

Land Matters and Rural Development: 2023

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Abstract

The most important land-related developments in 2023 are set out. Interesting and important developments took place within the policy, legislative and case law contexts. In this regard, the urgent need for land—suitable for residential and agricultural purposes—was again underscored. Unlawful occupation of land and corresponding eviction within urban areas continued, underscoring the need for policy initiatives like the Draft White Paper for Human Settlements. In the context of rural areas, the eviction of occupiers on farmland continued. The note deals with redistribution, restitution and tenure reform developments in the land reform arena, coupled with developments relating to new courts, deeds and registries, housing generally and traditional and Khoi-San authority constructs.

Keywords: Land reform; redistribution; tenure reform; restitution; housing; unlawful occupation of land and eviction; rural development and land reform; deeds and registries; land court; traditional courts; traditional and Khoi-San constructs

General

Interesting judgments were handed down in the report period, within the contexts of redistribution and restitution, with a critical Constitutional Court (CC) judgment dealing with the constitutionality of the Traditional and Khoi-San Leadership Act 3 of 2019, a statutory measure in relation to eviction, the Extension of Security of Tenure Act 62 of 1997 (ESTA) or the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE), was furthermore dealt with specifically. This note deals with the most important land-related developments in 2023.¹

Land Restitution

Several land parcels were restituted in both urban and rural areas, for example, 100 families will return to Simon's Town sixty years after they were forcibly removed. Many other claimants chose financial compensation as the land restitution process has taken very long.² In Mpumalanga, the Minister of Public Works and Infrastructure released over 1,000 ha of land (R7,4m) to assist the land claimants in the Kaapsche Hoop area.³ By March 2023, the Department of Agriculture, Land Reform and Rural Development (DALRD) indicated that 7,000 land claims were still outstanding although 83,762 land claims were settled.⁴ The Land Claims Commission spent more than three billion rands on compensation to land claimants and buying land during the 2022/2023 financial year.⁵ The Commission would require an additional sixty-five billion rands to finalise the remaining land claims.⁶ While some progress was made, not all land restitution projects were successful, including in KwaZulu Natal where land allocated under the restitution programme was captured by individuals for their own enrichment, leaving the rightful beneficiaries destitute.⁷

Restitution and Just and Equitable Compensation

*Izaacs v Government of the Republic of South Africa*⁸ is an important judgment that provides valuable guidelines for determining compensation under the Restitution of Land Rights Act⁹ (Restitution Act), where actual restoration is impossible. The plaintiff is the descendant of the original deceased claimant, forming part of the Izaacs family who lost certain properties due to racially discriminatory practices of the erstwhile Union and apartheid governments. A restitution claim was lodged and given that no

1 Not all case law and legislation of 2023 will be discussed in detail due to the scope of the note.

2 Lucas Nowicki, 'Simon's Town Land Claimants Set to Return 60 Years After Forced Removal' *Daily Maverick* (27 January 2023).

3 Anon, 'DPWI Approves Release of 1,199ha of Land to Settle Mpumalanga Restitution Claim' *Biznews* (30 January 2023).

4 Nicola Daniels, 'Land Reform at a Snail's Pace' *Cape Times* (10 March 2023).

5 Anon, 'Land Claims: R3bn Spent on Compensation – Commission' *Legalbrief* (9 October 2023).

6 Anon, 'Land Reform: R65bn to Settle Remaining Claims – Minister' *Legalbrief* (28 April 2023).

7 See Don Pinnock, 'How to Steal a Game Reserve: Poach Animals, Sell Plots and Threaten Those in Your Way' *Daily Maverick* (2 October 2023).

8 [2023] ZALCC 30 (4 October 2023).

9 22 of 1994.

specific restoration was possible because of particular considerations,¹⁰ the only issue before the court was the amount of compensation to be awarded.¹¹ The plaintiff claimed R1,5 million for the dispossession and R8,562 million for the loss of the two erven. In response, the defendant averred that the family had received partial compensation, that the total amount of compensation should be R1,149 830 and that the family was not entitled to be compensated for the past loss of the use of the property.¹²

Justice Spilg delineated what restitution in the form of compensation entailed, setting out the law first, specifically the judgment of *Florence v Government of the RSA*.¹³ Critical for this discussion was section 33 of the Restitution Act, in particular, section 33(eB)—the history of dispossession, the hardship caused, the current use of the land and the history of acquisition and use of the land; and section 33(eC): in the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money.¹⁴

Of relevance was the issue of market value.¹⁵ The historic market value of the erven at the time of dispossession was £1, 200, and when adjusted by the Consumer Price Index (CPI) the current value was R475, 000. However, contemporary sales indicated a value of R1,5 million, given that the erven were being cultivated very effectively as vineyards and used for grape farming. The State claimed that the family had received some consideration as was contemplated in section 33(eA) of the Act,¹⁶ although no evidence of any payments could be found.¹⁷

Thereafter the court specifically considered the various factors listed in section 33 of the Restitution Act and highlighted ‘... that some consideration at least be given to the discrepancy, if any, between the value of the land based on its current natural attributes if it was capable of restoration and the CPI adjusted methodology in calculating the market value at the time of dispossession.’¹⁸ The court was satisfied that it was unlikely that the family would have disposed of the erven, given that they acquired the properties over a long period and were an astute and entrepreneurial family. But for the losses that they suffered, the evidence demonstrated that the family would have remained on the land indefinitely and would have continued to use the erven optimally and effectively.¹⁹

As mentioned, the plaintiffs also claimed compensation for the loss of use of the erven since dispossession, valued at R5,496 million, on the apparent basis of the *aquilian*

10 See eg the background in paras 7–11.

11 Paragraphs 14–15.

12 Paragraph 16.

13 2014 (6) SA 456 (CC).

14 Paragraph 19.

15 Paragraph 22 and further.

16 Paragraph 26.

17 Paragraph 30.

18 Paragraph 34.

19 Paragraph 38.

action for actual patrimonial loss.²⁰ The court highlighted that compensation and considerations under section 33 remained umbilically linked to the loss of land and issues like dignity, equality and justice.²¹ Ultimately, the dispossession resulted in a complete reversal of the Izaacs family's fortunes.²² Therefore, how could the court correlate in monetary terms the hardship endured by previous generations to an appropriate award of compensation for the present generation to give effect to section 33?²³

By putting the plaintiff's claim on the same footing as an *aquilian* action, the fundamental nature of restitution under the Restitution Act would be ignored.²⁴ Compensation under the restitution programme and the law of delict was not identical: It did not aim to restore claimants in current monetary terms to the exact position they would have been had they not been dispossessed.²⁵ If that had been the case, then a fiction of continuous possession of the properties would have to be pursued. Instead, as advocated in the *Florence* judgment, a meaningful way a court could compensate a claimant for not being able to return to the land was by taking into account the CPI-adjusted value of the land at the time of dispossession and the other section 33 considerations.²⁶

Here specifically, the considerations of sections 33(b), (c), (eB) and (f) should result in a substantial increase to the amount of R475, 000 determined as the CPI-adjusted value of the erven at the time of the dispossession. The circumstances surrounding the dispossession were important, specifically the racially motivated disrespect, indignity and economic exploitation the family endured as so-called 'Basters' at the hands of the then-government, its leaders and its officials.²⁷ A final amount of R1,5 million was thus awarded.²⁸

Kind of Land Claim?

Whether it was legally permissible for a land claim lodged by a person or family to be converted into a community claim by the Commission was dealt with by the SCA in *Minister of Agriculture, Land Reform and Rural Development v Ndumo (obo Emdwebu Community)*.²⁹

20 Paragraph 44.

21 Paragraph 45.

22 Paragraph 47.

23 Paragraph 50.

24 Paragraph 51.

25 Paragraph 52.

²⁶ Paragraph 54.

27 Paragraph 58.

28 Paragraph 59.

29 [2023] ZASCA 136 (19 October 2023).

The claim was lodged in 1998³⁰ by Mr Ndumo. As part of the investigation process in 2017, the claim was described as ‘a community claim for the Emdwebu Community.’ The corresponding Rule 5 Report was signed in 2019 and in a 2020 notice to that effect, it described the claimant as Ndumo, ‘on behalf of the Emdwebu Community.’³¹ The Commission later made an unsigned settlement offer for monetary compensation, resulting in all 289 members receiving roughly R320,000 each. However, when the memorandum was audited, it became clear that the claim form submitted did not refer to it being lodged as a community claim or on behalf of any particular community. On urgent application, the Land Claims Court (LCC) dealt with the matter and was satisfied that the claim was gazetted as a community claim, that there were lists of names setting out who would receive monetary compensation, that there was no prejudicing of any parties and that there were no competing claims.³²

On appeal, the court per Mothle JA (with Zondi, Carelse and Matojane JJA and Siwendu AJA concurring) first dealt with whether there was indeed a ‘settlement’ on the table. The ‘settlement’ referred to by Mr Ndumo was a copy of a signed route form, namely, a means of internally circulating a document in accordance with a particular hierarchy of officials within the Department and the Commission.³³ Essentially, it was a document that would authorise the Commission to conclude and sign the settlement offered to the respondents. It also recommended that the Minister makes funds available for the compensation after the settlement had been submitted to the LCC under section 42D of the Restitution Act and that it should authorise the Commission to sign the settlement offer. The audit led to an objection to the implementation of the recommendation to settle, which resulted in the Commission not signing the settlement offer. That then led to the *mandamus* application to the LCC alluded to above. In this light, the SCA was satisfied that the matter was indeed not settled as no agreement under section 42D of the Act had been concluded.³⁴

The court thereafter set out the four procedural phases in the processing of restitution claims: lodgement of the claim; acceptance and publication of the claim in the gazette; investigation of the claim and filing of the relevant reports; and finally, the referral of the claim to the court under sections 14 and 42D of the Act.³⁵ On the facts, it was clear that the claim filed by Mr Ndumo was not dealt with in accordance with the sequence set out above.³⁶ But could the claim be converted into a community claim through condonation, having regard to sections 2, 10 and 11 of the Restitution Act? The claim form was completed by Mr Ndumo with reference to restitution of ‘his rights in land,

30 See for background paras 4–9.

31 Paragraph 5.

32 Paragraph 9.

33 Paragraph 11.

34 Paragraph 12.

35 Paragraph 13.

36 Paragraph 14.

belonging to his late father.’³⁷ The claim form was incomplete—regarding the location of the property, there was only a reference to ‘Emdwebu,’ with no reference to the Emdwebu community. The form reflected that Mr Ndumo acted in his capacity as a descendant of the late Nokhenke Ndumo, not as a representative of the Emdwebu Community.³⁸ While the LCC found that it was permissible for the Commission to condone the conversion of the claim in the present instance, the LCC previously found that such a conversion was not permissible in *Minnaar v The Regional Land Claims Commissioner: Mpumalanga*.³⁹ Yet, both cases were similar.

Given the above, the court concluded that the LCC had erred in finding that when Mr Ndumo lodged the claim in 1998, he intended it to be a community claim.⁴⁰ While the idea to convert an individual (or family) claim to a community claim in order for more persons to benefit therefrom was a benevolent idea, the formalities had not been complied with. Further, the Commission’s decision to accept and gazette the Ndumo family claim as a community claim was not authorised by the Act. The appeal thus succeeded. Classifying a claim as either an individual (or family) claim or community claim is not a status-related issue only; it also has implications for how the claim is to be processed further and ultimately finalised.

Land Reform

Old Order Rights

In *Blaines Property (Pty) Ltd v Macevele*,⁴¹ the court stated its dismay that it still had to interpret the former apartheid legislation pertaining to permissions to occupy (PTO).⁴² The applicants requested the court to nullify another PTO granted over the same area as set out in their PTO. The first respondent stated that his PTO was not included in the applicants’ PTO, that he established a bricklaying business on the land and that he paid the requisite fee. The applicants argued that their PTO was lawfully granted and approved by the traditional authority, municipality and relevant government departments.⁴³ The applicants applied for a business site, complying with all the legal perquisites. The applicant also had to establish a trust to benefit the community. They also paid the requisite R7,000. Both parties claimed that their PTOs were valid. The court found that the applicants followed the legal route and obtained all the permissions while the first respondent merely stated that the fee was paid, but did not indicate the

37 Paragraph 18.

38 Paragraph 19.

39 ZALCC 12 (8 December 2006) see para 23.

40 Paragraph 27.

41 (045/2021) [2023] ZALMPHHC 14 (12 December 2023).

42 Paragraph 1–3; referring to GG 2486 (11 July 1969) Proc R188.

43 Paragraph 3–4.

route he followed to obtain the permission. The first respondent's PTO was therefore declared null and void.⁴⁴

Interim Protection of Informal Land Rights Act 31 of 1996

The Act was extended for another year for the 27th time as the government is still struggling to find a solution for dealing with the pre-1996 tenure rights, as is also apparent from the case discussed above.⁴⁵

Upgrading of Land Tenure Rights

To solve some of the challenges of land tenure, draft regulations concerning the conversion of land tenure rights in terms of the Upgrading of Land Tenure Rights Act 112 of 1991 were published for comment in November 2023.⁴⁶ The draft regulations provide for the application process as well as the forms that applicants should use.⁴⁷ The Minister must give notice of such an application in accordance with the regulations.⁴⁸ The procedure for objections to the application is furthermore prescribed.⁴⁹ Once the decision is final, the Minister must inform the Registrar of Deeds.⁵⁰ As the courts made divergent decisions as to upgrading, the regulations at least provide a procedure that needs to be followed for both the application and the objection to the upgrading.⁵¹ These developments were necessitated by various Constitutional Court judgments, notably *Rahube v Rahube*,⁵² in terms of which glaring gaps and challenges within this domain were pointed out.

Communal Property Association Act 28 of 1996

The challenges with the management of communal property associations (CPA) remain with community members trying to solve their challenges through the courts. The issues range from dysfunctional CPAs, mismanagement, loss of land and the inclusion of non-

44 Paragraph 18–27.

45 GG 49603 (3 November 2023) GN 4026.

46 GG 49720 (17 November 2023) GN 4068 and GG 49787 (30 November 2024) GN 4419. The final regulations were published in 2024 GG 50705 (24 May 2024) GN 4886.

47 Regulation 2, Annex Form 1.

48 Regulation 3, Annex Form 2.

49 Regulation 4, Annex Form 3.

50 Regulation 5.

51 For case law in this regard, see Juanita Pienaar, Willemien du Plessis and Ebrezia Johnson, 'Land Matters and Rural Development: 2022' (2023) 38(2) SAPL 4–5 <<https://doi.org/10.25159/2522-6800/14902>>.

52 2019 (2) SA 54 (CC) See for a discussion of the case law developments Juanita Pienaar, 'Living in the Shadow of Apartheid: The Continued Struggle for Tenure Security in Former National States and Self-governing Territories' in Zsa-Zsa Temmers Boggenpoel (ed), *Law, Justice and Transformation* (LexisNexis 2021) 215–244.

beneficiaries.⁵³ The Land Court or a mediator will in future have jurisdiction to deal with disputes amongst CPA members.⁵⁴

Ingonyama Trust

The year 2023 was characterised by challenges to appoint a chairperson for the Ingonyama Trust Board.⁵⁵

Extension of Security of Tenure Act 62 of 1997

In *Pieters v Stemmet NO*,⁵⁶ the question was, which statute regulated eviction? The ESTA or the PIE? If the relevant land was not in a township, or, despite being in a township the land was designated for agricultural purposes, then ESTA was relevant and not PIE. To that end, an exposition of the relevant legislative framework was first provided.⁵⁷ This was followed by an exposition of the historic recognition of townships in the Western Cape.⁵⁸ To be determined was whether a township, ‘otherwise recognised as such in terms of any law,’ was present here, involving the following questions:⁵⁹ whether the property was part of a subdivision; whether the property was used mainly for residential purposes; whether, within the subdivided parts, there were public spaces in the form of streets or roads; whether such streets or roads shown on a general plan of a township were registered in any deeds registry; and whether the municipality zoning took the property out of the ambit of a township. These questions were all forthwith discussed.⁶⁰ The relevant property fell within the land that was subdivided pursuant to the approval of a general plan which incorporated public roads and streets under the control of the metropolitan council and which general plan was approved by the Surveyor-General and registered in the deeds registry. These attributes rendered the property as falling within the boundaries of a township for purposes of section 2(1) of ESTA.⁶¹ However, every other property in the subdivision was zoned ‘rural.’

53 See eg, *Leogale and Another v Diratsagae Communal Property Association* (M520/2021) [2023] ZANWHC 6 (7 February 2023); *Mnisi v Mawulu Communal Property Association* (083533/2023) [2023] ZAGPPHC 1888 (2 November 2023); *N'wandlamhari Communal Property Association v Mathebula* (LCC 89/2019) [2023] ZALCC 27 (10 August 2023); *Khutso Naketsi Communal Property Association v Khutso Naketsi Agri (Pt) Ltd* [2023] ZAGPPHC 394; 61961/2022 (25 May 2023).

54 Amended ss 1 and 13(1) of the CPA Act, Schedule item 6, Land Courts Act 6 of 2023.

55 Paddy Harper, ‘Ingonyama Trust Chairperson Defies Zulu King’s Decision to Fire Him’ *Mail & Guardian* (25 April 2023); Anon, ‘General: Ingonyama Trust Board in Limbo.’ *Legalbrief* 22 February 2023.

56 [2023] ZALCC 4 (3 February 2023).

57 See paras 13–25.

58 Paragraphs 26–37.

59 Paragraph 37.

60 Paragraph 37 and further.

61 Paragraph 54.

Importantly, that did not automatically mean that the land was used for agricultural purposes.⁶²

Apart from the factual determination of the kind of land in question, the court also mentioned other considerations, including that the outcome had to be consistent with constitutional values, other legislation that the legislature had in mind, as well as other relevant provisions in ESTA.⁶³ In this light, the court reached the following conclusions:⁶⁴ Land would be included under ESTA if, despite being within a township, it was nonetheless designated for agricultural purposes and importantly, the legislature itself recognised that individual pieces of land designated for agricultural purposes could also be found in the heart of townships.⁶⁵ In this instance the relevant land fell within a township—the mere fact that it was zoned ‘rural’ did not mean that it was designated for agricultural purposes. This meant that ESTA was not applicable. It is a very lengthy, systematic judgment that provides valuable guidelines in ascertaining whether a specific parcel of land was subject to ESTA and whether another measure, for example, PIE, was applicable instead. Importantly, the mere zoning of land within a township as rural land would not automatically result in the application of ESTA. Whether the land is actually utilised for agricultural purposes would be crucial.

While *Hohenfelde Dohne Merinos (Pty) Ltd v Louw*⁶⁶ concerned an eviction application under section 4 of PIE, one of the questions to be determined was whether ESTA was applicable. The other issues to be dealt with included: (a) whether the eviction was properly authorised; (b) whether the applicant was the ‘person in charge;’ (c) whether the respondents were unlawful occupiers; (d) whether it was just and equitable to grant an eviction order; and (e) if all the requirements had indeed been met, what would constitute a just and equitable date for eviction?

Mr Louw was the owner of the property, which he vacated in May 2019⁶⁷ and the father of the first and second respondents, who occupy the property in question, in terms of which no rental was paid. Since 2016, a series of contracts had been entered into by the applicant and Mr Louw, inter alia two lease agreements, in terms of which the whole of the property was leased by the applicant, including the improvements thereon. The applicant was entitled to use the property for sheep farming and ancillary activities. The applicant paid rent and covered expenses for water and electricity usage on the property. In January 2022, the respondents were given a one-month notice to vacate the property, which they did not do.

62 Paragraph 55.

63 Paragraph 57.

64 Paragraph 75.

65 Paragraph 75.

66 [2023] case number 5852/2022 (30 October 2023) High Court, Western Cape Division.

67 See for more detail paras 3–8.

Could the applicant lodge an eviction application? Was the applicant a person in charge for purposes of PIE? The property belonged to Mr Louw, who leased the whole of the property to the applicant, constituting ‘the buildings, installations ... on the farm.’⁶⁸ The homestead occupied by the respondents ‘was not specifically excluded in the lease.’⁶⁹ While they intended to rectify the lease agreement, no such proceedings followed. The court per Leslie AJ was thus satisfied that the applicant was the person in charge, as contemplated in section 1 of PIE.⁷⁰

The next question was whether the respondents were unlawful occupiers under PIE. While the respondents accepted that the homestead was not excluded from the lease agreement, they nevertheless alleged that they had an oral lease agreement, concluded with the owner, Mr Louw; consequently, they had consent to occupy it.⁷¹ The court found an oral agreement or consent from Mr Louw to occupy ‘highly improbable,’ given the very clear terms of the written lease agreement. The court found that the respondents were indeed unlawful occupiers, which led to the determination of whether PIE or ESTA had been applied. The court highlighted that the application of ESTA in a particular case needed to be pertinently alleged and proved, for example, by placing evidence before the court that the income was less than the threshold required for occupiers under ESTA. As no proof was provided, the onus had not been met.

But would the granting of the eviction order be just and equitable? The court quoted the well-known *Grobler v Phillips*⁷² case where the CC stated that the main purpose of PIE was to prevent arbitrary deprivation of property.⁷³ Preventing the arbitrary deprivation of property was most certainly not the main goal of PIE, given the historical and contextual background linked to the racial spatial allocation of and development of land for housing.⁷⁴ Nevertheless, in these particular circumstances, the court was satisfied that the respondents could relocate, that they had the means to find alternative accommodation and that it was unreasonable to expect to continue residing on the property, rent-free.⁷⁵ The court was further satisfied that the applicant was prejudiced in his sheep farming enterprise.⁷⁶ The court was satisfied that the granting of an eviction order would indeed be just and equitable, and set a just and equitable date for the eviction. Important from this judgment as well as the *Piters* judgment above is that the location of the land is imperative for determining whether ESTA is applicable and if

68 Paragraph 21.

69 Paragraph 22.

70 Paragraph 23.

71 Paragraph 29.

72 [2022] ZACC 32 (20 September 2022).

73 Paragraph 35.

74 See for a detailed discussion of this case Juanita Pienaar, ‘The Tale of Two Women: Is the Transformative Thrust Embodied in the Property Clause a Theory or a Lived Reality Where Land Reform is Concerned?’ in Zenker O, Walker C and Boggenpoel Z (eds), *Beyond Expropriation Without Compensation Law, Land Reform and Redistributive Justice* (CUP 2024) 95–117.

75 Paragraph 38.

76 Paragraph 39.

reliance is on ESTA, then particular facts need to be placed before the court to indicate such application, for example, the income of the party averring to be an occupier.

Land Court Act

The Land Court Act 6 of 2023 was assented to on 16 September 2023.⁷⁷ The Act provides for the establishment of a Land Court and appeals against decisions of the Land Court. It also provides for the administration and judicial functions of the Court and sets out the jurisdiction of the Court and magistrates' court for certain land-related matters. Notably, much emphasis is also placed on mediation procedures. In essence, this Act is giving effect to section 25 of the Constitution, which provides that the state is obligated to take reasonable and legislative measures within its available resources to foster conditions which enable citizens to gain access to land on an equitable basis.

Chapter 2 of the Act states that the Land Court is established in relation to matters arising from the Restitution of Land Rights Act 22 of 1994 or any other legislation expressly provided therefor. The Land Court is a superior court that has the authority, inherent powers and standing in relation to all matters under its jurisdiction. Accordingly, the Land Court is equal to a division of the High Court of South Africa and as such has the same jurisdiction as provided to courts of that standing in the Superior Courts Act. The Land Court is a court of record and all hearings in the Court must be conducted in an open court, except in so far as the Court may in special cases direct otherwise.

It is hoped that the new Land Court, to be put into operation in the course of 2024, would expedite the process of land reform and attend to matters in a more effective and focused manner.

Unlawful Occupation and Eviction

Housing

During 2023, several protests responding to the treatment of the homeless occurred.⁷⁸ Evictions and relocations remain emotional concerns. In the case of the *City of Cape Town v Commando*,⁷⁹ the SCA found that Cape Town's emergency housing programme was constitutional.⁸⁰ The SCA reaffirmed that the provisioning of emergency housing was included in section 26 of the Bill of Rights. The SCA stated that '[t]he central issue in this appeal is whether that constitutional obligation extends to making temporary

77 GG 49372 (27 September 2023).

78 See, eg Tamsin Metelerkamp, 'State of the Nation — Housing Rights Activists March Against "Abuse" of Landless People in Cape Town' *Daily Maverick* (8 February 2023).

79 *City of Cape Town v Commando and Others* [2023] 2 All SA 23 (SCA); 2023 (4) SA 465 (SCA).

80 Paragraphs 1–2.

emergency accommodation available at a specific location.’⁸¹ The Court ordered the municipality to provide emergency housing as near as possible to where the homeless resided. It found that the Court a quo erred as

[i]t is not for the courts to tell the government how to upgrade the area. This is a matter for the government to decide. The fact that there may be other ways of upgrading the area without relocating the residents does not show that the decision of the government to relocate the residents is unreasonable. It is not for the courts to tell the government how best to comply with its obligations.⁸²

The applicants should furthermore be treated with ‘dignity and care.’⁸³ In September 2023, the Consolidated List of Restructuring Zones for the City of Cape Town was approved providing more clarity on where social housing projects can be erected.⁸⁴

The case of *Living Africa One (Pty) Ltd v Ekurhuleni Metropolitan Municipality and Another*⁸⁵ constituted an appeal against the court a quo’s decision to hold the respondent in contempt for its failure to provide temporary emergency accommodation to the evictees from private land.

In December 2023, the Gauteng premier instituted a commission of inquiry into the fire in a building in Johannesburg where 77 people died and many more were injured. While the rooms were rented out to tenants, the building was dilapidated, and the building infrastructure was not maintained.⁸⁶

Given the state of affairs, the government introduced various new measures to address the housing crisis. In January 2023, the Norms and Standards for Rental Housing, published in terms of the Housing Act 107 of 1997 stated the following:⁸⁷

Well designed and well-located housing enhances the social and economic value of housing. Therefore, it is important that housing is not only well constructed, meeting a set of building standards and material specifications, but should also meet a set of qualitative standards that address issues such as space standards, typologies and environmental issues. Challenges that are occurring due to climate change also require consideration in terms of ensuring that buildings can cope with rapidly changing temperatures and that the use of scarce resources such as water is optimised.

The Norms and Standards are applicable to ‘Public Sector Rental Housing; Social Housing; Community Residential Units; Private Sector Rental Housing; and Backyard Rentals.’⁸⁸ The norms and standards for Public Sector Rental housing refer, amongst others, to the nature of the property, its utilities and amenities, the lease agreement and

81 Paragraphs 6–7.

82 Paragraph 58.

83 Paragraph 75.

84 Social Housing Act 16 of 2008 - GG 49325 (22 September 2023) GN 3902.

85 [2023] 4 All SA 111 (GJ); 2023 (6) SA 551 (GJ).

86 Samantha Granville, ‘Johannesburg Fire: Hijacks and Death Traps in a Crumbling South African City Centre’ *BBC* (3 September 2023). Also see Ivan Turok and others, ‘Enabling Grassroots Solutions to the Urban Housing Problem’ *Mail & Guardian* (24 October 2023).

87 GG 47883 (20 January 2023) GN 2941, Introduction.

88 Introduction and paras 7–11 Part B. Part A provides an overview and the legislative context.

environmental sustainability.⁸⁹ If the Norms and Standards are enforced, it will definitely provide a habitable environment for renters and prevent exploitation. However, allegations of corruption, fraud and extortion still mar housing projects.⁹⁰

In December 2023, a Draft White Paper for Human Settlements was published for comment.⁹¹ The White Paper refers to adequate housing that includes the following key elements, namely ‘security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy.’ The provisioning of adequate housing should be broadly interpreted to include access to land, a serviced site and access to building material to build on a serviced site, amongst others.⁹² The policy vision is stated as ‘[t]ransformed housing and human settlements dispensation for sustainable socioeconomic growth and improved livelihoods,’ while the objectives deal with policy and governance.⁹³ The White Paper stresses, amongst others, the upgrading of informal settlements and measures to address the rental crisis as set out above.⁹⁴ Although the White Paper’s proposed policy measures are laudable, the implementation thereof will ultimately speak to its success.

Deeds Registry

The Regulations of the Deeds Registries Act 47 of 1937 were amended to provide for a transparent process before any certified copies of any deeds are issued.⁹⁵ The applicant must publish a notification of the intent to apply for the certified copy in a newspaper (for a notarial bond in more than one) circulating in the area where the land is situated. The registered holder of a notarial bond that requires cancellation of a bond that has been lost or destroyed needs to publish such notice at his or her own expense.

Traditional Governance

In *Mogale v Speaker of the National Assembly*,⁹⁶ the Traditional and Khoi-San Leadership Act⁹⁷ (TKLA) was declared unconstitutional. This judgment followed previous judgments in the land reform domain where legislation was declared unconstitutional, including the *Tongoane* judgment with respect to the Communal Land Rights Act 11 of 2004⁹⁸ and *Land Access Movement of South Africa v Chairperson*,

89 Paragraphs 7.2.1–7.2.4.

90 See, eg Magnificent Mndebele, ‘Property Mogul Flips R86m Land Parcel to Gauteng Housing Department for R244m’ *Daily Maverick* (1 March 2023); Tsoanelo Sefoloko, ‘R83m and Three and a Half Years Later Only One RDP House to Show For It’ *GroundUp* (16 June 2023); Anon, ‘Crackdown on Construction Mafias in South Africa – Over 700 Arrests So Far’ *BusinessTech* (20 December 2023); Soyiso Maliti, ‘SA Construction Mafia: 183 Projects Worth R63bn Have Been Hit by Extortion Since 2019’ *News24* (10 July 2024).

91 GG 49895 (18 December 2023) GN 4206.

92 Paragraph 1.1.

93 Paragraphs 1.5.1–1.5.2.

94 Paragraphs 3.4 and 3.6.

95 Substitution of regulations 88(1E) and 88(11B)(a) - GG 466 (29 March 1963) GN R474.

96 2023 JDR 1816 (CC).

97 3 of 2019.

98 *Tongoane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC).

*National Council of Provinces*⁹⁹ judgment dealing with the Restitution Amendment Act.¹⁰⁰ With respect to both these legislative measures, remedial legislation is still outstanding.

The current application was under section 167(4)(e) of the Constitution for an order declaring that the National Assembly, the National Council of Provinces (NCOP) and the nine provincial legislatures failed to fulfil their constitutional obligations to reasonably facilitate public involvement in the passing of the TKLA. The unanimous judgment penned by Theron J departed from the point that the Constitution's vision of democracy included representative and participatory elements,¹⁰¹ and that participation in law-making was part and parcel of the 'casting a ballot' process.¹⁰²

The TKL Bill was introduced in September 2015, and in January 2016 submissions were invited, followed by meetings in the nine provinces in the period February 2016 to August 2017, during which many alleged deficiencies were recorded by monitors. The National Assembly passed the Bill and referred it to the NCOP in November 2017. Between April to August 2018, the provincial legislatures conducted public hearings and adopted their negotiating mandates. Various alleged deficiencies were again recorded. Before the Bill was signed, the applicants' attorneys recommended to the president that the Bill ought to be referred back to Parliament. Yet, on 20 November 2019, the TKLB was signed into law. The applicants' attorneys thereafter indicated that a constitutionality challenge would follow, given the deficient public involvement, arguing that the coming into operation of the Act be stayed until the constitutionality challenge had been concluded. The commencement date of the Act was thereafter published as 1 April 2021, followed by this application in December 2021.

Various questions were dealt with, including: whether the Court had exclusive jurisdiction; whether the applicants had standing; what the prescribed standards were for public participation; whether the Parliament and the provincial legislatures met those standards; and finally, if not, what the most appropriate remedy would be?¹⁰³ The Court was satisfied that it had jurisdiction generally.¹⁰⁴

At the heart of the matter was the obligation to facilitate public participation and the concomitant standards.¹⁰⁵ Public participation was a crucial part of participatory democracy and law-making that afforded the public a meaningful opportunity to participate in the legislative process in terms of which the court has set a standard,¹⁰⁶

99 2016 (5) SA 635 (CC).

100 15 of 2014.

101 Paragraph 2.

102 Paragraph 4.

103 Paragraph 13.

104 Paragraph 17.

105 See para 32 and further.

106 Paragraph 33.

namely, whether Parliament's process was reasonable.¹⁰⁷ This entailed a reasonable opportunity being 'capable of influencing the decision to be taken.'¹⁰⁸ In this process, South Africa's obligations under international law also entered into the picture.¹⁰⁹ All in all, the following factors were relevant: (a) what Parliament itself has deemed to be reasonable and how such public participation would be facilitated; (b) the importance of the relevant legislation and its impact on the public; and (c) time constraints on the passage of a particular bill and the potential expense.¹¹⁰ Each of these factors was forthwith dealt with in the judgment handed down.

Regarding the first factor, Parliament had already codified the level of participation in its Framework and Practical Guide, including amongst others that pre-hearing workshops should be conducted.¹¹¹ Furthermore, the importance of this Act had also already been acknowledged.¹¹² The legislation was also significant in that the TKLA replaced the TLGFA and sought to address its failings.¹¹³ While shortcomings in the TLGFA had already been pointed out numerous times before, ironically the TKLB, in turn, failed to address the failings of the TLGFA and instead, introduced further concerns.¹¹⁴ Although this application dealt with the public participation process, various substantive concerns could also be levelled against the Act.¹¹⁵

In its deliberation, the Court also dealt with the relationship between the NCOP and the provincial legislatures, emphasising that the obligation to facilitate public involvement rested independently on both the NCOP (under section 72) and the provincial legislatures (under section 118). With this backdrop provided, the Court proceeded to assess the public participation process.¹¹⁶ It was critical to establish, as a matter of fact, the process adopted by Parliament and as a matter of law, whether that process was reasonable. Various specific deficiencies were identified in the process followed: (a) insufficient notice; (b) lack of pre-hearing education;¹¹⁷ and (c) inaccessibility of hearings.¹¹⁸ There were also further deficiencies preventing participation in the public hearings themselves, including (a) lack of communication;¹¹⁹ (b) prioritisation of certain groups and people prevented from speaking;¹²⁰ and (c) deficiencies preventing the

107 Paragraph 34.

108 Paragraph 35.

109 Paragraph 36.

110 Paragraph 37.

111 Paragraph 39.

112 Paragraph 40.

113 Paragraph 41.

114 Paragraph 44.

115 Paragraph 45.

116 Paragraph 53 and further.

117 Paragraph 64–65.

118 Paragraphs 66–67.

119 Paragraphs 68–72.

120 See paras 73–75.

public's views from being conveyed to and/or considered by the relevant lawmakers.¹²¹ Overall, the Court concluded that the identified deficiencies demonstrated a wide-ranging and substantial failure to facilitate public participation,¹²² which rendered legislation as a whole invalid.¹²³ However, an immediate order of invalidity would cause immense disruption, as the TLGFA differed hugely from the TKLA.¹²⁴ Suspension would allow Parliament to embark on a new legislative process to pass the TKLA, in a modified version or an entirely new bill. The order of invalidity was thus suspended for twenty-four months.

Ironically, whereas costs and a lack of resources were identified as some of the reasons for not complying fully with the public involvement process, the order handed down by the CC inevitably meant additional expenses as the process would have to start afresh.

The Traditional Courts Act 9 of 2022 will come into operation on a date published in the *Government Gazette*.¹²⁵ The Act was assented to on 16 September 2023, aiming to finally provide a uniform legislative framework for the structure and functioning of traditional courts in South Africa and to bring it in line with constitutional imperatives and values.

Notably, a golden opportunity was missed with the promulgation of this Act as it does not contain any reference to the possible role traditional courts could have played in relation to the contentious issue of land in rural and communal areas in South Africa. Section 1 of the Act contains all the relevant definitions, while section 2 states the various objectives. The latter include, inter alia, affirming the values of customary law in the resolution of disputes based on restorative justice and reconciliation and to align them with the Constitution. It also seeks to affirm the role of traditional courts in terms of customary law by promoting the co-existence of peace and harmony in the community and the enhancement of access to justice by providing a forum for dispute resolution in accordance with the principle that recognises participation by all parties. The Act further aims to enhance the effectiveness, efficiency and integrity of traditional courts in the resolution of disputes, facilitate full and meaningful participation without discrimination and create an enabling environment which promotes the rights enshrined in Chapter 2 of the Constitution. The guiding principles of the Act are provided for in section 3. There is once again emphasis on the need to align traditional courts with the Constitution and the values enshrined in it in resolving disputes. The values include the right to human dignity, the achievement of equality and the advancement of human

121 Paragraphs 76–80.

122 Paragraph 81.

123 Paragraph 83.

124 For example, the manner in which traditional councils are constituted and recognised and their powers and responsibilities—para 84.

125 GG 49373 (27 September 2023), repealing ss 12 and 20 of the Black Administration Act 38 of 1927, the Chiefs Courts Act 6 of 1983 (Transkei) and Regional Authorities Courts Act 13 of 1982 (Transkei).

rights and freedoms, the promotion of non-racialism and non-sexism and the freedom of sexual orientation and identity and religion. The promotion of restorative justice measures through mediation and conciliation is yet another objective, together with the development of skills and capacity of members of traditional courts in ensuring the effective implementation thereof. In section 4 of the Act, the procedure for instituting proceedings in traditional courts is set out, while in section 5, the composition and participation in these courts are provided for. Traditional courts must consist of women and men, pursuant to the goal of promoting the right to equality as contemplated in section 9 of the Constitution. Section 6 provides for the nature of traditional courts, which is to promote access to justice, prevent conflict, and resolve conflict where relevant. All of this must be done in a manner that promotes restorative justice, Ubuntu, peaceful co-existence and reconciliation. Section 6(3) also provides for levels of traditional courts, namely:

- a) a headman or headwoman's court;
- b) a senior traditional leader's court;
- c) a principal traditional leader's court; and
- d) a king or queen's court, where available.

From this exposition, clearly not all of these different courts will always be available in all communities. The availability of these courts in a particular community would direct the starting point of dispute resolution. The procedures in traditional courts are provided for in detail in section 7 of the Act. Of particular importance is the prohibition on legal representation under section 7(4)(b). Section 7(5) of the Act provides for choice of law rules in traditional courts. Section 8 of the Act provides for the different types of orders that such a court can make, while section 9 provides for the enforcement of these orders. Section 10 provides for Provincial Traditional Court Registrars who are tasked with compiling and maintaining a prescribed register of all traditional courts in the province and referring and reporting on cases of public interest to the High Court having jurisdiction for review in order to contribute to jurisprudence or enhance the reform of customary law. Section 11 of the Act provides for review by a High Court, while section 12 provides for the referral of matters from traditional courts to magistrates' courts. In section 13, provision is made for the recording of proceedings, while section 14 provides for the transfer of disputes by a traditional court to either a magistrate court or a small claims court having jurisdiction, depending on the nature of the matter. In section 18, it is stated that this Act repeals the Regional Authorities Courts Act 13 of 1982, the Chiefs Court Act 6 of 1983, as well as section 12 and 20 of the Black Administration Act 38 of 1927.

Land Redistribution and Rural Development

During 2023, the National Council of Provinces held hearings on the Expropriation Bill [B23B-2020].¹²⁶ Most of the participants agreed that the current Expropriation Act 63

126 Parliamentary Monitoring Group (PMG), 'Expropriation Bill Public Hearings NCOP Public Infrastructure and Minister in the Presidency' (11 October 2023) <<https://pmg.org.za/committee-meeting/37646/>> accessed 25 July 2024.

of 1975 is outdated and that a single Act should address the 230 Acts that deal with expropriation individually. The comments were wide-ranging, from lauding the provision for nil compensation to address insecure land tenure, especially in the urban areas, others proposing the removal of the provision for nil compensation, while further suggestions dealt with ensuring proper dispute resolution in the courts when expropriation was in dispute, correcting the definition of property to refer to immovable property only, removing vague and wide definitions, making the Bill constitutionally compliant, appreciating the mediation process in the Bill and that land reform should be addressed specifically. Conversely, some submissions indicated a fear that the Bill would be used for land reform while at the other end of the spectrum a blanket expropriation of all landowners was suggested.¹²⁷

Although there were some land redistribution successes in the report period, there were, unfortunately, also failures. In the North West Province, a R462m communal property association land reform project near Brits failed due to mismanagement and the complexities of the CPA structure.¹²⁸ An application was lodged in the Limpopo High Court for the liquidation of the Zebediela Citrus Estate in Limpopo, which was once a very lucrative enterprise.¹²⁹ A study by Kirsten, Verschoor and Gandidzanwa revealed that only seven per cent of the redistributed farms were successful, while approximately eighty-three per cent of the farms had the potential to perform. Ten per cent of the farms sustained subsistence farming only. The land overall had high agricultural potential but due to various reasons, 350 farms refrained from producing anything at all.¹³⁰ Kirsten, Verschoor and Gandidzanwa propose, amongst others, that farmers who proved themselves should receive land ownership which would give them access to capital. This would also lead to critical infrastructural investment. Importantly, beneficiaries should be selected based on their skills.¹³¹ Setou indicated that the land reform programme had also been captured and marred with fraud.¹³²

127 Marianne Mertin, 'Back to the Future - Ex-president Jacob Zuma Preaches Land Rights at Expropriation Bill Hearings' *Daily Maverick* (27 September 2023).

128 Magnificent Mndebele, 'R462m 'Megafarm' Land Reform Project in Disarray after North West Department Fails to Release Funding' *Daily Maverick* (9 November 2023).

129 Anon, 'Liquidations: End of the Road for Land Reform Project?' *Legalbrief* (4 August 2023).

130 Johan Kirsten, Aart-Jan Verschoor and Coletta Gandidzanwa, 'The South African Government Has Been Buying Farmland for Black Farmers. It's Not Gone Well' *The Conversation* (29 January 2023).

131 *ibid.*

132 See Peter Setou, 'Reflections on Land Reform As We Recover from a Pandemic and a Sluggish Economy' *Bizcommunity* (24 January 2024). Also see Anon, 'Criminal: Family of Five Charged with R6m Land Grant Fraud' *Legalbrief* (13 July 2023); Corruption Watch, 'Land and Corruption in Africa: a Transparency International Project' <<https://www.corruptionwatch.org.za/land-and-corruption-in-africa-a-transparency-international-project/>> accessed 28 July 2024; Alex Mitchley, 'AFU and SIU Granted Order to Freeze Govt-owned Land Fraudulently Transferred to Private Individuals' *News24* (8 March 2023).

Conclusion

While critical for the country's future, its economy and stability, land reform and land-related matters remain challenging. In the report period, various initiatives were embarked on to deal with long-standing, as well as more recent concerns. Access to land and settlement generally have continued to be main burning points. In this regard, the Draft White Paper for Human Settlements stands to play a crucial role in human settlement, the occupation of land and matters linked therewith—on a sustainable and progressive basis, linked to the values undergirding the Constitution and the Bill of Rights. Likewise, the recent Traditional Courts Act aims to regulate conflict in a restorative justice approach, while the Land Court Act, once in operation, will streamline land-related concerns more effectively, placing much more emphasis on mediation as opposed to litigation.

After many years in which there has been a review of section 25 of the Constitution and thrust to promote expropriation at nil compensation, it seems the finalisation of the Expropriation Act is imminent.

Legislative and policy frameworks impacting on and guiding land matters must be aligned with the Bill of Rights and the values underlying constitutional democracy. While policy and legislative alignment is important, it is not enough: it goes without saying that legislation needs to pass constitutional muster. The recent unconstitutionality finding of the Traditional and Khoi-San Leadership Act could have been prevented by an effective and efficient public consultation process. Ex post facto unconstitutional declarations not only deter the constitutional project but also add fiscal and human resource constraints to processes that are already under pressure. Furthermore, legislation needs to be implemented effectively for it to make a real difference in people's lives and livelihoods. Recent research highlighting the degree of corruption within the land reform domain is thus disconcerting. It is in this regard that continued vigilance, at all levels, remains critical.

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