Land Matters and Rural Development: 2018

Juanita M Pienaar
University of Stellenbosch
jmp@sun.ac.za

Willemien du Plessis
http://orcid.org/0000-0002-0907-5063
North-West University
willemien.duplessis@nwu.ac.za

Ebrezia Johnson
University of Stellenbosch
ebrezia@sun.ac.za

General

The year 2018 will be known as a period of emotionally loaded debates on the expropriation of land without compensation. The public were invited to submit comments on the amendment of section 25 of the Constitution of the Republic of South Africa, 1996, and public hearings were held all over the country.[1] There were allegations that the public hearings were hijacked by political parties and that the ordinary people never really had a chance to voice their concerns, but reports seem to differ in this regard.[2] The Constitutional Review Committee of Parliament, at the request of the National Assembly and National Council of Provinces, released a 'Draft Report on the Possible Review of Section 25 of the Constitution' on 15 November 2018. This report summarised the views that emerged from the public hearings and the written comments. The president subsequently appointed a committee to draft an amendment to section 25 and to the Expropriation Act 63 of 1975.

There was not much time left for parliament to pass new Bills before the elections in 2019; accordingly, second versions of Bills on land-related issues were also published in 2018. If the Bills were not passed before the elections, they would have to be dealt with from scratch by the newly elected parliament and its committees. The courts also

1 Draft Report on the Possible Review of Section 25 of the Constitution, released 15 November 2018, para 1. See the discussion of expropriation later in this note.

2 See eg C Collison, '"Yes to Expropriation" the General Feeling at Upington Public Hearings' *Mail & Guardian* (28 June 2018); Anon, 'Land Reform: Farmers Warn of Economic Collapse' *Legalbrief Today* (29 June 2018); M Dayimani, '"The Land was Stolen": Derek Hanekom Backs "Justified" Expropriation' *TimesLive* (16 August 2018).

UNISA university of south africa PRESS

Southern African Public Law
https://upjournals.co.za/index.php/SAPL
Volume 34 | Number 1 | 2019 | #5640 | 32 pages

https://doi.org/10.25159/2522-6800/5640
ISSN 2219-6412 (Print) | 2522-6800 (Online)

dealt with various issues pertaining to land, land legislation and customary law—including the remnants of pre-1994 land legislation—with the courts generally siding with the most vulnerable members of society.

In this note, the most important legal measures and court decisions pertaining to the three legs of land reform (restitution, redistribution and tenure reform), as well as unlawful occupation, housing, land-use planning, deeds and sectional titles are discussed.[3]

Land Restitution

The land-restitution process embodied in the first round of claims has been nearing finalisation. Most provinces published approximately 60 notices in the preceding year.[4] It seems that the more complex land claims that still need finalisation. In Cape Town, the District Six issue has still not been finalised and new notices are still being published.[5] The budget to give effect to the restitution process in District Six was given to the Western Cape government.[6] In Limpopo, North West and Mpumalanga, claims pertain to mining land,[7] while in these provinces, KwaZulu-Natal and the Eastern Cape, land has been claimed in game and nature reserves.[8] In North West, a land claim notice refers to Kroondal, a German missionary station that was established in 1843. In 1858 the land was registered in the name of Van Helsdingen.[9] Such a land claim will fall outside the 1913 cut-off date. It is not clear whether the Gauteng–North West office entertains claims that originated before 1913 or whether the research into the claim has been completed.

The Restitution of Land Rights Amendment Bill (B19B-2017), introduced in parliament during September 2018, will repeal the Restitution of Land Rights Amendment Act 15

---

3 This note includes a selection of literature, legislation and court decisions published in the period 31 March 2018 to 30 November 2018.

4 Western Cape (65 notices); KwaZulu-Natal (50 notices, 6 amendment notices and 2 withdrawals); Mpumalanga (103 notices and 7 amendment notices); Mpumalanga (67 notices); Limpopo (65 notices and 5 amendment notices); Eastern Cape (67 notices); Northern Cape (3 notices and 4 amendment notices); Gauteng and North West (22 notices and 2 withdrawals).

5 See eg GG 41887 (7 September 2018) GN 539. In August 1 000 of 70 000 claims were still outstanding—see D Chambers, 'District Six Restitution Logjam Broken, Says Gleeful DA' *TimesLive* (21 August 2018). There is, however, still confusion as to who represents the District Six community—Anon, 'Litigation: Confusion over District Six Claimants' Representatives' *Legalbrief* (10 September 2018).

6 ibid.

7 See eg GG 42053 (23 November 2018) GN 1289; GG 41473 (2 March 2018) GN 167; GG 41903 (14 September 2018) GN 946; GG 42037 (16 November 2018) GN 1250.

8 See eg claim for land in the Addo Elephant Park (*GG* 41667 (1 June 2018) GN 550; Nylsvley (GG 42068 (30 November 2018) GN R1311; Mkambathi Nature Reserve (GG 41456 (23 February 2018) GN 133; Game reserves KwaZulu-Natal (eg GG 42068 (30 November 2018) GN 740, 749.

9 GG 41903 (14 September 2018) GN 946. See also SAHistory Online, 'Kroondal, Rustenburg' <https://www.sahistory.org.za/places/kroondal> accessed 15 December 2018.

of 2014 that was declared unconstitutional in 2016. The Court found that the National Council's public-participation process had been unreasonable and was therefore invalid.[10]

The Bill proposes to amend the cut-off date for the lodging of claims, by proposing a date five years after the commencement of the Amendment Act.[11] This will enable claimants who did not make the cut-off date in 1998 and those who were subjected to betterment schemes and homeland consolidations also to lodge claims.

Section 6(1A) of the Act, which provides for a National Land Restitution Register has been amended to refer to land-restitution claims lodged from 1 July 2014, the previous commencement date of the 2014 Amendment Act. In terms of the amendment, the register will be open to the public and subject to the Promotion of Access to Information Act 2 of 2000; land claims will be published in the *Government Gazette* as well as in provincial and national media.[12]

Section 16A now provides for the processing of claims to ensure that 'old claims' are finalised before any new claims are submitted. The Chief Land Claims Commissioner will have to certify in writing that a claim has been finalised or referred to the Court. They must also publish the date on which the Commission will start to process land claims lodged from 1 July 2014 until 28 July 2016 in terms of the Restitution of Land Rights Amendment Act of 2018. In this investigation the Commission may also consider the merits of claims lodged before or on the 1998 cut-off date. The undue influence of a person not to lodge a claim or the institution of a fraudulent claim are now offences under the Act.[13] The amendment will also allow for claims to be prioritised. Furthermore, the amendment aims to regulate the appointment, tenure of office, remuneration and conditions of service of judges of the Land Claims Court. The Minister's power of delegation has also been extended.

Court Decisions

A critical judgment providing guidelines regarding historical or oral evidence in restitution cases was handed down by the Constitutional Court in *Salem Party Club v Salem Community.*[14] The application was for leave to appeal against a judgment of the Supreme Court of Appeal (SCA), *Salem Party Club v Salem Community*.[15] The first applicant, Salem Party Club, is a voluntary association that governs the recreational facilities of Salem, whereas the first respondent is the Salem community, the claimants,

---

10 *Land Access Movement of South Africa & Others v Chairperson of the National Council of Provinces & Others* 2016 (5) SA 635 (CC).

11 Section 2(1)(e) amended by clause 1.

12 Section 11(1) to be amended.

13 Section 17(1)(e) and (2) to be amended.

14 (CCT26/17) [2017] ZACC 46 (11 December 2017).

15 [2017] 1 All SA 712 (SCA)

who were successful in their land claim in both the Land Claims Court (LCC) and the SCA. Despite being important, the historical background will not be conveyed here.[16] Of importance is that the evidence and elements of the pertinent historical background were presented and interpreted paradoxically by the expert witnesses who acted for the respective parties. A question thus emerged, namely, about the role and function of history—in general, but specifically in the context of restitution claims within the legal framework and the employment of expert witnesses. Substantial portions of the Cameron judgment are dedicated to these matters specifically.[17]

This discussion departs from the decision reached by the SCA, against which the present application lies. The Salem community was successful in the LCC.[18] Majority and minority judgments were handed down in the SCA.[19] The distinction between the two judgments rests almost entirely on the weight to be attached to the evidence concerning the requirements of the Restitution of Land Rights Act 22 of 1994 (Restitution Act).[20] The minority judgment supported the interpretation and findings of the expert witness, Professor Giliomee, for the appellants, opposing the claim. The minority concluded that the claimants had failed to establish that any black person or any community had occupied the relevant commonage before the settlers' arrival in the 1820s and that the landowners' title to the commonage (based on deeds of grant) was incompatible with any indigenous rights. Therefore, the claimants could not have exercised a system of ownership in parallel with the landowners. As the claim was not properly lodged, it failed on that basis also. The majority,[21] however, disagreed and found that evidence supported that assertion that the claimants' ancestors had lived on the commonage and that they had regulated their lives accordingly. The dispossession was, furthermore, racially discriminatory because the relevant subdivision of the commonage had occurred without any consultation with the affected parties and without taking into account the interests of the community. That process had forced hundreds of black people away from their homes for the benefit of 25 white farmers.[22] Accepting that the application dealt with important constitutional matters,[23] Judge Cameron proceeded to contextualise the approach to historical evidence and interpretation.[24] Of critical importance was that the case was built partially on oral history, with different recollections and diametrically opposed views and interpretations of it. With heavy reliance on Canadian case law, including *Delgamuukw v British Columbia*[25] and the

16 *Salem Party Club* (n 14) paras 7–30 generally.
17 Paragraphs 63–71.
18 Paragraphs 31–46.
19 Paragraphs 48–60 generally.
20 Paragraphs 47.
21 Paragraphs 53–60.
22 Paragraph 60.
23 Paragraph 61.
24 Paragraph 63 and further.
25 [1997] 3 SCR 1010 (SCC).

more recent *Tsilhqot in Nation v British Columbia*,[26] the Court stressed that it was quite possible for different historical experts to approach the same historical materials differently, often quite radically so.[27] Despite the absence of an Archimedean point from which history could be understood, a free-for-all of subjective interpretations was impossible.[28] Importantly, the process of unlocking and understanding history was guided by the Restitution Act itself, coupled with the 'usual techniques available', including expert evidence.[29] Inherent here was also the Act's restorative principles of historical justice.[30] The Constitutional Court thereafter dealt with four questions:

- Was there a community of black people living on the Salem commonage?[31]
- Were they a 'community'?[32]
- Were rights exercised by them?[33]
- Was the dispossession a result of past racially discriminatory laws or practices?[34]

Concerning the first question, it was underscored that a continuing uninterrupted presence on the commonage from 1820 was not required under section 2 of the Restitution Act. The Act specifically provided for 'any right', including beneficial occupation, which included the dispossession of occupation of land for a continuous period of more than ten years.[35] In the light of the Act, the historical evidence, especially the then Native Commissioner Report[36] and aerial photography, the Court concluded that approximately 450–500 black people had in fact been living on and in the vicinity of the Salem commonage.[37]

Regarding question two, the Court considered the distinctive nature of the relevant land rights, deriving as they did from shared rules.[38] Evidence indicated clearly that the community had ordered themselves with regard to a settlement pattern, including a leadership pattern, had followed common traditional practices, had pooled resources for farming purposes and had enjoyed economic activity as a community.[39] Occupation, furthermore, had necessarily coincided with community interaction and use, including

---

26 [2014] 2 SCR 257.
27 Paragraph 66.
28 Paragraph 68.
29 Paragraph 69.
30 Paragraph 74.
31 Paragraphs 75–97.
32 Paragraphs 98–116.
33 Paragraphs 117–149.
34 Paragraphs 150–154.
35 Paragraph 76.
36 See n 104 of the case, where the Report is reproduced in full.
37 Paragraph 95.
38 Paragraph 100. See also Juanita Pienaar, *Land Reform* (Juta 2014) 544–548 for a discussion of 'community' in the context of land reform generally and restitution specifically.
39 Paragraph 104.

communal use of the lime quarry.[40] Thus, occupation of the commonage over a period of more than 60 years had included common rules that had determined how the community accessed and utilised the commonage.[41]

The third question dealt with the kind of rights the community had exercised. The minority of the SCA emphasised that formal individual ownership disqualified the exercise of indigenous title to the commonage.[42] The question whether other land rights could co-exist where registered title was awarded had in fact already been dealt with before, most notably in *Prinsloo v Ndebele-Ndzundza Community*.[43] The Court found that registered ownership neither extinguished, established nor precluded rights from arising.[44] Another approach would elevate ownership to the detriment of indigenous ownership for the purposes of restitution.[45] Judge Cameron explained at length that the individual rights granted to the settlers were in any event 'dubious', the rights were never 'immaculate' and the beneficiaries of the grants were 'inchoate and amorphous'.[46] Thus, it was quite plausible that a community would be able to expand, use the land and self-regulate their use accordingly. Furthermore, 'even if the settlers were proved to have immaculate title of the land, the Community could still have developed their own rights'.[47] The rights enjoyed and exercised by the community were, furthermore, neither dependent on, nor did they derive from, consent.[48] As explained, the community had continued living on the commonage and utilising it for their particular purposes.

The remaining issue concerned dispossession as a result of racially discriminatory laws or practices. In 1940 the SCA handed down a judgment that enabled the subdivision and allocation of the commonage to individual landowners, after which the black population had dispersed. Preceding the subdivision, the black persons living there as a community were neither notified nor consulted.[49] This lack of attention and consultation on which the dispossession was based constituted a racially discriminatory dispossession.[50] All the requirements of a valid land claim under section 2 were therefore met, resulting in the claim being confirmed and referred back to the LCC to be finalised.[51]

The unique characteristics of the South African restitution programme were highlighted in this judgment. While some reliance on legal comparative work is valuable and often

---

40 Paragraphs 108–110.
41 Paragraph 115.
42 Paragraph 118.
43 2005 (6) SA 144 (SCA).
44 Paragraph 121.
45 See also Pienaar (n 38) 550–553 for an analysis of 'right in land' under s 2 of the Restitution Act.
46 Paragraphs 130–142.
47 Paragraph 144.
48 Paragraph 146.
49 Paragraphs 150–154.
50 Paragraph 154.
51 Paragraph 161.

necessary, the restitution programme is founded in section 25(7) of the Constitution of the Republic of South Africa, 1996, with a specific legislative framework contained in the Restitution Act itself. The Act specifically provides for any kind of evidence, including oral evidence, to be presented, as necessitated by the nature of the restitution programme.[52] How that evidence is to be approached, accessed, interpreted and applied is perhaps a more difficult matter. This is where the judgment is relevant and where reliance on other jurisdictions adds value.

In the light of this judgment, two aspects of 'a right in land' are highlighted:

- the test is neither that of aboriginal title that requires continuous exercise of relevant rights concerning specific parcels of land;
- nor is the scenario similar to that of vesting a right by way of prescription.

Instead, any right in land suffices, as long as it is clear that such a right existed and was exercised by the claimants. The requirement is furthermore contentious when black letter law approaches are followed, as in the minority judgment of the SCA. If the 'traditional hierarchical' approach is followed, registered title would always (automatically) exclude indigenous (unregistered) land rights. That is so simply because of the hierarchical consideration that registered title is the apex right – a phenomenon that was highlighted and cautioned against previously.[53]

Land Reform

Interim Protection of Informal Land Rights Act 31 of 1996

During the reporting period, various important judgments were handed down dealing with land-reform legislation, especially that linked to tenure reform. In this regard, the following is striking: first, following the new political dispensation in 1994, it was critical that tenure-related measures had to be drafted to deal with the remnants of the racially based land-control system that prevailed before 1994 and, secondly, despite being integral to dealing with tenure reform, the measures that were drafted might be inadequate—depending on the facts and circumstances of particular cases. Accordingly, the Interim Protection of Informal Land Rights Act (IPILRA) is pertinent. Despite having been 'interim', the application of the Act was again extended to 31 December 2019.[54] Recent judgments handed down furthermore underlined the interaction of IPILRA and other relevant legislation, notably the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA).

---

52 For a critical discussion of the unique character of the South African restitution programme as reflected in the analysis of specific Constitutional Court judgments, see Juanita Pienaar, 'Land Reform and Restitution in South Africa: An Embodiment of Justice?' in J de Ville (ed), *Memory and Meaning* (LexisNexis 2015) 141–160.

53 *Alexkor Ltd v Richtersveld Community* 2004 (5) SA 460 (CC).

54 GG 42111 (14 December 2018) GN 1384.

In *Maledu v Itereleng Bakgatla Minerals Resources (Pty) Limited*,[55] the reasons for the IPILRA and the MPRDA and their interaction are set out in detail. Concerning IPILRA,[56] it was critical to enact a measure to give some form of recognition and protection to informal land rights, as a large portion of land rights, especially those in former national states and self-governing territories, were in fact informal. For the duration of the land-reform programme generally and the tenure reform programme specifically, those rights had to be protected. At issue here was the prevention of mining and prospecting by a specific portion of the community on the basis that they had not consented to the deprivation of their rights in land, albeit informal rights. Further, the relevant portion of the community argued that they were the real owners of the land in question despite the land being registered in the name of the minister who holds it in trust. Various issues therefore arose, including ownership and other entitlements, although Petse AJ chose not to deal with all the issues identified.

In the High Court an eviction order was granted evicting the first to 37th applicants and interdicting them from re-entering the land or bringing their livestock onto the land. It is against this order that the present appeal was lodged.[57] After the community had purchased the land in 1919, it was effectively subdivided to accommodate 13 families forming the Lesetlheng community, which is part of the greater Bakgatla-Ba-Kgafela community. In 2004, a prospecting right was awarded to the respondents under the MPRDA, followed by a mining right in 2008. In that same year a surface lease agreement was also concluded. In 2014, full-scale mining operations commenced, thereby disrupting the peaceful existence of the original 13 families and their descendants still residing on the land. After a brief respite by way of a successful spoliation order granted to the community, full-scale eviction proceedings were lodged and were successful against the community. As the High Court refused leave to appeal, the Constitutional Court was approached, the latter Court concluding that the matter at hand was of great importance and that leave to appeal had to be granted.[58] Apart from dealing with the matter whether the *Amici* had to be allowed and, if so, whether new evidence could be introduced,[59] four issues were identified by the Constitutional Court:

a. ownership of the land;

b. the validity of the respondents' mining right;

c. the applicants' legal competence to raise a collateral challenge to the validity of the respondents' mining right, and

d. the validity of the surface lease agreement.

---

55 (CCT265/17) [2018] ZACC 41 (25 October 2018).

56 See also Pienaar (n 38) 491–493 for a historical exposition and the motivation for the promulgation of IPILRA.

57 Paragraph 4.

58 Paragraph 32.

59 See paras 27–38. While the *Amici* was allowed, no new evidence could be introduced.

The Court focused on whether the community was precluded from obtaining an interdict before exhausting the mechanisms in section 54; and whether the applicants had consented to being deprived of their informal land rights to or interests in the farm.[60]

As mentioned above, the MPRDA and IPILRA are both relevant here. Apart from section 54 of the MPRDA, the common law is also relevant regarding the impact of granting a mining right on land ownership, inter alia, that it is a limited real right, which, among other things, entitles the holder of such right to enter onto the land.[61] While the granting of a mining right does not extinguish ownership rights, both the landowner and the holder of the mining right have to act in a reasonable manner.

As explained above, IPILRA protects certain informal land rights, as set out and defined in the Act.[62] Included in the overall protection is that informal rights-holders cannot be deprived of their rights without their consent. It therefore had to be ascertained whether the community fell within the ambit of the Act and whether they had to be consulted prior to mining operations' commencing, as they claimed ought to have happened under section 22(4)(*b*) of the MPRDA.[63] Therefore, as holders of informal rights, the community had to have been consulted, on the one hand, and could not be deprived of their rights without consent, on the other. In this light it was argued that the granting of a mineral right *per se* already subtracts from the *dominium*, thereby causing a deprivation.[64] There had to have been consent, which had to have been free, informed and granted prior to the deprivation.[65] In response, the respondents averred that the applicants had been consulted, that the project was supported by the community and that a resolution was granted in April 2007 at the meeting of the Lesetlheng Community.[66]

Having set out the nature of the consultative process under the MPRDA,[67] the Court turned to the question of ownership of the farm. As explained, consultation is required with the landowner, which, in principle, is the owner as reflected in the deeds and registries. The community averred that they were the true owners of the land despite being it being registered in the name of the minister. To rectify the record, the application lodged by the community under the Land Titles Adjustment Act 111 of 1993 was still pending.

Although the parties agreed that the community were holders of informal land rights, the respondents argued that the community had become unlawful occupiers as their

60 Paragraph 42.
61 Paragraph 56–57.
62 Paragraph 63.
63 Paragraphs 64 and 66.
64 Paragraph 71.
65 Paragraph 72.
66 Paragraph 74.
67 Paragraphs 76–82.

rights had been terminated under section 2 of IPILRA upon the granting of the mining right and/or the entering into of the surface lease agreement.[68] Here the Court turned to the rules of customary law where land was occupied (and held) communally. The point of departure remained the same, namely, that no deprivation can take place without consent. Such deprivation could take place only in line with custom or usage of the community involved, except where the land in question was expropriated.[69] Because many people were affected in a communal context, affected parties had to be given sufficient notice of and afforded a reasonable opportunity to participate, either in person or via representatives, at any meeting where the decision to dispose of their rights was to be taken, calling for the support of the majority.[70]

The Court then focused on whether the granting of the mining right constituted a deprivation of informal land rights. Having regard to the nature of limited real rights embodied in mining rights, as alluded to above, a mining right was certainly of an invasive nature and would therefore intrude on the rights of the landowner.[71] However, the fact that a mining right was valid did not per se make the occupation of the occupiers of the land unlawful.[72] This approach was also confirmed in section 54 of the MPRDA, which envisaged the co-existence of a mining right with occupation. Under the IPILRA, the holder of an informal right could consent to the granting of a mineral right but could still be entitled to occupation, depending on the terms and conditions of the consent granted.[73] More was required to indicate that the holder of an informal right under IPILRA had been deprived of those rights than the mere granting of a valid mining right. Therefore, the MPRDA and IPILRA had to be read in a manner that served their respective underlying purposes. In this light, the aim of the IPILRA was pertinent, namely, to provide security of tenure for the historically disadvantaged and the vulnerable. The respondents therefore derived their rights from the MPRDA, which had its own internal mechanisms for resolving obstacles when seeking to exercise mining rights under the Act. Section 54 of the MPRDA had to be exhausted before either an eviction application or an interdict could be sought. The granting of a mining right did not annul the informal land rights of the community, with corresponding implications for both parties, including following the procedure provided for in section 54 of the MPRDA. In this light, the decision of the High Court was overturned.

Likewise, the need for IPILRA was underlined in the *Baleni* case.[74] Similarly, the community held land under informal rights that were protected under IPILRA. It was, furthermore, not disputed that they dealt with their land in terms of living customary

---

68 Paragraph 93.
69 Paragraph 96.
70 Paragraph 97.
71 Paragraph 102.
72 Paragraph 103.
73 Paragraph 105.
74 *Baleni & Others v Minister of Mineral Resources & Others* (73768/2016) [2018] ZAGPPHC 829 (22 November 2018).

law.[75] Transworld Energy and Mineral Resources (SA) Pty Ltd had applied to mine titanium-rich sand within the Xolobeni community area, with concomitant social, economic and environmental implications.[76] Sections of the community were against the mining in the area, whereas others favoured the idea.[77] One of the questions in the case was whether the government and the mine would need the prior and informed consent of the community in terms of the IPILRA.[78] Similarly to the *Maledu* case above, the Court had to consider the inherent tension between the IPILRA and the MPRDA.[79] The Court found that the granting of a mining right constituted deprivation in terms of the IPILRA.[80] It also found that the IPILRA and the MPRDA operated alongside each other[81] and that the IPILRA specifically sought the consent of the community and not merely consultation.[82]

The two cases confirm that the courts have to take the IPILRA into account whenever the customary use of land is affected and corresponding rights are deprived. The judgments have an impact on any development to be undertaken where communities have informal rights. This is not restricted to customary rights only, but includes many other informal rights, including rights allocated to households on former South African Development Trust land and in the so-called 'homelands'.[83]

Upgrading of Land Tenure Rights Act 112 of 1991

Rahube v Rahube & Others[84] concerned the constitutionality of section 2(1) of the Upgrading of Land Rights Act (Upgrading Act), which enabled holders of tenure rights to be automatically converted into owners of property. In the court *a quo* this provision was found to be unconstitutional, leading to the present matter before the Constitutional Court as to (*a*) whether the order had to be confirmed and (*b*) if confirmed, what remedy would be just and equitable.

The facts were briefly the following: the applicant, Ms Rahube, brought the application both in her own right and on behalf of other women in similar positions. The application was opposed by the applicant's brother, Mr Rahube, the registered owner of the property. In the 1970s, the extended family took occupation of the property located in what was to become North West province. While there was no documentary proof of

75 Paragraph 3.
76 Paragraphs 4–5.
77 Paragraphs 11–14. The conflict in the area led the Minister of Mineral Resources to place an 18-month moratorium on the issuing of any mining authorisations in the area—paras 16–18, 21–23.
78 Paragraphs 24–27.
79 Paragraph 39.
80 Paragraph 61.
81 Paragraph 76.
82 Paragraphs 76 and 79.
83 Also see Willemien du Plessis, Juanita Pienaar and Nic Olivier, 'Legislation Affecting Land: An Overview' 1990 SAPL 266–276 for an exposition of all the apartheid measures pertaining to land.
84 (CCT319/17) [2018] ZACC 42 (30 October 2018).

ownership, it was common cause that the parties' grandmother was the owner of the property.[85] Except for a period of three years, the applicant had always been in occupation of the property. After the grandmother's death and in 1987 the first respondent, the applicant's brother, was nominated by the family to be the holder of the certificate of occupation. In 1988 he was issued a deed of grant under Proclamation R293 (Proc R293),[86] promulgated under the Black Administration Act 38 of 1927. In 1991 the Upgrading Act was promulgated, coinciding with the publication of the White Paper on Land Reform.[87] The Act automatically converted certain rights into ownership, including deeds of grant, resulting in the first respondent becoming the owner of the property even though he was not in occupation of it—the applicant and her family resided in the house.

The litigation history is set out in paragraphs 10–17 of the judgment and will not be repeated here, except to highlight that the High Court found section 2(1) of the Upgrading Act to be unconstitutional on the basis that it contravened sections 9 and 34 of the Bill of Rights.[88] In the Constitutional Court the applicant argued that section 2(1) violated her right to equality (section 9) on the basis of gender and sex, her right to property (section 25) and her section 33 rights relating to just administrative action.[89]

The background to promulgating Proclamation R293 in the former Bophuthatswana is set out in detail.[90] From this it is clear that women generally were barred from holding positions as head of the family, which was a prerequisite for formal titles in land. The historical context is further set out in a detailed exposition in paragraph 22 and further, where themes of patriarchy and status, clearly linked to ownership and control over property, resonate. Furthermore, two matters come to the fore: the legislative inclination was in favour of male property-rights holders and, secondly, at least generally, only men were considered to be head of the family.[91]

Given the above and taking into account the textual reading of the Proclamation R293, especially the definition of 'family', it is clear that the wording was gendered and that it defined family only in relation to the head of the family. Masculine words and phrases were generally employed.[92] In this regard the Constitutional Court, *per* Goliath, AJ, with the Full Bench concurring, first explored the possibility of interpreting the section in a manner that conformed with the Constitution, before deciding that it was not reasonably possible to do so.[93] The specific rights identified by the applicant and their violation

85 See paras 6–9 for background.
86 GG 373 (16 November 1962) Proc R293.
87 For more detail and background, see Pienaar (n 38) 154–157.
88 Paragraph 16.
89 Paragraph 19.
90 See paras 20–21.
91 Paragraph 28.
92 Paragraph 30.
93 Paragraph 34.

were dealt with individually, starting with section 9. Differentiation could occur, but then there had to be a rational connection to a legitimate governmental purpose. The differentiation here was between people who were holders of land-tenure rights and those who were not but who occupied the property. It was argued that section 2(1) of the Upgrading Act did not have a legitimate governmental purpose as it contradicted the overall purpose for which the Act was enacted.[94] The Upgrading Act relied on the Proclamation, which in its formulation excluded African women from the group standing to benefit from it.[95] This position, had it been in force today, would be inconsistent with various sections of the Bill of Rights.[96] In fact, the Upgrading Act reinforced the position created by the Proclamation. The lack of governmental purpose was therefore irrational. Accordingly, '[t]he section does not pass this lowest threshold of constitutional scrutiny.'[97] With reference to section 25(5) of the Constitution, and the state's duty to take necessary steps to broaden access to land, the Court concluded that the quest also included attempts to strengthen the rights of citizens who had previously held land, including informal rights such as those of the applicant.[98] The Court deemed the Upgrading Act to be a measure that had to give effect to section 25(5) of the Constitution. Furthermore, the mischief that the Act had been created to rectify was to provide for recognition and security of rights that had previously been ignored or systemically devalued. That objective was not achieved, because African women were excluded from the benefit of the protection.[99]

It was further argued that the failure of section 2(1) to provide a forum for review before upgrading had taken place also rendered the provision unconstitutional.[100] Only section 24D of the Act was available, and it enabled an appeal to the minister within 30 days of a person's becoming aware of the entry and no more than one year after the entry was made.[101] The section did not provide a procedure by which affected parties were notified of the automatic upgrading. Overall, section 24D was therefore insufficient.

But what would constitute effective relief? The impugned provision of the Upgrading Act essentially became invalid when the final Constitution came into force. Furthermore, it was quite possible, depending on the particular facts, that the upgrading of titles could in some instances have benefitted women. The Court therefore had to be cautious not to create new injustices in its attempt at remedying section 2(1). Two groups of person were therefore identified as being excluded from the effect of retrospectivity, namely (*a*) those who were third parties and who had in good faith purchased the property; or (*b*) those who had inherited it under the law of succession,

94 Paragraph 38.
95 Paragraph 41.
96 Paragraph 41.
97 Paragraph 44.
98 Paragraph 49.
99 Paragraph 51.
100 Paragraph 52.
101 Paragraph 57.

where estates had been finalised. The Constitutional Court added a further extension to the category of exclusions, namely, women who, through a stroke of luck or an unforeseen event, had obtained title to property which was upgraded to ownership.[102] Overall, the Upgrading Act, in attempting to redress one injustice exacerbated another. The unconstitutionality finding was confirmed, but suspended for a period of 18 months to allow parliament to introduce a constitutionally permissible procedure for determining rights of ownership.

The underlying theme of gender inequality, access to land and tenure security resonates throughout the pre-constitutional approach to land control. It was imperative for the outgoing government to attempt to deal with the issue as expediently as possible, given the dire need for access and tenure security. In this regard, the absence of title or ownership was pertinent and the main focus was on redressing that lacuna as effectively and as speedy as possible. In this light, the main thrust of the Upgrading Act made sense. To that extent it is questionable whether the Act as a whole did not have a reasonable governmental purpose. To our minds it did in the sense that upgrading in principle was paramount. However, unfortunately, the automatic upgrading did result in extending the unequal land access and tenure status quo, as explained in the judgment.

Herbert NO & Others v Senqu Municipality & Others[103] concerned the upgrading of a permission to occupy to leasehold or ownership, also in terms of the Upgrading Act. The Teba Property Trust, 'represented by the five applicants, claims an entitlement to acquire ownership of the immovable property known as Erf 88, Sterkspruit' applying 'for conversion of its permission to occupy certificate to full ownership and transfer of the property from the first respondent to it'.[104] After various unsuccessful attempts to purchase the land from the municipality, an application for upgrading was lodged. The Court had to determine whether the Upgrading Act applied in the former Transkei. Section 25A extended the application of the Act to the whole of South Africa, but excluding section 3, which provides for upgrading which was inserted by the Land Affairs General Amendment Act 61 of 1998.[105] The Trust argued that section 25A was inconsistent with section 9 of the Constitution by excluding section 3.[106] The Court found that the exclusionary measure in section 25A was inconsistent with sections 9 and 25 of the Constitution.[107]

---

102 Paragraphs 68–69.

103 [2018] 4 All SA 677 (ECG).

104 Paragraph 1.

105 Paragraph 16. Section 25A had been substituted by the Communal Land Rights Act 11 of 2004, which was subsequently declared unconstitutional. Accordingly, the amended s 25A never came into operation. The amended s 25A extended the application of the Act without any exceptions. This section was reintroduced in the Communal Land Rights Bill of 2017—paras 59 and 63.

106 Paragraph 18.

107 Paragraphs 25 and 68.

Communal Property Association Act 28 of 1996

A second version of the Communal Property Associations Amendment Bill (B12B-2017) was published in April 2018.[108] When communities' land was restored, they had a choice as to the legal entity that had to regulate the land. Many communities opted to establish communal property associations (CPAs) in terms of the Communal Properties Association Act. Unfortunately, the management of the CPAs led to strife and challenges in many communities.[109]

In the case of *Makgoba v Ledwaba NO*,[110] the community opted for the establishment of a trust after their successful land claim.[111] This was an appeal by the first to the 12th appellants against the order of the Gauteng Division of the High Court, Pretoria (the court *a quo*) setting aside the decision of the third respondent, the Master of the High Court, Pretoria (the Master), to remove the trustees of Mamphoku Makgoba Community Trust (Trust Registration No IT8699/2004) (the Trust). The appellants were members of the Board of Trustees who had remained in their position since 2010 despite the termination of their term of office and subsequent court orders—the Master subsequently removed them. Annual meetings as required were not held and various other allegations of mismanagement of funds came to the fore.[112] The Court concluded that the trust had been dysfunctional and had not served the needs of the beneficiaries it was created for and the community at large, and called for the removal of the appellants.[113] The Court stated that the first to 12th appellants' term of office had ended in 2013, and that the first and second respondents had to convene a general meeting to elect new trustees at which only the 603 listed beneficiaries would be able to attend and vote. Within 60 days after the meeting, the new Board of Trustees would have to convene another general meeting to appoint further beneficiaries.[114] The Court stated that it could not act outside the Trust Deed, which in this case protected the beneficiaries from misuse of the trust funds.

Land Title Adjustment Act 111 of 1993

Various communities applied for title adjustments. One example is that of a community in the district of Sekhukhune in Limpopo province, which applied for title adjustments to three farms. The notice is subject to comment from the public.[115] Title adjustment is

---

108 For a discussion of the Bill, see Juanita Pienaar, Ebrezia Johnson and Willemien du Plessis, 'Land Matters and Rural Development: 2017 (1)' (2017) 33 (1) SAPL.

109 See also Juanita Pienaar, 'The Battle of the Bakgatla-Ba-Kgafela Community: Access to and Control of Communal Land' (2017) 20 PELJ.

110 (054/2018) [2018] ZASCA 181 (4 December 2018).

111 Paragraph 4. A company was created and it was decided to lease the land.

112 Paragraphs 1 and 7.

113 Paragraph 17.

114 Paragraph 18.

115 GG 41512 (23 March 2018) GN 150.

another way of obtaining ownership rights over land without going through a formal restitution or registration process.

Land Reform: Land and Assistance Act 126 of 1993

In *Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd, Mathibane v Normandien Farms (Pty) Ltd*,[116] the Court found that a court cannot order the Minister of Rural Development and Land Reform to designate land in terms of the Land Reform: Land and Assistance Act. Even if the minister could be ordered to do so, the land had to be designated for settlement and not for grazing purposes only.

Extension of Security of Tenure Act 62 of 1997

The Extension of Security of Tenure Amendment Act 2 of 2018 (ESTA) was published in the *Government Gazette* of 20 November 2018 and will come into operation on a date as set out by proclamation.[117] ESTA was amended to give more clarity on what is meant by 'dependant', 'family' and 'reside', and to establish a Land Rights Management Board and Land Rights Management Committees in terms of a newly inserted Chapter IVA. The definition of 'dependant' has been inserted to read 'a family member whom the occupier has a legal duty to support' and 'family' includes the 'occupier's spouse'. 'Spouse' refers to a spouse in a registered or unregistered customary marriage. Family members also include children (including adopted and foster children and grandchildren), parents and grandparents who are dependent on the occupier and 'who reside on the land with the occupier'.[118] 'Reside' means to live permanently at the place.

The definition of 'occupier' has also been amended to read 'a person residing on land which belongs to another person, and who, on 4 February 1997 or thereafter, had consent or another right in law to do so'; it corrects the grammatical error that existed in the previous versions of the Act. Section 4 of ESTA no longer refers to 'subsidies' but to 'tenure grants'. Through tenure grants it will now also be possible to enable occupiers and former occupiers to acquire suitable alternative accommodation; and to compensate owners or persons in charge for the provision of alternative accommodation and services to occupiers and their families.[119]

Section 6 was amended to reflect the judgment in *Daniels v Scribante.*[120] Section 7(2)(*d*B) now provides that an occupier may take 'reasonable measures to maintain the dwelling occupied by him or her or members of his or her family'. Occupiers will have the right not only to visit and maintain family graves, but also to 'erect a tombstone on, mark, place symbols or perform rites on, his or her family graves on land which belongs

---

116 [2018] 1 All SA 390 (SCA) paras 65–75.

117 Section 11. The Act was published in GG 42046 (20 November 2018) GN 1259. For a discussion of the Bill, see Pienaar, Johnson and Du Plessis (n 108).

118 Section 1.

119 Insertion of s 4(1)(*d*) and (*e*); s 4(2) was accordingly amended.

120 2017 (4) SA 341 (CC).

to another person.'[121] Section 9(1) has been amended to ensure that occupiers must have legal representation, except if they waived their right in this regard or the Court determines that the interests of justice would not be harmed if the occupier is unrepresented. Sections 10 and 11 now include mediation as a consideration before an occupier may be evicted. In determining a just and equitable date, the Court must also consider the prevailing weather conditions.[122]

The minister must appoint between seven and 13 members of the Land Rights Management Board to advise the minister and the director-general on tenure security matters and, among other duties, to oversee the work of the Land Rights Management Committees, help with the provision of mediation and arbitration, create and maintain a database on occupiers and disputes, and monitor and evaluate the impact of the legislation.[123] The Land Rights Management Committees must include a variety of stakeholders. The functions of these committees include, among other functions, identifying and recommending the acquisition of land, facilitating the provision of municipal services, identifying and monitoring land-rights disputes and taking steps to resolve a dispute.[124]

Unlawful Occupation

Nomkhitha Ntantana v Mhontlo Local Municipality; the Municipal Manager: Mhontlo Municipality[125] dealt with an appeal against the dismissal of certain applications. The applicants, all indigent persons deriving income from informal sources and living in Chris Hani Park, contended that their homes had been demolished by the respondent without a court order. Some of the applicants had been residing there for more than a decade up to November 2014, when municipal officials informed them that the local authority intended to build subsidy houses there, resulting in an agreement of understanding. Despite the understanding that the residents would not be without accommodation pending the construction of the Reconstruction and Development Programme (RDP) houses, they were forthwith instructed to vacate their structures on or before 21 November 2014. On the set date, the local ward councillor and workers arrived and demolished the structures of the residents without a court order. At this point, some residents started to demolish their own structures so as to salvage some of the materials.[126]

The applicants contended that said demolition amounted to illegal action, being in contravention of the Prevention of Illegal Eviction from and Unlawful Occupation of

121 Amendment of s 2(4).
122 Insertion of s 12(1)(*c*).
123 Section 15C.
124 Section 15H. Section 21(3A) was inserted to allow mediation and arbitration by the Board.
125 (3412/2017) [2018] ZAECMHC 13 (27 February 2018).
126 Paragraphs 1–3.

Land Act (PIE) and the Constitution.[127] As indigent occupiers, they were entitled not only to proper notice of the eviction, but also to alternative accommodation, it was argued. The applicants also sought an interdict restraining the respondents from further demolishing their homes, or evicting them or removing their belongings, pending the application for constitutional relief. The conduct of the respondents furthermore amounted to spoliation, since the applicants were in peaceful and undisturbed possession when they were violently or unlawfully and against their will deprived of such possession.[128] The applicants further submitted that, although the respondents may have been acting in terms of policy by trying to give affected parties access to adequate housing and thus addressing their constitutional rights, the implementation of such policy was not reasonable. This was especially the case considering the manner in which the demolition was undertaken and the fact that the residents were removed from their homes without being given alternative accommodation.[129]

In the present application the Court issued a *rule nisi* calling on the respondents to show cause why the requested relief should not be granted, namely, a declaration that the eviction and demolition of homes were unlawful and for restoration of the homes as soon as possible, even if only temporarily, pending the permanent allocation of subsidy housing. Moreover, the temporary structures should be equal to the demolished structures regarding the provision of shelter, privacy and amenities. With respect to the temporary structures the Court held that materials that were still at the disposal of the appellants could also be used, as long as it could be easily dismantled when the permanent RDP homes would be allocated.[130] The Court further ordered meaningful engagement with regard to, inter alia, the location of temporary structures; the manner in which the appellants would be assisted by officials or agents; the stage at which the appellants could expect to be accommodated in the RDP homes; the applicable time frames, and, lastly, the granting of other or further constitutional reparation to the appellants as a result of the unlawful evictions.[131]

On behalf of the applicants it was argued that further oral evidence had to be heard, without arguing the merits of the matter, but that was opposed by the respondents. The matter to be referred for oral evidence pertained to whether the respondents were responsible for demolishing the applicants' structures, since this could not be resolved on paper alone. In this regard the Court considered rule 6(5)(*g*) of the Uniform Rules of Court and how it was applied in case law.[132] The Court held that since this matter embodied exceptional circumstances, while also raising constitutional issues which may

127 Paragraph 4.
128 ibid.
129 ibid.
130 Paragraph 5.
131 ibid.
132 For example, *Nkwetsha v Minister of Law and Order & Another* 1988 (3) SA 99 (A) para 117C; *De Reszke v Czeslaw Maras & Others* 2006 (1) SA 401 (C) para 34.

have far-reaching consequences for the parties, the matter had to be referred for oral evidence.[133]

This matter underlines the point that municipalities, like any other landowner or organ of state, have to take responsibility for complying with the procedural safeguards in PIE. Local authorities, including when they act through intermediaries such as a local ward councillor, remain accountable.

In *Ughala & Others v Laws Stores CC and Nelson Mandela Bay Metropolitan Municipality*,[134] the Court had to decide as a matter of urgency an application for the rescission of an eviction order which had already been carried out.[135] In terms of the rescission application, the applicants wanted interim relief in that the first respondent had to restore peaceful and undisturbed possession of the applicants' homes, as well as interdicting and restraining the first respondent from evicting the applicants from the property. However, the eviction had already occurred.

The first respondent, the registered owner of a block of flats, had entered into a month-to-month verbal lease agreement with the first applicant in terms of which the latter had to pay a monthly rental of R40 000.[136] The first applicant took occupation of the property and sublet various rooms to tenants.[137] The verbal rental agreement was honoured for a period of nine years until May 2016, when a fire broke out in the property. This resulted in extensive damage to the property. According to the respondent, members of its maintenance team were prohibited access to the building to effect repairs after the fire. The first applicant also stopped payment of the monthly rental during or about June 2016. When the first applicant recommenced payments, it was only sporadically and they were not made in full.[138] Over time, the building fell into a dilapidated state, contravening a number of municipal by-laws and national legislative measures. The respondent issued various notices to vacate to the applicants, but to no avail. This resulted in the first respondent's launching eviction proceedings against the applicants in August 2017, which were successfully carried out by the sheriff on 9 February 2018.[139]

The applicants denied having received the notice issued in terms of section 4(2) of PIE and served by the sheriff. However, this averment of the applicants was in conflict with their rescission application, since it was apparent from the rescission application that

---

133 Paragraphs 6–16.

134 (2645/2017) [2018] ZAECPEHC 7 (20 February 2018).

135 The eviction order in the *Ughala* matter was issued on 14 November 2017 and served on the occupiers on 28 November 2017. The rescission application was launched only on 30 January 2018, whereas the occupiers were evicted with the assistance of the South African Police Services on 9 February 2018.

136 Paragraphs 3–6.

137 The second to 27th applicants therefore occupied the building through the first applicant.

138 Paragraph 4.

139 Paragraphs 1–6.

the applicants were at all material times aware of the eviction application. In effect, what the applicants wanted was a spoliation order in terms of the *mandament van spolie*, namely to be restored to their peaceful and undisturbed possession and occupation of the property in question. A successful *mandament* would entitle a person who was unlawfully deprived of their possession to be reinstated to their former position before all else, that is, before merits. This was difficult in this case because the applicants' deprivation had occurred in terms of a lawful process—an order of court—and was therefore not unlawful.[140] Accordingly, for as long as the eviction order remained in force, the applicants' occupation of the property remained unlawful. In this light, the judge did not have a discretion, pending the hearing of the rescission application, to reinstate the applicants to their former position.[141]

The applicants argued that they were entitled to interim relief pending the hearing of the rescission application, since the *causa* for the execution of the eviction was pending. While having sympathy for the applicants, Eksteen J stated that whether an injustice occurred depended upon the validity of the argument raised in respect of the rescission order.[142] On the facts of the matter it was clear that the eviction order had been properly granted and therefore it could not be said that an injustice had occurred.[143] Furthermore, the event causing the 'alleged irreparable harm, being the eviction, had already occurred'.[144] An interdict could be granted only to prevent future conduct and not conduct which had already occurred. On that basis the applicants failed to establish a prima facie right to the relief sought.[145]

It is noteworthy that the *mandament van spolie* is still often resorted to during eviction proceedings, usually so as to restore possession—either of building materials, as in the *Nomkhita Ntantana* case above, or restoration of occupation, as in the present matter. In order to be successful with the *mandament*, all requirements have to be met, including unlawful dispossession. Where an eviction occurred in terms of PIE and an eviction order was granted lawfully, the *mandament* would therefore not succeed.[146]

---

140 Paragraph 16.
141 Paragraph 16.
142 Paragraph 18.
143 Paragraphs 17–19.
144 Paragraph 20.
145 Paragraphs 20–22.
146 Also see Zsa-Zsa Boggenpoel and Juanita Pienaar, 'The Continued Relevance of the *Mandament van Spolie*: Recent Developments Relating to Dispossession and Eviction' (2013) 46 (4) De Jure 998.

Housing

There have been allegations that the the government agency whose job it is to build houses for the poor has allegedly been looted to such an extent that it has an R11 million deficit and may be unable to pay salaries.[147]

In *Thubakgale & Others v Ekurhuleni Metropolitan Municipality & Others*,[148] the 133 applicants approached the Court on the basis that housing subsidies had been acquired in their names in relation to Thembisa, but that houses were allocated to other beneficiaries after completion. The applicants received bills for the municipal services for each of these erven. The Gauteng High Court found that the municipality and its predecessors had breached the applicants' right to housing and the National Housing Code. It accordingly ordered the municipality to provide housing for the applicants before 31 December 2018. The municipality then appealed the order in *Ekurhuleni Metropolitan Municipality & Others v Thubakgale & Others*[149] on the basis that it would not be possible to deliver the houses by 31 December 2018. The SCA granted an extension until 30 June 2019.

A Property Practitioners Bill, 2018[150] was published to provide for the regulation of property practitioners and for the establishment of an authority that would oversee the practitioners and look after the rights of consumers, among other provisions. The authority also had to provide for 'the meaningful participation of historically disadvantaged individuals and small, micro and medium enterprises in the market' and the 'transformation of the property market to address the distortions, especially in the secondary property market', as well as to ensure that more South Africans can obtain property ownership in an affordable secondary market.[151]

Deeds

An Electronic Deeds Registration Bill (B35B-2017) was introduced in parliament. In terms of this Bill, the Chief Registrar of Deeds, is required to 'develop, establish and maintain the electronic deeds registration system'. The system must provide for the 'preparation, lodgement, registration, execution and storing of deeds and documents'.[152] In consultation with the Regulations Board, they must then issue directives on the registration of users as well as on the use of the system.[153] According to clause 3 and subject to section 14 of the Electronic Communications and Transactions Act 25 of 2002, a deed or document generated, registered and executed electronically and any

147 Paddy Harper and Thanduxolo Jika, 'Roof Caves in on Housing Agency' *Mail & Guardian* (14 December 2018).
148 (39602/2015) [2018] ZAGPPHC 76 (15 March 2018).
149 (125/2018) [2018] ZASCA 76 (31 May 2018).
150 [B21A-2018] and [B21B-2018].
151 Clause 3.
152 Clauses 2(1) and 4.
153 Clause 2(2).

other registered or executed deed or document scanned or otherwise incorporated into the electronic deeds registration system by electronic means is for all purposes deemed to be the only original and valid record.

The minister, in consultation with the Regulations Board, may issue regulations pertaining to the system.[154] According to the Memorandum to the Bill, the need for the expansion of the electronic system is necessary as the 'preparation and lodgement by the conveyancer, as well as the processing of deeds and documents by the Registrar of Deeds, take place manually'. It was also foreseen that with the expediting of the land reform process more than 20 million land parcels would have to be registered.

The minister approved rules of the Deeds Registries Regulation Board pertaining to fees in terms of section 10 of the Deeds Registries Act 47 of 1937.[155]

The Community of Grootkraal, Trui Kiewiets and Katrina Mei v Jacobus Du Plessis Botha NO, Estelle Botha NO, Gerhard Botha NO (In their Capacities as Trustees for the time being of the Kobot Business Trust (IT969/2009), Registar of Deeds[156] dealt with an appeal, essentially against the granting of an eviction order.[157] The relevant area in issue comprised a building that was initially used as a church and later as a school, one separate classroom, some outbuildings, a children's outdoor play area and a cultivated plot. The land forms part of the bigger farm Grootkraal owned by the Kobot Trust as represented by its trustees, who are the first to third respondents.[158] The dispute initially arose when the Department of Education, Western Cape decided to close the school and to merge it with another school. As the decision was opposed by the school and its governing body, an interdict was obtained prohibiting the closure or relocation of the school without proper consultation with all the relevant stakeholders. The Trust then lodged an eviction application seeking the eviction of the school from the land.[159] Intervening parties on behalf of the Grootkraal Community[160] relied on use rights in favour of the community, which would preclude an eviction order. On this basis, a counterclaim was lodged seeking an order to register and record a public servitude over Grootkraal. In the court *a quo* Baartman J postponed her decision on the former ground but dismissed the latter. It is against this decision that the applicants were appealing, therefore concerning the community's claim to exercise public rights over the property.[161]

---

154 Clause 5.
155 GG 41669 (31 May 2018) GN R557.
156 (1219/2017) [2018] ZASCA 158 (28 November 2018).
157 The *a quo* matter was heard by Baartman J.
158 Paragraph 1.
159 Paragraph 2.
160 Hereafter referred to as 'the community'.
161 Paragraph 3.

The relevant community consists of individuals who had historical and family ties to the Grootkraal area, where they and their forebears had lived and worked for many generations. The long-standing link with the area and especially with the church on the property was paramount.[162]

As a result of missionary activity in the area, the church was established in the early part of the nineteenth century and ever since then, up until the present day, the community and their forebears had had, as of right, used the property for church-related purposes. From about 1930 the use also included a school in the church building. All of the various church and recreational uses, including the school, took place in the church building and therefore gave rise to a public right, by way of servitude, which vested in the community to use for those purposes – in perpetuity.[163] While three arguments were proffered in support of the community's claim,[164] only one was pursued in court, namely, that a public servitude of use for religious, school and related community purposes existed in favour of the community and that its lawful existence was confirmed by the principles of *vetustas*.[165] With reference to *De Beer v Van der Merwe*,[166] the Court concluded that *vetustas* related to a right that has been exercised against other persons and has been in existence since time immemorial to the extent that no one can tell when and, therefore how, it arose. It was assumed that the right arose lawfully, subject to the other party's being able to rebut that presumption by showing that it had an unlawful origin.[167] *Vetustas* appeared similar to prescription, although it operated differently. Prescription depended upon an act adverse to the interests of the owner and lacking legal authority, whereas *vetustas* presumed a lawful act, although the presumption could be rebutted. Prescription created rights arising from conduct by the claimant and their predecessors in title adverse to and infringing upon the rights of the other party. It created a right and not a rebuttable presumption. Therefore, in contrast, *vetustas* did not create a right, but dispensed with the need to prove its origin. Once the party relying on it had proved the immemorial existence of the state of affairs, it was presumed that such state of affairs had been created in a lawful way. This then resulted in the onus shifting to the other party to prove that it lacked a lawful origin.[168]

The Court forthwith investigated thoroughly the missionary activity in the area in order to determine whether the notion of *vetustas* could be supported.[169] In discussing the meaning of the immemorial usage, Wallis J referred to Watermeyer J, who in *Divisional Council of Fraserburg v Van Wyk*,[170] had held that what was required was proof of the

---

162 Paragraph 4.
163 Paragraph 5.
164 See para 6.
165 Paragraph 7.
166 1923 AD 378.
167 Paragraph 8.
168 Paragraph 9.
169 Paragraphs 22–58.
170 1927 CPD 285 at 306.

existence and the exercise of the right during the memory of the current generation 'which was not restricted to that which persons themselves remembered but extended to things stated to the existing generation by that which preceded it'.[171] Phrased differently, there had to be proof that the right had existed for a very long time and that there was no certain knowledge or information of a different condition or practice having existed. It had to be clear, and the witnesses had to state accordingly, that in their own time and that of their forebears the practice had existed and nothing was heard or reported to the contrary.[172] The Court emphasised that the right sought by the community in this matter was novel and there was no closed list of servitudes.[173] There was therefore no reason why the entitlement of the public or a defined section of the public to use someone's property in a particular way or for a particular purpose could not give rise to a public servitude, the existence of which could be established by proof of the immemorial user. There was thus no legal bar to the community's contention that they were entitled to the registration of a public servitude, provided that it could establish a right to use for religious and educational purposes.[174] From the detailed discussion of the history of the church it became clear that the histories of the church and the Grootkraal community were closely interwoven. The missionary reports were further testimony to that.[175]

Although it could be concluded that the church had existed by the latter stages of the nineteenth century when the community erected a church building, it had its roots at an even earlier time, possibly going back as far as 1838 or earlier. Throughout many decades the community had or has exercised the right to use the property for the purpose of its church and, by extension, its school and related activities.[176] At no point in history did any of the successive owners of the property in question prevent the church from operating or assert that it was operating unlawfully. This in itself was as indication that the use of the property had occurred lawfully.[177] This was sufficient to establish a state of affairs existing from time immemorial.[178]

Accordingly, the appeal was successful and the order was handed down as follows: the community of Grootkraal, being all the families and individuals who live and work on the farms in the valley which is known as the Grootkraal-Kombuys area, as a portion of the public, has the right, in the form of a public servitude, to use and occupy the property

171 Paragraph 14.
172 Paragraphs 11–15.
173 Paragraph 15.
174 ibid.
175 Paragraphs 22–46.
176 Paragraph 47.
177 Paragraph 48.
178 Paragraph 49.

in question.[179] This would be subject to the consent of the Minister of Agriculture under section 6A(1) of the Subdivision of Agricultural Land Act.[180]

The *Community of Grootkraal* case is interesting as it shows the extent to which the courts will go to protect the interests of vulnerable South Africans in the post-apartheid state. It is clear from the factual and historical analysis embarked on by Wallis J that in order to do this, it is sometimes necessary to rely on doctrines not often used, such as the *vetustas* doctrine, since this may still have value and result in the protection and enforcement of rights and entitlements today.

Expropriation

As indicated above, the president appointed a task committee to investigate the possibility of an amendment to section 25 of the Constitution to allow for the expropriation of land without compensation. According to the committee, the two main arguments with regard to section 25 were proffered, namely, (*a*) that it allows for 'just and equitable compensation', which can include zero compensation depending on the circumstance and thereby no amendment was necessary, while (*b*) opponents of the view argued that the Constitution should be clear in this regard and indicate that zero compensation was possible.[181]

Various issues pertaining to land reform were also raised. One critical matter was the failure to implement relevant and effective policies and legislation to address land reform.[182] In other words: even if section 25 were amended, underlying difficulties and problems would prevail which would exacerbate the problem overall. Other arguments raised include that the spatial injustices in cities should be dealt with, lots of land had to be resized—possibly by way of land ceilings—and that the rights of landless people should be dealt with by way of legislation, among other measures.[183] An amendment to the Expropriation Bill, 2019 was submitted to the cabinet for approval, namely, to provide for zero compensation in the case where land is expropriated in the public interest. The circumstances when it could happen are also set out, namely, in the case of labour tenants; where the land is held for speculative purposes; when it is state-owned land; when the land has been abandoned, or where the land value is similar to the present value of direct state investment into the land.[184] An ad hoc commission under the

179 Paragraph 72.
180 Act 70 of 1970.
181 Draft Report (n 1) paras 3.1, 4.2.
182 ibid.
183 ibid para 4.2.
184 Anon, 'Legislation: "Soft" Line on Expropriation in New Bill' *Legalbrief* (12 December 2018).

leadership of Thoko Didiza has to formulate the amendments to section 25 of the Constitution.[185]

Regulations have been issued in terms of the Property Valuation Act 17 of 2014.[186] The Property Valuation Regulations provide, inter alia, for records of valuation instructions and property inspections and a database to be kept by the Valuer-General. The criteria and procedures for the valuation of property identified for the purposes of land reform are also set out specifically. These regulations will come into operation on a date to be published in the *Government Gazette.*

Spatial Planning

Mabelane v Dykema & Another[187] illustrates the confusion that could reign when legislative measures or portions of legislation are declared unconstitutional and where substituting legislation has not been issued. In this case the respondent lodged an application for a filling station near the N2 in the Bela-Bela municipal area. The application was lodged three months before the declaration of the unconstitutionality of Chapters V and VI of the Development Facilitation Act 67 of 1995 came into effect. At that stage the Spatial Land Use Planning Act 16 of 2013 had not yet been passed by parliament—the Act came into effect only in 2015. Mabelane's application was subsequently approved by the Limpopo Development Tribunal acting on a policy statement of the Department of Rural Development and Land Reform that the tribunals should conclude all existing applications but not accept new applications. The majority judgment of Wallis JA indicated that the tribunal could not approve the application after the relevant chapters of the DFA had been declared unconstitutional. The respondent accordingly had to submit a new application and his and the applicant's applications would then have to be considered by the relevant municipality. The Court did not consider section 11 of the Interpretation Act 33 of 1957, which states that:

When a law repeals wholly or partially any former law and substitutes provisions for the law so repealed, the repealed law shall remain in force until the substituted provisions come into operation.

In the absence of any legislation substituting the unconstitutionality finding of the DFA, section 11 may have been applicable—although it does not deal directly with unconstitutionality but with repeal and amendments. The idea behind section 11 is, however, to ensure that an injustice does not occur. Mothle AJA dissented from the judgment and agreed with the court *a quo*, which seems to be more in line with the

185 T Mokone, 'Thoko Didiza Deployed to Committee Amending Section 25' *TimesLive* (7 December 2018).

186 GG 42064 (30 November 2018) GN R1321, R1322.

187 (1054/2017) [2018] ZASCA 174 (3 December 2018).

principles of administrative justice than the mere black-letter interpretation followed by the majority decision.

Sectional Titles

The regulations [188] of the Sectional Titles Act 95 of 1986 were amended. The amendments inserted Regulation 15A to allow for the amendment or withdrawal of an unregistered sectional plan and amend some of the footnotes of the forms available in the Annexure to the regulation.[189]

The minister further published a notice inviting nominations for the Sectional Schemes Management Advisory Council of the Community Schemes Ombud Service, established in terms of section 18(1) of the Sectional Titles Schemes Management Act 8 of 2011.[190]

188 GG 11245 (8 April 1988) GN R664.

189 Regulations 3 and 4 of *GG* 41669 (31 May 2018) GN R557.

190 GG 41685 (8 June 2018) BN 80.

References

Anon, ‘Land Reform: Farmers Warn of Economic Collapse’ *Legalbrief Today* (29 June 2018).

Anon, ‘Litigation: Confusion over District Six Claimants' Representatives’ *Legalbrief* (10 September 2018).

Anon, ‘Legislation: “Soft” Line on Expropriation in New Bill’ *Legalbrief* (12 December 2018).

Boggenpoel Z-Z and Pienaar JM, ‘The Continued Relevance of the *Mandament van Spolie*: Recent Developments Relating to Dispossession and Eviction’ (2013) 46 4 De Jure 998–1021.

Chambers D, ‘District Six Restitution Logjam Broken, Says Gleeful DA’ *TimesLive* (21 August 2018).

Collison C, ‘“Yes to Expropriation” the General Feeling at Upington Public Hearings’ *Mail & Guardian* (28 June 2018).

Constitutional Review Committee, Draft Report on the Possible Review of Section 25 of the Constitution, released 15 November 2018.

Dayimani M, ‘“The Land was Stolen”: Derek Hanekom Backs “Justified” Expropriation’ *TimesLive* (16 August 2018).

Du Plessis W, Pienaar JM and Olivier NJJ, ‘Legislation Affecting Land: An Overview’ 1990 SAPL 266–276.

Harper P and Jika T, ‘Roof Caves in on Housing Agency’ *Mail & Guardian* (14 December 2018).

Mokone T, ‘Thoko Didiza Deployed to Committee Amending Section 25’ *TimesLive* (7 December 2018).

Pienaar JM, *Land Reform* (Juta 2014).

Pienaar JM, ‘Land Reform and Restitution in South Africa: An Embodiment of Justice?’ in J de Ville (ed), *Memory and Meaning* (LexisNexis 2015) 141–160.

Pienaar JM, ‘The Battle of the Bakgatla-Ba-Kgafela Community: Access to and Control of Communal Land’ (2017) 20 PELJ. https://doi.org/10.17159/1727-3781/2017/v20i0a1444

Pienaar JM, Johnson E and Du Plessis W, ‘Land Matters and Rural Development: 2017 (1)’ (2017) 33 1 SAPL. https://doi.org/10.25159/2522-6800/3228

SAHistory Online, ‘Kroondal, Rustenburg’ <https://www.sahistory.org.za/places/kroondal> (accessed 15 December 2018).

Cases

Alexkor Ltd v Richtersveld Community 2004 (5) SA 460 (CC).

Baleni & Others v Minister of Mineral Resources & Others (73768/2016) [2018] ZAGPPHC 829 (22 November 2018).

Community of Grootkraal, Trui Kiewiets and Katrina Mei v Jacobus Du Plessis Botha NO, Estelle Botha NO, Gerhard Botha NO (In their Capacities as Trustees for the time being of the Kobot Business Trust (IT969/2009)), Registar of Deeds (1219/2017) [2018] ZASCA 158 (28 November 2018).

Daniels v Scribante 2017 (4) SA 341 (CC).

De Beer v Van der Merwe 1923 AD 378.

De Reszke v Czeslaw Maras & Others 2006 (1) SA 401 (C).

Delgamuukw v British Columbia [1997] 3 SCR 1010 (SCC).

Divisional Council of Fraserburg v Van Wyk 1927 CPD 285.

Ekurhuleni Metropolitan Municipality & Others v Thubakgale & Others (125/2018) [2018] ZASCA 76 (31 May 2018).

Herbert NO & Others v Senqu Municipality & Others [2018] 4 All SA 677 (ECG).

Land Access Movement of South Africa & Others v Chairperson of the National Council of Provinces & Others 2016 (5) SA 635 (CC).

Mabelane v Dykema & Another (1054/2017) [2018] ZASCA 174 (3 December 2018).

Makgoba & Others v Ledwaba NO & Others (054/2018) [2018] ZASCA 181 (4 December 2018).

Maledu v Itereleng Bakgatla Minerals Resources (Pty) Limited (CCT265/17) [2018] ZACC 41 (25 October 2018).

Minister of Rural Development and Land Reform v Normandien Farms (Pty) Ltd & Others, Mathibane & Others v Normandien Farms (Pty) Ltd & Others [2018] 1 All SA 390 (SCA).

Nkwetsha v Minister of Law and Order & Another 1988 (3) SA 99 (A).

Nomkhitha Ntantana v Mhontlo Local Municipality; the Municipal Manager: Mhontlo Municipality (3412/2017) [2018] ZAECMHC 13 (27 February 2018).

Prinsloo v Ndebele-Ndzundza Community 2005 (6) SA 144 (SCA).

Rahube v Rahube & Others (CCT319/17) [2018] ZACC 42 (30 October 2018).

Salem Party Club v Salem Community [2017] 1 All SA 712 (SCA).

Salem Party Club v Salem Community (CCT26/17) [2017] ZACC 46 (11 December 2017).

Thubakgale & Others v Ekurhuleni Metropolitan Municipality & Others (39602/2015) [2018] ZAGPPHC 76 (15 March 2018).

Tsilhqot in Nation v British Columbia [2014] 2 SCR 257.

Ughala & Others v Laws Stores CC and Nelson Mandela Bay Metropolitan Municipality (2645/2017) [2018] ZAECPEHC 7 (20 February 2018).

Legislation

Black Administration Act 38 of 1927.

Constitution of the Republic of South Africa, 1996.

Communal Land Rights Act 11 of 2004.

Communal Land Rights Bill of 2017.

Communal Property Association Act 28 of 1996.

Communal Property Associations Amendment Bill (B12B-2017).

Development Facilitation Act 67 of 1995.

Electronic Communications and Transactions Act 25 of 2002.

Electronic Deeds Registration Bill (B35B-2017).

Expropriation Act 63 of 1975.

Extension of Security of Tenure Act 62 of 1997.

Interim Protection of Informal Land Rights Act 31 of 1996.

Land Affairs General Amendment Act 61 of 1998.

Land Reform: Land and Assistance Act 126 of 1993.

Land Title Adjustment Act 111 of 1993.

Mineral and Petroleum Resources Development Act 28 of 2002.

Promotion of Access to Information Act 2 of 2000.

Property Practitioners Bill (B21A-2018) and (B21B-2018).

Property Valuation Act 17 of 2014.

Restitution of Land Rights Act 22 of 1994.

Restitution of Land Rights Amendment Act 15 of 2014.

Restitution of Land Rights Amendment Bill (B19B-2017).

Sectional Titles Act 95 of 1986.

Sectional Titles Schemes Management Act 8 of 2011.

Spatial Land Use Planning Act 16 of 2013.

Subdivision of Agricultural Land Act 70 of 1970.

Upgrading of Land Tenure Rights Act 112 of 1991.

Government Gazettes

GG 373 (16 November 1962) Proc R293.

GG 11245 (8 April 1988) GN R664.

GG 41456 (23 February 2018) GN 133.

GG 41473 (2 March 2018) GN 167.

GG 41512 (23 March 2018) GN 150.

GG 41669 (31 May 2018) GN R557.

GG 41667 (1 June 2018) GN 550.

GG 41685 (8 June 2018) BN 80.

GG 41887 (7 September 2018) GN 539.

GG 41903 (14 September 2018) GN 946.

GG 42037 (16 November 2018) GN 1250.

GG 42046 (20 November 2018) GN 1259.

GG 42053 (23 November 2018) GN 1289.

GG 42064 (30 November 2018) GN R1321, R1322.

GG 42068 (30 November 2018) GNN 740, 749.

GG 42068 (30 November 2018) GN R1311.

GG 42111 (14 December 2018) GN 1384.