under CARA, constituted spoliation. The court further did not consider the environmental impact of the decision.

*Maluleke NO v Sibanyoni*⁵² focused on whether the termination of the first respondent's right to reside was just and equitable (in substance and procedure) under section 8(1) of the Act. At the time of the eviction application, the respondent, Mr Sibanyoni, was 56 years of age and occupied a cottage on the farm with his wife and some family members. A dispute of facts ensued regarding the history of the respondent's residence on the farm, generally and specifically regarding the land his family could utilise and the livestock and other animals he kept on the land. The LCC dismissed the eviction application on the basis that it did not comply with section 8 of ESTA, resulting in the present appeal. The SCA confirmed the two-stage eviction procedure, terminating the occupier's right to reside, followed by a notice of eviction under section 9(2)(d) to the occupier.⁵³ Section 8 of ESTA provides for the termination of the right of residence regarding all relevant factors, including, inter alia, the fairness of any agreement, the interests of the parties and the fairness of the procedure followed by the owner or person in charge.⁵⁴

Importantly, an eviction order may only be granted if it is just and equitable in the given circumstances. While the appellant argued that continued occupation of the cottage would prevent current and prospective employees from accessing accommodation, there was no evidence to support this.⁵⁵ A mere statement of hardship was insufficient. While suitable alternative accommodation was available in the nearby township, it did not include livestock and other animals of the respondent.

Regarding the procedure, the court emphasised that a lawful ground for termination and just and equitable termination were required. While a supposedly fair procedure was followed, the exact procedure was not set out. Stating that such representations could be made later, before the court, was insufficient.⁵⁶ Importantly, the fairness of the procedure would be case-specific, involving the weighting of specific factors, given particular facts. There was no engagement with the respondent before his right of residence was terminated, only with the erstwhile owner.⁵⁷ The appeal was thus dismissed.

52 Unreported, referred to as [2022] ZASCA 40, 4 April 2022.

53 Paragraph 9.

54 Paragraph 10.

55 Paragraphs 17–18.

56 Paragraph 23.

57 Paragraph 27.

Unlawful Occupation and Eviction

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill [B6-2022]⁵⁸ was published for comment in September 2022, aiming to amend the 1998 Act. According to the long title of the Bill, it is aimed at extending the offence to incite or promote orchestrated unlawful invasions to include instances where no payment was received or solicited. The Bill also extends the explicit criteria that a court must consider during court proceedings before an order for eviction may be granted. Provision is made for courts to make an order related to alternative accommodation or land. It requires courts to stipulate the specific period that alternative accommodation or land would need to be provided to an unlawful occupier. Clause 1 thus seeks to amend section 3 of the principal Act in two ways: firstly, it amends subsection (1) by providing that no person may incite, arrange or organise for a person to occupy land without the consent of the owner in charge of that land. Secondly, subsection (2) is also amended to increase the term of imprisonment for the contravention of subsection (1) from two to five years.

Clause 2 amends section 4(6) of the principal Act by including other relevant circumstances that a court must consider when granting an order for eviction if it is just and equitable to do so. A new subsection (13) is also introduced in section 4, which provides that a court may make an order against a joined municipality, land owner or organ of state to provide alternative accommodation or land and where reasonable to do so. If such accommodation or land is only temporary, the order can stipulate the length of time such accommodation or land must be made available. Clause 3 amends section 6(3) of the principal Act to provide that in deciding whether it is just and equitable to grant an order for eviction, the court must have regard to the intention of the unlawful occupier when he or she occupies the land. Upon hearing evidence, it will thus be up to the court whether a person truly requires alternative accommodation. Clause 3 further inserts a new subsection (3A) in section 6 to provide that where an organ of state must provide alternative accommodation or land, and where reasonable to do so, if such accommodation or land is only made available temporarily, a court may make an order stipulating the length of the period such accommodation or land must be made available. This amendment, therefore, now gives legislative effect to what was decided in numerous court judgments dealing with evictions. Hopefully, it will compel courts to consider providing alternative accommodation or land and not only treat the matter as a peripheral consideration.

Potentially linked to unlawful occupation is the Unlawful Entering on Premises Bill, 2022, which applies nationally and prohibits unlawful entry on premises by an intruder, irrespective of whether the intruder, after unlawful entry, occupies the premises. Several areas are excluded from the application of the Bill, namely:

58 GG 46847 (2 September 2022).

- a) any area or place as contemplated in the National Key Point Act⁵⁹ or the Critical Infrastructure Protection Act;⁶⁰
- b) any public place or public vehicle as contemplated in the Control of Access to Public Premises and Vehicles Act;⁶¹
- c) any labour tenant contemplated in the Land Reform (Labour Tenants) Act;⁶²
- d) an occupier contemplated in the Extension of Security of Tenure Act;⁶³
- e) any designated area or traffic free zone contemplated in the Safety at Sports and Recreational Events Act.⁶⁴

This list of exclusions makes sense as a person who may enter a premise provided for in the legislation has the required consent to be present on the premises, as regulated in said legislation.

Clause 3(1) states that every person commits the offence of unlawful entry upon unlawfully entering any premises. Clause 3(2) states that a person found on or in a premises who is not a lawful occupier or employee of a lawful occupier and who does not have expressed or implied permission by a lawful occupier is presumed to have unlawfully entered the premises. If a person has been directed orally or in writing to leave the premises and does not do so or re-enters the premises, he or she is guilty of the offence. Clause 4 of the Bill states that entry on a premises for a particular purpose may be permitted but prohibited for any other activity. Clause 5 makes provision for various methods of giving notice, for instance, orally or in writing or using a sign posted at or near the ordinary point of access to the premises under normal conditions and during daylight. Such a sign must be visible, and if it is in writing, it must be legible. If graphic representation is used, it must still be clearly visible. Clause 6 states that it is an offence to remove, alter or deface posted signs and that only a lawful occupier or authorised person may do this. Clause 7(1) provides that as soon as the lawful occupier or an authorised person becomes aware of any unlawful entry, they must request such intruder(s) to leave the premises immediately. If the intruder does not leave the premises or where the lawful occupier or an authorised person is threatened, clause 7(2) stipulates that they should request the assistance of the South African Police Services. The powers of the police are provided for in clause 8 of the Bill, who must assist when requested to remove any unlawful occupiers from the premises.

59 102 of 1980.

60 8 of 2019.

61 53 of 1985.

62 3 of 1996.

63 62 of 1997.

64 2 of 2010.

Clause 9 provides for several offences against the charge of unlawful entry on the premises, namely consent of a lawful occupier of the premises or an authorised person; other lawful authority or that the unlawful occupiers reasonably believed that they had title to or an interest in the premises that entitled them to entry. In terms of clause 10, a person guilty of an offence under the Bill is, on conviction, liable to a fine or imprisonment for a period not exceeding two years or to both such fine and imprisonment.

This Bill will repeal the Trespass Act⁶⁵ once enacted, with the aim of prohibiting people from unlawfully entering their land and also land grabbing. It does, therefore, seem that this Bill seeks to strengthen the rights of owners of land in that they can now prohibit unlawful entry onto their land by erecting warning signs to that effect and request the assistance of the SAPS in the event that there is still continued entry onto their land.

*Grobler v Phillips*⁶⁶ is a critical judgment that concludes a long-standing struggle between respective parties: the land owner and the respondent—an elderly lady—who had occupied the property in question since she was a girl of 11. The relevant house was originally part of a farm that had, over time, been subdivided and developed for township establishment purposes. Whilst in occupation—later with her husband and disabled son, previous landowners promised Mrs Phillips a life right to remain on the property. When Mr Grobler purchased the property in 2008, consent to occupy was revoked, and eviction proceedings ensued. A series of judgments followed. While Mrs Phillips was found to be an unlawful occupier under PIE, the SCA concluded that it would be just and equitable *not* to grant an eviction order with regard to the particular factors surrounding Mrs Phillips’ occupation. It was against that result that the present appeal was lodged in the Constitutional Court (CC).

The CC underscored that eviction from one’s home always raised a constitutional issue.⁶⁷ Combined, the CC highlighted the ‘some time’ approach, the particular wish of Mrs Phillips to remain on the land and the misapprehension of where the discretion lay in the first place.⁶⁸ The CC highlighted that all relevant circumstances had to be considered whether granting an eviction order was just and equitable. The SCA specifically focused on Mrs Phillips’ age, that she occupied the property with her disabled son, and that the land would have been protected under ESTA had it not been overtaken by township development. The SCA specifically also took into account Mrs Phillips’ wish to remain on the particular property and not to be relocated—despite various offers for relocation made by the owner.⁶⁹ With reference to case law decided under ESTA, the CC underlined that the wishes or personal preferences of unlawful

65 6 of 1959.

66 [2022] ZACC 32 (20 September 2022).

67 Paragraph 21.

68 Paragraphs 22–24.

69 Paragraph 34.

occupiers were not relevant.⁷⁰ The CC next dealt with the burden of providing alternative accommodation, highlighting.⁷¹

Who then bears the obligation to provide alternative accommodation? Section 4(7) of PIE clearly states that such obligation lies with a ‘municipality, or other organ of state or another landowner’. PIE was enacted to prevent arbitrary deprivation of property and is not designed to allow for the expropriation of land from a private landowner from whose property the eviction is being sought.⁷²

The statement that section 4(7) of PIE ‘clearly states that such obligation lies with a municipality, or other organ of state or another landowner’ is technically incorrect. The whole of section 7(4) reads as follows:⁷³

If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, a court may grant an eviction if it is just and equitable to do so, after considering all the relevant circumstances, including, except whether the land is sold in a sale of execution pursuant to a mortgage, whether land has been made available or can reasonably be made available by a municipality or other organ of state or another a land owner for the relocation of an unlawful occupier, and including the rights and needs of the elderly, children, disabled persons and households headed by women.

Whether suitable, alternative land had been made available by the persons or bodies mentioned was *one of the factors* that could be considered in deciding whether the granting of an eviction order would be just and equitable. Notably, the rest of the section also specifically lists the rights and needs of the elderly, children, disabled persons and households headed by women. Interpreting the specific part of section 4(7) as only indicating where the duty to provide alternative accommodation lay and specifically ignoring the second part of section 4(7) is problematic. Further, stating that PIE was promulgated to protect private land ownership against arbitrary deprivation as a starting point is again misplaced. PIE was promulgated for various reasons, including regulating unlawful occupation of land in a fair and humane manner.⁷⁴

Regarding competing interests of parties, due regard must be given to the considerations of justice and equity by striking a balance between the various rights,⁷⁵ a process that requires ‘some give by both parties’.⁷⁶ Mr Grobler made various (generous) offers to

70 Paragraph 36.

71 Paragraph 37.

72 Emphasis added.

73 See paragraph 28.

74 There is a huge body of law dealing with this issue—see for example G Muller, R Brits, JM Pienaar and Z Boggempoel, *Silberberg and Schoeman’s Law of Property* (6th edn, LexisNexis 2019) 751–763; G Muller and S Viljoen, *Property in Housing* (1st edn, Juta 2021) 287–296; JM Pienaar, *Land Reform* 820–822.

75 Paragraph 39.

76 Paragraph 40.

Mrs Phillips.⁷⁷ In this light, the CC concluded that the SCA had failed to balance the rights of both parties. Mr Grobler had been struggling to enforce his ownership for 14 years since he bought the property in 2008. On the other hand, Mrs Phillips would continue to enjoy a decent home.⁷⁸ The property to be purchased would be registered in Mr Grobler’s name, and a right to reside in the dwelling for the rest of her life would be registered against the title deed in favour of Mrs Phillips. While the provision of housing was made part-and-parcel of the order handed down, the CC highlighted that it could not form a precedent and that there was no obligation on a private landowner to provide alternative accommodation to an unlawful occupier.⁷⁹

The judgment handed down is a critical judgment: not only in providing closure to an issue that had been dragging on for many years but also for framing and weighting respective rights and, ultimately, impacting the place and role of private individual title on the one hand and so-called ‘lesser rights’ on the other. By identifying the protection of private ownership as a point of departure, the CC might have signalled clearly that ownership remains paramount—despite a body of law developed over decades, urging a more nuanced approach. The very nuanced, contextualised approach in, for example, the *PE Municipality* judgment⁸⁰ is wholly lacking here. Inevitably, the question arises as to whether the eviction paradigm has shifted post-1994, as Van der Walt argues in his well-known publication *Property in the Margins*.⁸¹

Housing

Several measures were introduced to protect housing consumers. The parliamentary committee approved the Housing Consumer Protection Bill [B10-2021]. The Bill requires the registration of home builders to protect consumers and to ensure quality buildings. Eventually, the Act will apply to new buildings and renovations or alterations to existing buildings.⁸² The Bill also introduces a regulatory council,⁸³ a home warranty fund,⁸⁴ and economic transformation,⁸⁵ amongst others.⁸⁶ Draft Rental Housing Tribunal Regulations, 2021, issued under the Rental Housing Act 50 of 1999, were

77 Paragraphs 41–43.

78 Paragraph 44.

79 Paragraph 48.

80 See also JM Pienaar, ‘“Unlawful Occupier” in Perspective: History, Legislation and Case Law’ in H Mostert and MJ de Waal (eds), *Essays in Honour of CG van der Merwe* (LexisNexis 2011) 317–338; S Wilson, *Human Rights and the Transformation of Property* (Juta 2021) 5; and in general S Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta 2010).

81 See generally AJ van der Walt, *Property in the Margins* (Hart Publishing 2009).

82 Clause 2.

83 Clause 4–22.

84 Clause 35.

85 Memorandum to the Bill.

86 Anon, ‘Parliamentary: Human Settlements Committee Approves Housing Bill’ *Legalbrief* (2 December 2022).

published for comment.⁸⁷ The regulations deal *inter alia* with the legal responsibilities of owners, lessors and lessees. The Income Bands for Social Housing were further adjusted.⁸⁸

The Portfolio Committee on Human Settlements called for legislation to deal with the illegal sale of RDP houses. It is common practice to sell the RDP houses to unaware buyers, who not only lose the house but also their money. The police are not eager to step in and regard such activities as a civil matter.⁸⁹

The government's rapid land release programme that foresees the delivery of serviced stands rather than houses was criticised. The criticism included that the programme would not succeed without proper public participation; the sites would be provided on cheap land far from city centres and, therefore, would not contribute to spatial integration. The concern of not enough people with building skills, as well as the non-existence of waiting lists (or if in existence, they are not utilised), were also raised.⁹⁰ Kumar⁹¹ proposes a city-wide approach where tenure rights are allocated in existing informal settlements. In addition, 'tenure security for land occupations must be supplemented by a rapid acceleration in the provision of social housing on well-located land.' Cape Town introduced their own Priority Programme on Affordable Housing to fast-track dealing with the housing crisis in the city.⁹²

The Property Practitioners Act 2 of 2019 came into operation on 1 February 2022, and on the same date, the Property Practitioners Regulations, 2022, dealing with trust accounts and dispute resolution, amongst others, were published.⁹³

*In Changing Tides 17 (Proprietary) Limited NO v Kubheka; Changing Tides 17 (Proprietary) Limited NO v Mowasa; Changing Tides 17 (Proprietary) Limited NO v Bucktwar; Changing Tides 17 (Proprietary) Limited NO v Horsley*⁹⁴ Fisher J spelled out the process practitioners should follow in cases of foreclosure. She stated that the 'reconsideration of a reserve price in terms of rule 46A(9)(c) should be sought by way of application in open court and not by approach to a judge in chambers' to protect the rights of homeowners.

87 GG 46063 (18 March 2022) GN 1913.

88 Issued in terms of the Social Housing Act 16 of 2008 and the Housing Act 107 of 1997 - GG 46211 (8 April 2022) GN 2009.

89 A Patrick, 'Human Settlements Committee Asks Police to Prosecute "Criminals" Selling RDP Housing in Gauteng' *TimesLive* (27 January 2022); J Isaac, 'Municipal Officials Accused of Complicity in Land Grab' *GroundUp* (3 February 2022).

90 A Kumar, 'Housing: Let's Scrap the Mythical "Housing Lists"' *GroundUp* (13 September 2022).

91 *ibid.*

92 G Hill-Lewis, 'It's Time to Flip the Housing Delivery Model on its Head' *GroundUp* (12 September 2022).

93 GG 45735 (14 January 2022) Proc 47.

94 2022 (5) SA 168 (GJ).

Deeds Registry

A Deeds Registries Amendment Bill [B28-2022] was submitted to Parliament. The Bill deals with the appointment of a chief registrar of deeds,⁹⁵ registrar of deeds, deputy registrar of deeds and assistant registrars of deeds. It also prescribes the qualification requirements.⁹⁶ The responsibilities and duties of the chief registrar of deeds are set out.⁹⁷ The Bill also deals with the recording of land rights issued by the government or other competent authorities.⁹⁸ It is possible to ‘register waivers of preference in respect of real rights in favour of leases.’⁹⁹ The need to register copies of powers of attorney in another deeds registry was deleted.¹⁰⁰ The Minister is authorised to make regulations in terms of the Deeds Registries Act 47 of 1937 and the Electronic Deeds Registration Systems Act 19 of 2019. The amendment will also allow the Minister to issue regulations with regard to the collection of personal information, such as race, gender, citizenship and nationality, that will be used for audit purposes.¹⁰¹ The registration of State land is regulated, as well as the issuing of certificates of registered title of undivided shares in land.¹⁰² The time period for the registration of notarial bonds in more than one registry is four months from the date of registration.

The Bill provides for a fine for registrars or officials that form part of collusion and act *mala fide*. Similarly, unauthorised preparation, execution and attestation of deeds and documents are criminalised.¹⁰³ Attorneys working in the Department of Agriculture, Land Reform and Rural Development will be able to perform the duties of attorneys, conveyancers and notaries in relation to State land transactions.¹⁰⁴ If implemented, the amendments will definitely expedite land reform and reduce costs.

Land Redistribution and Rural Development

A recent study indicated that South Africa had reached at least 24 per cent of its 30 per cent target to transfer land into Black ownership, with the 30 per cent target of 2030 reachable. The research took into account land restitution, land redistribution and private acquisition of land.¹⁰⁵ Setou argues that the private sector should play a larger

95 Insert s 2A cl 2.

96 Amending s 2 cl 1.

97 Insert ss 2B-2C cl 2.

98 Insert s 3(1)(c)(bis) and (ter) cl 3.

99 Substitute s 3(1)(i) cl 3.

100 Amending s 3(1)(u) cl 3.

101 Inserting s 10(1)(t).

102 Amending s 18 cl 7 and substituting s 34 cl 8.

103 Substituting s 99 cl 10 and inserting s 99A cl 11.

104 Amendment of s 102 cl 12.

105 J Kirsten and W Sihlobo, ‘Land Reform in South Africa: 5 Myths about Farming Debunked’ *The Conversation* (26 November 2022).

role in post-settlement support as part of their corporate social responsibilities.¹⁰⁶ The Western Cape Provincial Government released land to a communal property association for small-scale farming as part of their land redistribution programme.¹⁰⁷

The Preservation and Development of Agricultural Land Bill [B8-2021] aims to provide a national policy and regulatory framework for the preservation and development of agricultural land. In the Bill, it is stated that the Department of Agriculture, Forestry and Fisheries considered its policies and legislation on agricultural land to ensure constitutional compliance. The Bill aims to support the Government's objectives and priorities further with respect to sustainable development and the use of natural resources, the provision of effective national regulatory framework mechanisms and risk management systems. In the 2030 National Development Plan, agricultural land has been identified as one of the important sectors which contribute toward job creation and employment. As such, the Bill aims to support the countries' efforts to use agricultural land effectively, thus ensuring optimal long-term food production. The Bill also aims to encourage provincial and local spheres of government to enable and promote the use of agricultural land for farming purposes and compatible uses in their policies, legislation and other relevant administrative and planning frameworks. It is also stated in the Bill that the subdivision of especially high-potential cropping and grazing land that results in fragmentation of that land is discouraged and prohibited. In terms of clause 5 of the Bill, the Minister may establish evaluation and classification systems to appraise agricultural land and to delineate agricultural sector areas spatially. In clause 6 of the Bill, the national criteria and guidelines for compiling and preparing provincial agricultural sector plans are set out. Clauses 7 and 8, respectively, provide for the purpose of these agricultural sector plans and the content of such plans. Clause 11 provides for the declaration of national and provincial protected agricultural areas by the Minister and the MEC. The procedure to declare such a protected agricultural area is provided for in clause 12. Clause 13 empowers the Minister and the MEC to review, withdraw and amend the protected agricultural areas every five years, where necessary. Although all of the stated aims seem admirable, they will require concrete and implementable legislative measures, as well as regulations, to give effect to said aims.

*Land and Agricultural Bank of South Africa v The Minister of Rural Development and Land Reform and Others*¹⁰⁸ concerned a failed land redistribution project where the land was to be transferred to a trust for the benefit of 39 beneficiaries. The Land Bank and the Minister funded the purchase of the farms, and a mortgage bond was registered in favour of the Land Bank. As the court stated:

106 P Setou, "'Private Sector's Role in Supporting Land Reform Beneficiaries' Adoption Of Good Governance Practices' *Bizcommunity* (22 November 2022).

107 Anon, 'WCDHS releases Sandkraal Farm to Communal Property Association' *Bizcommunity* (21 September 2023).

108 (1174/2021) [2022] ZASCA 133(13 October 2022).

Because of corruption and fraud that sadly are not uncommon in South Africa,¹⁰⁹ the property was registered in the name of CPAD Farm Holdings (Pty) Ltd (CPAD). In the main, the appeal concerns the extent, if any, to which the Land Bank and the Minister, respectively, are entitled to the exclusion of an interest from the forfeiture of the property under the Prevention of Organised Crime Act 121 of 1998 (POCA).¹¹⁰

The court found that the Land Bank had a preferential right to proceeds of the forfeiture and that the Minister had no such right.

Conclusion

The reporting period underlined massive discrepancies between technical legal measures being in place and new, advanced technical measures being promulgated, for example, developments within electronic deeds and registries and property practitioners on the one hand and *a lived reality* on the other. With respect to the latter, a dire need for housing and land access prevails—whether within the context of individuals like Mrs Phillips, families and households within an ESTA context or larger communities within the inner city and informal settlement environments. Whereas a lot of energy, time and focus went into the constitutional section 25 review process in the period 2018-2021, basic needs and foundational concerns continued, often unaddressed, in 2022. In this regard, hope is placed on newly drafted Bills. Still, generally, much reliance will continue to be placed on courts specifically and the adjudication of justice, especially within the broader land reform domain. It is hoped that the Land Court Bill, once finalised and implemented, will make the difference so needed.

References

Anon, ‘Land Reform: Nearly 7 000 Old Claims Outstanding – Minister’ *Legalbrief* (2 July 2022).

Anon, ‘WCDHS Releases Sandkraal Farm to Communal Property Association’ *Bizcommunity* (21 September 2022).

Anon, ‘Almost 400 Title Deeds Handed over to Orange Farm Residents’ *SA News* (21 October 2022).

Anon, ‘Parliamentary: Human Settlements Committee Approves Housing Bill’ *Legalbrief* (2 December 2022).

Arde G and Enoch E, ‘The Bloody Battle for Land and Rights in Cato Manor’ *GroundUp* (11 October 2022).

109 Also see S Yende, ‘Lawyer and “Fronting” by a BEE Partner are Blamed for Collapsing Two Land Reform Projects’ (11 December 2022).

110 Paragraph 2.

- Bloom K, 'Revealed: David Mabuza, Fred Daniel and the Missing Crime Dockets' *Daily Maverick* (7 August 2022).
- Bloom K, 'Case number 35402/2010 – the Mabusas and the Giant Mpumalanga Land Claims “Scam”' *Daily Maverick* (19 March 2022)
- Cogger J, 'DA amendments to PIE Act — An Attempt to Criminalise a Lack of Housing in A Housing Crisis' *Daily Maverick* (24 October 2022).
- Hill-Lewis G, 'It's Time to Flip the Housing Delivery Model on its Head' *GroundUp* (12 September 2022).
- Isaac J, 'Municipal Officials Accused of Complicity in Land Grab' *GroundUp* (3 February 2022).
- Kirsten J and Sihlobo W, 'Land Reform in South Africa: 5 Myths about Farming Debunked' *The Conversation* (26 November 2022).
- Kumar A, 'Housing: Let's Scrap the Mythical “Housing Lists”' *GroundUp* (13 September 2022).
- Liebenberg S, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Juta 2010).
- Muller G, Brits R, Pienaar JM and Boggenpoel Z, *Silberberg and Schoeman's Law of Property* (6th edn, LexisNexis 2019).
- Muller G and Viljoen S, *Property in Housing* (1st edn, Juta 2021).
- Patrick A, 'Human Settlements Committee Asks Police to Prosecute “Criminals” Selling RDP Housing in Gauteng' *TimesLive* (27 January 2022).
- Pienaar JM, *Land Reform* (1st edn, Juta 2014) <<https://doi.org/10.47348/YSAL/v1/i1a16>>
- Pienaar JM, 'Living in the Shadow of Apartheid: The Continued Struggle for Tenure Security in Former National States and Self-Governing Territories' in Boggenpoel ZT (ed), *Law, Justice and Transformation* (LexisNexis 2022).
- Pienaar JM, ““Unlawful Occupier” in Perspective: History, Legislation and Case Law' in Mostert H and De Waal MJ (eds), *Essays in Honour of CG van der Merwe* (LexisNexis 2011).
- SERI, 'An Analysis of Eviction Applications in the Johannesburg Central Magistrate's Court and their Compliance with the Law' in *Just and Equitable? Evictions Research Series Report 1, Socio-Economic Rights Institute (SERI)* (2022).

Setou P, 'Private Sector's Role in Supporting Land Reform Beneficiaries' Adoption of Good Governance Practices' *Bizcommunity* (22 November 2022).

South African Government, 'Minister Patricia de Lille: Title deeds handover to Thornhill Farms Communal Property Trust' (25 November 2022)
<<https://www.gov.za/speeches/minister-patricia-de-lille-title-deeds-handover-thornhill-farms-communal-property-trust-25>> accessed 23 September 2023.

Van der Walt AJ, *Property in the Margins* (Hart Publishing 2009)
<<https://doi.org/10.1093/acprof:oso/9780195391572.003.004>>

Van Niekerk A, 'Watch: Half-a-century later, these apartheid victims have got their land back' *GroundUp* (18 January 2022).

Wilson S, *Human Rights and the Transformation of Property* (Juta 2021).

Yende S, 'Lawyer and "Fronting" by a BEE Partner are Blamed for Collapsing Two Land Reform Projects' *News24* (11 December 2022).

Case Law

Frannero Property Investments 202 (Pty) Ltd v Selapa [2022] ZASCA 61 (29 April 2022).

Gauteng Provincial Government: Department of Human Settlements v Pogatsi (2020/19559) [2022] ZAGPJHC 762 (7 October 2022).

Gauteng Provincial Government: Department of Human Settlements v Motasi (2021/42636) [2022] ZAGPJHC 663 (8 September 2022).

Grobler v Phillips [2022] ZACC 32 (20 September 2022).

In Changing Tides 17 (Proprietary) Limited NO v Kubheka; Changing Tides 17 (Proprietary) Limited NO v Mowasa; Changing Tides 17 (Proprietary) Limited NO v Bucktwar; Changing Tides 17 (Proprietary) Limited NO v Horsley 2022 (5) SA 168 (GJ).

Land and Agricultural Bank of South Africa v The Minister of Rural Development and Land Reform and Others (1174/2021) [2022] ZASCA 133 (13 October 2022).

Loskop Landgoed Boerdery (Pty) Ltd v Moeleso [2022] ZASCA 53 (12 April 2022).

Maluleke NO v Sibanyoni [2022] ZASCA 40 (4 April 2022).

N'Wandlamharhi Communal Property Association v Westcott [2022] ZASCA 129 (3 October 2022).

Nyavana Traditional Authority v MEC for Limpopo Department of Agriculture and Others [2021] 1 All SA 237 (LCC).

Legislation

Black Communities Development Act 4 of 1984.

Conservation of Agricultural Resources Act 43 of 1983.

Control of Access to Public Premises and Vehicles Act 53 of 1985.

Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988.

Critical Infrastructure Protection Act 8 of 2019.

Deeds Registries Act 47 of 1937.

Deeds Registries Amendment Bill [B28-2022].

Electronic Deeds Registration Systems Act 19 of 2019.

Extension of Security of Tenure Act 62 of 1997.

Housing Act 107 of 1997.

Housing Consumer Protection Bill [B10-2021].

Interim Protection of Informal Land Rights Act 31 of 1996.

Land Reform (Labour Tenants) Act 3 of 1996.

National Key Point Act 102 of 1980.

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

Preservation and Development of Agricultural Land Bill [B8-2021].

Rental Housing Act 50 of 1999.

Restitution of Land Rights Act 22 of 1994.

Safety at Sports and Recreational Events Act 2 of 2010.

Social Housing Act 16 of 2008.

Subdivision of Agricultural Land Act 70 of 1970.

Trespass Act 6 of 1959.

Unlawful Occupation of Land Amendment Bill 2022.

Unlawful Entering on Premises Bill 2022.

Preservation and Development of Agricultural Land Bill 2021.

Government Gazettes

GG 2096 (14 June 1968) General Notice R1036.

GG 45735 (14 January 2022) Proclamation 47.

GG 46063 (18 March 2022) General Notice 1913.

GG 46211 (8 April 2022) General Notice 2009.

GG 46991 (30 September 2022) General Notice 2553.