

LAND REFORM POLICIES AND HUMAN RIGHTS: A SOUTH AFRICAN CASE STUDY

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A word of thanks

A sincere word of thanksgiving to Dr. Cherry who spent hours ensuring that this treatise is a clear and accurate document. Her patience, skills, knowledge and wisdom was worth a pot of gold.

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ABSTRACT. This treatise begins with a discussion of different clauses of the Bill of Rights in the South African Constitution and the land reform policies of the South African government. The inequality and injustice caused by decades of apartheid land law forms the background of the land reform programme. The treatise addresses the consequences of this legacy on the implementation of the South African Constitution including the right to property. The discussion includes the three key elements of the land reform programme namely restitution, redistribution and tenure reform.

The content of this treatise ranges over these three elements of land reform, applying constitutional issues to the relevant case law, The balancing and the reconciliation of rights and interest between the individual and the public in a just manner will be the barometer.

The conclusion shows that the Constitution both protects existing rights and authorises the promotion of land reform within the framework of Section 25 of the Constitution, and that every aspect of the property clause has to be regarded as part of a constitutional effort in balancing individual interest and public interest in terms of a constitutional order.

It is my sincere hope that this treatise will contribute toward the achievement of equity, stability and by the values of an open and democratic society based on human dignity, freedom and human rights.

Key words: Deprivation, expropriation, human rights to property, land restitution, land redistribution, security of tenure, Bill of Rights South African Constitution.

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GLOSSARY

Absolution from the instance	: Dismissing the case.
Appeal Upheld	: Appeal successful.
Arbitrary	: Based on personal opinion or impulse, not any reason or system.
Bill of Rights	: A statement of the basic rights of the citizens of a country.
Compensation	: The action of compensating.
Constitution	: A system of laws and principles according to which a state or other organisation is governed.
Deprivation	: The action or process of depriving or of being deprived of.
Equality	: The principle that human beings are of identical worth or are entitled to be treated in the same way: equality can have widely differing applications.
Evict	: To remove from a house or land with the support of the law.
Expropriation	: To take away property from its owner for public use without payment.
Frivolous vexatious	: Meaningless
Government	: The machinery through which collective decisions are made on behalf of the state, usually comprising legislature, executive and judiciary.
Human Rights	: Rights to which people are entitled by virtue of being human; universal and fundamental rights.
Jurisdiction	: The official power to make legal decisions and judgements about a matter.
Justice	: A moral standard of fairness and impartiality, social justice is the notion of a fair or justifiable distribution of wealth and rewards in society.
Law	: Established and public rules of social conduct, backed by the machinery of the state: the police, courts and prisons.
Plaintiff	: A person who brings a legal action to court (in a court of law).
Property	: A thing or things owned; a possession or possessions.
Redistribution	: The redistribution of wealth or land.

Restitution : The action of giving what was lost or stolen back to its original owner.

State : An association that establishes sovereign power within a defined territorial area, usually processing a monopoly of coercive power.

Usufruct : Life usufruct.

Vacate : To leave a place or position.

LATIN ABBREVIATIONS

<i>Ad infinitum</i>	: Without limit
<i>A quo</i>	: From which
<i>De novo</i>	: Anew from the beginning
<i>In casu</i>	: In the case in question
<i>In limine</i>	: Initially
<i>Ipsa facto</i>	: By the very fact
<i>Juris prudence</i>	: General Law
<i>Locus standi</i>	: A right of appearance in court
<i>Mandament van spolie</i>	: Spoliation order
<i>Maxim ubi ius ubi remediom</i>	: Where there is a right there is a remedy
<i>Prima facie</i>	: At first sight
<i>Res judicata</i>	: Case already decided
<i>Sine die</i>	: For a further meeting or hearing

CHAPTER ONE

BILL OF RIGHTS AND LAND REFORM POLICIES

1. Introduction

This treatise focuses on land rights and their protection in a Bill of Rights. The challenge exists in the balance between theory and practice. A truly meaningful discussion and evaluation of human rights to land in a society in transformation should follow not only a legal discourse, but also reflect on the way in which this discourse is manifested in practice in the society. In this paper it is taken for granted that we are involved in a fundamental restructuring of society and the legal order of land and human rights. The question revolves around the rights of those dispossessed from their property by apartheid laws, and also the rights of current owners whose land has been identified for redress.

It can safely be said that the purpose of the constitutional property guarantee should be to find and maintain a balance between individual interests and the public interest. This means that the constitutional property clause cannot be interpreted or applied from an exclusively private-law or an exclusively public-law perspective. Instead, a just and equitable balance has to be established between the two alternatives.

In this treatise, the way in which the balance between these two groups of rights is dealt with in South Africa's land reform process is examined through a review of particular cases to come before the court in order to achieve a fair and just settlement between the individual interest and the public interest.

1.1 Context of research

A constitution is a document that contains the most important laws that regulate state and government functions. Private law is usually said to be concerned with the relation between individuals, and not with state functions. It is also, however, recognised that private and public spheres cannot be separated so easily. This fact was demonstrated in the old South African laws of apartheid, where government policy had enormous implications on private law and human rights. The De Klerk government's introduction of a range of land reforms in response to increased pressure for political and social transformation should therefore not be surprising. The reforms proposed by the De Klerk government were introduced by way of a White Paper on land reform in March 1991,

followed by a series of legislative measures,¹ that abolished racially-based land laws² provided for restitution of land dispossessed under apartheid, upgraded the security of tenure of black land holders,³ and facilitated the establishment of black townships in former white areas to ease the burden of urban homelessness.⁴

The direction of land reform was characterised by three main elements:

- The restitution of land rights that had been dispossessed in terms of apartheid laws and practices;
- Improvement of security of tenure for those whose land rights were weakened by apartheid land laws;
- The introduction of measures to increase and facilitate access to land and housing for individuals and communities who have been deprived of these during apartheid.⁵

The 1993 Constitution explicitly provided for land reform, and attempted to establish a balance between the promotion of land reform and the protection of existing property and human rights. In the 1996 Constitution, the land reform provisions in Section 25 again reflected the distinction between reforms aimed at restitution (Section 25 (7)) and improved security of tenure (Section 25 (5)).

Section 1 of the 1996 Constitution creates a new legal order, in which all South Africans are entitled to a common citizenship in a sovereign and democratic constitutional state, in which there is equality between all people, so that everybody can enjoy and exercise their fundamental rights, including human rights.

¹ The most important statutes were the Abolition of Racially Based Land Measures Act 108 of 1991, the Upgrading of Land Tenure Rights Act 112 of 1991 and the Less Formal Township Establishment Act 113 of 1991. See AJ van der Walt 'Land reform in South Africa since 1990 – An overview' (1995) 10 *SA Public Law* 1 – 30 at 11 – 12; PJ Badenhorst, JM Pienaar & H Mostert (assisted by M van Rooyen) *Silberberg and Schoeman's The law of property* (4th ed 2003) 483 – 485 for a brief overview, and see DL Carey Miller (with A Pope) *Land title in South Africa* (2000) 241 – 281 for a fuller discussion.

² The so-called Land Acts – the Black Land Act 27 of 1913 and the Development and Trust Land Act 18 of 1936 – established 'grand apartheid' or spatial race-based segregation by dividing the country into white and non-white areas, but apart from these, both 'grand apartheid' and 'petty apartheid' were entrenched in a host of other laws and legal, sanctioned practices.

³ AJ van der Walt 'Towards the development of post-apartheid land law: An exploratory survey' (1990) 23 *De Jure* 1 – 45 at 1 – 34; see also AJ van der Walt 'Property Rights and hierarchies of power: A critical evaluation of land-reform policy in South Africa' (1999) 64 *Koers* 259 – 294 at 259 - 267.

⁴ AJ van der Walt 'Towards the development of post-apartheid land law: An exploratory survey' (1990) 23 *De Jure* 1 – 45 at 1 – 34.

⁵ White Paper on South African Land Policy (1997) Heading 2.3 at <http://land.pwv.gov.za/legislation-policies-white-papers.htm>.

It can therefore safely be said that the new Constitution of 1996 is aimed at healing the divisions of the past, and building a future characterised by the recognition and restoration of human rights, democracy, equality, and freedom for all.

In order to achieve this, the Constitution will have to make its presence felt in both the public and private spheres. The challenge addressed here is finding the balance between the Bill of Rights in the Constitution, and the government's implementation of land reform policies.

Land reform policies in South Africa are aimed at the restitution of specific land that was taken from specific people in the apartheid era. The Restitution of Land Rights, Act 22 of 1994, provides for restitution claims and various kinds of restitution orders.

Land redistribution is a wider category, which is not based upon historical land claims, but rather on the general need for land amongst the poor in both rural and urban areas.

The Housing Act 107 of 1997, the Development Facilitation Act 67 of 1995, the Land Reform (Labour Tenants) Act 3 of 1996, and the Land Reform Pilot Programme of 1995 are all aimed at the redistribution process.

Section 28 of the 1993 Constitution was intended to protect existing rights on the one hand, while permitting legislative programmes aimed at correcting historical imbalances in the distribution of property and wealth on the other. A similar balance is attempted in Section 25 of the 1996 Constitution.⁶

Section 25 of the 1996 Constitution protects private property from confiscation by the state, and requires any expropriation of property to be compensated. It requires interference with private property to be authorised by law and to be rational. At the same time, the clause requires the state to actively pursue the goals of land redistribution; reform of land tenure rights and grants an entitlement to the restitution of property dispossessed in pursuance of apartheid policies.⁷

⁶ Katherine Savage. "An Overview of the key players" in Penelope Andrews & Stephen Ellman (eds). *The Post-Apartheid Constitutions* (2001), 164, 176-81 provides an account of negotiations of Section 25 of the 1996 Constitution.

⁷ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Services* 2002(4) SA 768 (cc) para 49 (the land reform provisions of Section 25(5)-(9) emphasize that "under the 1996 Constitution the protection of property as an individual right is not absolute but subject to societal considerations).

The clause, moreover, must be considered in context: the broad context of South African history.⁸

Section 25 of the Constitution reads as follows:

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
- (2) Property may be expropriated only in terms of law of general application:
 - For a public purpose or in the public interest, and
 - Subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
- (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interest of those affected, having regard to all relevant circumstances including:
 - The current use of the property;
 - The history of the acquisition and use of the property;
 - The market value of the property;
 - The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
 - The purpose of the expropriation.
- (4) For the purpose of this section:
 - The public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
 - Property is not limited to land.
- (5) The state must take reasonable legislative and other measures within its available resources, to foster conditions, which enable citizens to gain access to land on an equitable basis.

⁸ Port Elizabeth Municipality v Various Occupiers 2005(1) 217 (cc) para 15.

- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property, or to equitable redress.
- (7) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of Section 36 (1). Section 36 (1) of the Constitution states that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable.
- (8) Parliament must enact the legislation referred to in Subsection 6 of the 1996 Constitution of South Africa

1.2 Purpose of the property clause

A property clause in a Bill of Rights embodies three broad categories of rights claims, namely:⁹

- Claims to immunity against uncompensated expropriation of private property. This protection against uncompensated expropriation means that the state cannot lawfully take over property unless it pays for it.¹⁰ Therefore a Constitutional property right giving effect to such a claim would be a right not to be excluded from the class of property holders.
- A claim of eligibility to hold property. The best example of the recognition of such a claim in a human rights instrument is Art 17 of the Universal Declaration of Human Rights: “Everyone has the right to own property alone as well as in the association of others”.
- A claim to have property. This claim is premised on the argument that all people have a moral right to have at least enough property to enable them to survive or to lead a dignified existence. This means that if they do not have property, it should be provided

⁹ Jemery Waldron. *The Right to Private Property* (1988), 16-24.

¹⁰ The property right “bar(s) Government from forcing some people to bear public burdens which in all fairness and justice should be borne by the public as a whole”.

for them, usually by the state. This claim would make the constitutional property right a second-generation or socio-economic right.¹¹

In essence therefore, Section 25 provides that property may not be expropriated by the state, except where the expropriation occurs by the law of general application and is for a public purpose or in the public interest. Where expropriation meets these criteria, the state is obliged to pay monetary compensation to the former holder of the property. There are, however, instructions to the state to promote access to land on an equitable basis, according to Section 25(5). The Bill of Rights contains a number of socio-economic rights to adequate housing (Section 26), together with health care, food, water and social security (Section 27).

1.3 Definition of “property”

Section 25, Bill of Rights, Chapter Two, Act 106, 1996, states that no person may be deprived of property, and also that property may not be expropriated without compensation. Property is defined in a very wide sense. Property therefore can be defined as both an object of rights and the rights regulating that object. The meaning of Section 25 can therefore have three possible interpretations:

- It can refer to the physical property itself;
- It could also refer to a set of legal rules governing the relationship between individuals and physical property, and
- It can refer to any relationship or interest with exchange value¹².

Property cannot however extend to every right or interest, even if it is a right or interest of economic nature. In interpreting the term, the courts will obviously be guided by the existing ambit of the Law of Property, in other words, whether something is recognised as property in the existing law.¹³

1.4 Deprivation of property

Having defined the property clause, it is necessary to consider the protection for property offered by the Constitution. Deprivation of property by the state is permissible, provided

¹¹ Currie, Ian and De Waal, Johan. Fifth Edition. The Bill of Rights Handbook, Juta, 2005, p. 534-535.

¹² Diepsloot Residents & Landowners Association v Administrator, Transvaal, 1993 (3), SA 49 (T).

¹³ Thomas Allen “Commonwealth Constitutions and the Right not to be Deprived of Property” (1993), 42 Int & Comparative LA, 523, 528.

that it is not arbitrary and is carried out in terms of law of general application. An individual therefore has no right to compensation, unless the deprivation of property also amounts to expropriation of that property.¹⁴

The bundle of rights that makes up ownership of private property includes:

- Exclusive rights to the choice of use of a resource;
- Exclusive rights to the services (fruits) of a resource; and
- Rights to exchange the resource on mutually agreeable terms.¹⁵

A law of general application must, according to Section 25(1), authorise any interference with these rights. Section 25(1), when literally interpreted, means that there is an added protection for property holders against the state's powers to regulate. This takes the form of protection against property deprivations that are not in accordance with due process, as understood not only in a procedural sense, but also in a substantive sense. Procedural process means that deprivation of property must follow fair procedures, while substantive due process means that deprivation of property must not be arbitrary in substance.

1.5 Expropriation from property

What is expropriation from property? Terms similar to "deprivation" and "expropriation" are found in a number of Constitutions of Commonwealth States. For example, Art 13 of the Constitution of Malaysia provides that:

- (1) No person shall be deprived of property save in accordance with law;
- (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

As with Section 25 of the South African Constitution, the Malaysian articles provide that no compensation is needed for deprivation of property, but should be provided for a "compulsory acquisition" of property. Expropriation therefore must be understood as a form of interference with property, with two characteristics. The first is that there must be some form of appropriation - taking - of the property. No appropriation takes place if the

¹⁴ First National Bank para 57. *CF Mkontwana v Nelson Mandela Metropolitan Municipality* (SECLD, 2003, unreported) para 44 (Section 118 of the Local Government (Municipal Systems) Act 32 of 2000 prohibiting transfer of ownership of land unless municipality certifies that all outstanding rates and services charges relating to the property have been settled is a "restraint on one of the entitlements of ownership" (i.e. the right of alienation) and therefore deprivation).

¹⁵ Iain Currie & Johan de Waal. *The Bill of Rights handbook* fifth edition, Juta, 2005, p. 542.

state leaves the property in private hands, but imposes restriction on its use.¹⁶ The second characteristic is that appropriation must be connected with an expropriatory purpose.¹⁷

Compensation

Section 25 (2) does not remove the power of the state to expropriate property, but subjects it to two constraints:

- An expropriation is permissible only “for public purposes or in the public interest”.¹⁸
- An expropriation is subject to compensation for the taken property.¹⁹

In this regard, Section 25(4) of the Constitution of the Republic of South Africa, Act no. 106 of 1996, stipulates that the term “public interest” must be interpreted to include “the nation’s commitment to land reform”, and “reforms” to bring about equitable access to all South Africa’s natural resources. As far as compensation is concerned, Section 25 (2) of the Constitution of the Republic of South Africa, Act no 106 of 1996, states that the amount, timing and manner of compensation can be agreed upon between the expropriating authority and the expropriate. If no agreement can be reached, compensation is determined or approved by a court of jurisdiction. The compensation for expropriated property is required to be “just and equitable”.²⁰ “Just and equitable” compensation means market-value payment.²¹ To determine market value, the Land Claims Court adopted a test known to Commonwealth expropriation *juris prudencia* as the *Pionte Gourde* principle.²²

1.6 Restitution and Redistribution of Property

Section 25 (5) of the Constitution of the Republic of South Africa, Act no 106 of 1996, stipulates a socio-economic right, requiring the state to implement measures aimed at achieving land redistribution.²³ Section 25(7) grants the right to restitution “to the extent provided by an Act of Parliament” of property to persons and communities dispossessed

¹⁶ Selangor Pilot Association Legislation.

¹⁷ First National Bank paras 80-83 of the Australian High Court jurisprudence dealing with Section 51 (xxxii) of the Australian Constitution.

¹⁸ The Expropriation Act 63 of 1965, defines “public purposes” to include “any purpose connected with the administration of the provisions of any law by an organ of state”.

¹⁹ Article 14 (3) of the German Constitution provides that “expropriation shall only be permissible in the public interest”.

²⁰ Former Highlands Residents in re Ash v Department of Land Affairs [2000]. 2 All SA 26 (LCC)..

²¹ Ibid, para 33. A Eisenberg “Different Formulation of Compensation Clauses (1993) 9 SAJHR 412.

²² Pointe Gourde Quarrying & Transport Co Ltd v Sub-intendment of Crown Lands (Trinidad) [1947], Act 565 (PC).

²³ In Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (cc).

of property as a result of discriminatory legislation after 1913. Two restrictions on the entitlement in the Restitution Act should be noted. Firstly, claims for restriction must have been lodged with the Commission on Restitution of Land Rights by 31 December 1998. Secondly, although Section 25 (7) of the Constitution is silent about this, the Act excludes claims for restitution if just and equitable compensation “as contemplated” in Section 25 (3) of the Constitution was paid upon dispossession. Section 25 (6), with Section 25 (9) of the Constitution, imposes an obligation on the state to enact legislation relating to land redistribution and reform according to Section 25 (8) of the Constitution. The constitutional protection of property may not impede the state’s ability to effect land and water law reform for the purpose of socio-economic equity. Failure to compensate expropriation of property is a violation of Section 25 (2) of the Constitution. Therefore, where property is expropriated for purposes of land or water reform, compensation must be paid.²⁴

1.7 Human rights to property

The inequality and injustice caused by decades of apartheid land law forms the background of the land reform programme. The result is temporary and insecure land rights, as well as the criminalisation of land use. An aspect of the apartheid land law creating significant problems was the criminalisation of certain forms of land use, especially in terms of the Group Areas Act 36 of 1966 and the Prevention of Illegal Squatting Act 52 of 1951.

The Group Areas Act of 1966 designated segregated residential areas within the white areas for each race group. This implied that only people belonging to a particular race group were allowed to own, occupy and use land in a designated area.

The Prevention of Illegal Squatting Act 52 of 1951 was by far the most devastating Act of the Apartheid Land Laws. This act forced private landowners and public authorities to demolish and remove all buildings and structures erected without landowner’s consent or in contravention with building regulations. Most important in this regard was the court’s jurisdiction to interpret what is fair and just in each case on its own merits.²⁵

The effect of the property clause is therefore determined by court interpretation, where the court has jurisdiction to hear the matter. However, to understand the value of property rights, they should be interpreted in terms of wealth distribution in a society where there is

²⁴ Currie, Ian and De Waal, Johan. The Bill of Rights Handbook, Fifth Edition, Juta, 2005, p. 531-565.

²⁵ AJ van der Walt & GJ Pienaar. Law of Property. Fourth Edition, 2004, p.343-352.

a need for proper transformation.²⁶ Human rights, on the other hand, which are an essential element in politics, are upheld by the constitution. Human rights and property rights belong to the person, and as such are stipulated in a Bill of Rights within the Constitution, which is the “Supreme Law” of the country. Property rights can be defined as legal and social rules, under which economic and social behaviour takes place.²⁷ A problem arises when property rights exercised by one person or group results in the gain or loss of these rights to others. If we evaluate Human Rights against property rights, we come to the conclusion that human rights are guidelines of rules and regulations under which human interaction takes place. Therefore, human rights to property enjoy a prominent position in the Constitution, namely the Bill of Rights, as indicated. It is then with this motivation that the applicability of rights concerning property is examined.

²⁶ Murphy, John. Property rights in the new constitution, an analytical framework for constitutional review, vol. 26, Issue 2, p. 2-11, July, 1993. ISSN: 0010-4051.

²⁷ Michael Veseth. The Economics of Property Rights and Human Rights, 2 April 1951.

CHAPTER TWO

THE ROLE OF THE STATE IN LAND REFORM

2.1 Objectives of the new land reform policy

The objectives of the new land reform policy are aimed at dealing effectively with the various injustices of racially-based land dispossession. The main objective of this policy is to achieve a more equitable distribution of land ownership. Land reform has to contribute to the reduction of poverty and economic growth, security of tenure for all and a system of land management that would support sustainable land-use patterns and rapid land release for development.²⁸ Thus, the three elements of the land reform programme are redistribution to bring equity to the land market, land restitution for the victims of forced removals, and land tenure reform.²⁹

Land reforms, however, have potentially detrimental results for existing landowners. In some cases, the reform laws will allow the state to expropriate land. In other cases, land will not be expropriated, but the current owner's use will be subjected to substantial restrictions, such as to terminate the occupation rights of tenants or labourers and to evict them from the land. However, in view of the country's history, it is important that unequal and inequitable distribution of land be rectified, provided that this complies with the requirements of Section 25 and 36 of the South African Constitution. This is necessary to determine whether the deprivation or expropriation of property is valid, fair, reasonable and justifiable.³⁰

2.2 Role players in policy making

The Department of Land Affairs arranged a facilitation service to ensure that prospective beneficiaries of land reform have access to information and be empowered to apply for assistance.³¹ Institutions that impacted on the unfolding land policy include the World Bank, Urban Foundation and the DBSA. Although the old South African government tentatively initiated land reform, little was done to return land to dispossessed

²⁸ Department of Land Affairs (DLA) . 1997 c. White Paper on South African Land Policy. <http://www.polity.org.za/govdocs/white-papers/landwp.html>.

²⁹ Department of Land Affairs (DLA) . 1997c : 15 . White Paper on South African Land Policy.

³⁰ A.J. van der Walt & G.J. Pienaar. Law of Property. Juta, 2004, pp. 353-370.

³¹ Department of Land Affairs (DLA) . 1997c : 58. White Paper on South African Land Policy

communities. The result was therefore that the new 1994 democratic government had to take full responsibility for driving the land reform policy.

The 1994 government immediately introduced new legislative measures such as the Restitution of Land Rights Act (Act No 22 of 1994). The Act provided for a land claims court and the Commission on Restitution of Land Rights. Other legislative measures followed shortly. In 1995, the Department of Land Affairs issued the Framework Document on Land Policy.³² This was the starting point for the extensive process of public consultations. More than 50 entities, including farming organisations, NGOs, Government departments and individuals, responded to the Framework Document.³³ The views expressed helped to formulate the Green Paper on South African Land Policy. The processes of Green and White Paper documentation often run simultaneously in a single department. To redistribute 30 percent of land in South Africa by the target date of 2015 would require a joint effort from all the levels of government, so that at least 1,7 million hectares can be redistributed every year for the period of 2005-15.³⁴

The Constitutional Court, as the highest court in the country, has an important role to play in testing government policy against the constitution. As such, this Court makes the final decision regarding the constitutional nature of an Act of Parliament, a provincial act or conduct of the President.³⁵ Actions or laws that are constitutional will comply with the “spirit, purport and object of the Bill of Rights”.³⁶ An illustration of this capacity is the October 2000 Constitutional Court ruling that the government, given certain constraints and conditions, has the obligation to provide basic shelter to its citizens.

Therefore, when it is in the interest of justice and with leave of the Constitutional Court, it is important to bring a matter directly to the Constitutional Court. This is discussed in detail in the following Section, “Direct Access”.

³² Department of Land Affairs (DLA) . 1995a. White Paper on South African Land Policy

³³ Albert Venter & Chris Landsberg. Government and Politics in the New South Africa, Third Edition, 2006, Van Schaik Publishers, p. 186.

³⁴ Department of Land Affairs, 1996.

³⁵ The Constitution of South Africa Act No 108 of 1996: 90.

³⁶ The Constitution of South Africa Act No 108 of 1996: 23-24.

2.3 Constitutional Court

Direct Access

Direct access means that the Constitutional Court hears a matter first. The Court provides for direct access in certain circumstances. Section 167(6) (a) states that national legislation or the rules of the Constitutional Court must allow a person, when it is in the interest of justice and with leave of the Constitutional Court to bring a matter directly to the Constitutional Court. The Constitutional Court is a specialist court and not a court of general jurisdiction. It is intended as the court of final instance in relation to constitutional matters only defined in Section 167(7) as including “*any issue involving the interpretation, protection or enforcement of the Constitution.*”

The leading case with regard to the interpretation of Section 167 which deals with direct access is ***Alexkor Ltd v Richtersveld Community***.³⁷ In appeal from the Supreme Court of Appeal, the Constitutional Court had to consider a claim for restitution of land brought by the Richtersveld Community in terms of the Restitution of Land Rights Act. The Act, in fulfilment of provisions of the interim Constitution and Section 25 of the 1996 Constitution, grants a right to the restitution of land. The right is available on proof of the existence of a “right in land” after 1913 and dispossession of that right by a racially discriminatory law or practice. The Supreme Court of Appeal (SCA) found in favour of the Richtersveld Community on these questions. The questions in appeal to the Constitutional Court were (1) a contention that the rights of the Richtersveld Community to the land had been terminated by the annexation of that land by the British Crown in 1847 and (2) that any dispossession of the land after 1913 was not the consequence of racially discriminatory laws or practices. Such issues are questions of facts and laws that are not constitutional matters. They are, however, susceptible to consideration by the Constitutional Court, because they are “issues connected with decisions on constitutional matters”. In summary therefore, the Constitutional Court has four principal functions:

- Acting as a court of first instance, it hears matters within its exclusive jurisdiction;
- In exceptional cases, such as mentioned above, the Constitutional Court may grant direct access to hear a matter within its concurrent jurisdiction;
- To hear appeals from other courts relating to constitutional issues;

³⁷ *Alexkor Ltd v Richtersveld Community* 2004(5) SA 460(cc) para 23 (Restitution of Land Rights Act).

- To confirm orders made by other courts declaring Parliamentary or provincial legislation or conduct of the President constitutionally invalid.³⁸

2.4 The role of the state

The role of the state refers to its structure, federal or unitary influences, the way in which its functions are implemented and public services rendered, and which level of government is responsible for the implementation of such functions.

South Africa, for example, can be regarded as a unitary state with some federal characteristics. This means that power remains concentrated at the level of central (national) government, while certain prescribed powers are devolved to provincial and local authorities.³⁹ The courts are not the only institution ensuring the enforcement of socio-economic rights. The Constitution creates a similar enforcement mechanism by requiring the South African Human Rights Commission to monitor progress in the implementation of socio-economic rights and by requiring organs of state to report to the Commission. Section 184(3) of the Constitution provides as follows: “Each year, the Human Rights Commission must require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realization of the rights in the Bill of Rights concerning housing, health, cure, food, water, social security, education and the environment”.⁴⁰ In *Grootboom*, the Constitutional Court appointed the Commission to monitor the implementation of its order that the state devise and implement a housing programme that would cater for people in a situation of homelessness.⁴¹ The High Court’s order in ***Grootboom v Oostenberg Municipality, 2000 (3) BCLR 277 (c)*** indicates the most extensive use of the structural interdict to enforce a positive obligation. The court found that the living conditions of the squatters were a violation of children’s right to shelter in terms of Section 28 (1) (c) of the Constitution of South Africa.

In 1994, the democratic government opted for a three-pronged land reform policy to redress the historical injustices of land dispossession, denial of access to land and forced removals. A detailed discussion of the elements of land reform follows:

³⁸ Ian Currie & Johan de Waal. *The Bill of Rights Handbook*, Fifth Edition, 2005, Juta, p. 110.

³⁹ Albert Venter & Chris Landsberg. *Government and Politics in the New South Africa*. Third Edition, 2006, Juta, p. 89-90.

⁴⁰ The Fifth Economic and Social Rights Report, 2002-2003 (2004). <<http://www.sahrc.org.za/>>

⁴¹ *Grootboom*, 2001(1) SA 46 (cc), para. 97.

(a) Land Restitution

Purpose:

Under the Land Restitution Act of 1994, persons or communities who lost their property as a result of apartheid laws or practices after 1913 were invited to submit claims for restitution (return of land) or compensation.

State approach:

Restitution policy is guided by the principles of fairness and justice. As such, it must be recognised that solutions cannot be forced on people. The restitution process is driven by the just demands of claimants who have been dispossessed. They have a right to restitution in one form or another. The Department and the Commission will encourage claimants and others to come together to resolve claims. Where this cannot be achieved, the land claims court will decide the case in accordance with the provisions of the Constitution and the Act. The principles of fairness and justice also require a restitution policy that considers the broader development interest of the country and ensures that limited state resources are used in a responsible manner. To be successful, restitution needs to support, and be supported by, the reconstruction and development process. The Constitution and the Restitution of Lands Rights Act determine the parameters of the restitution process.⁴²

(b) Land Redistribution

Purpose:

Land redistribution is concerned with making land available for:

- Agricultural production;
- Settlement, and
- Non-agricultural enterprises

During the first five years (1994-1999) of democracy, the main emphasis of land redistribution was to provide the disadvantaged and the poor with land for housing and small-scale farming purposes.

⁴² White Paper on South African Land Policy, Land Affairs Department, February, 2006, p.41-42.

State approach:

The state approach involved a single, yet flexible redistribution mechanism to embrace a very wide range of land reform beneficiaries, including the very poor, labour tenants, farm workers, women, individuals and new entrants into agriculture. The mechanism can be adapted to continuous conditions. This depends largely upon voluntary transactions between willing buyers and willing sellers, which should result in dispensed land acquisition and settlement, as against block settlement in designated areas. Expropriation is used as a last-resort instrument for use when urgent land needs cannot be met, for various reasons, through voluntary market transactions. The challenge for government has been to devise and implement a programme that responds even-handedly to each segment of the land market in order to provide access to the range of clients seeking to obtain land: from the poorest, especially female-headed, single-parent families to emergent black entrepreneurs.⁴³

(c) Land Tenure Reform

Laws were introduced after 1994 to give people (especially farm workers and labour tenants) security of tenure over houses and land where they work and stay. The following laws were introduced for this purpose:

▪ Land Reform Act 3 of 1996:

Protecting the rights of labour tenants who live and grow crops or graze livestock on farms. They cannot be evicted without a court order, nor if they are over 65 years old.

▪ Extension of Security of Tenure Act 62 of 1997:

This protects the tenure of farm workers and people living in rural areas, including their rights to live on the land and the guidelines for other rights such as receiving visitors, access to water, health, education and so forth. The Act also spells out the rights of owners, protecting them against arbitrary evictions.

▪ Prevention of Illegal Occupation of Land Act of 1998:

This act puts in place procedures for the eviction and prohibition of illegal occupants.⁴⁴

⁴³ White Paper on South African Land Policy, Land Affairs Department, February, 2006, p.29-31.

⁴⁴ www.nda.agric.za/docs/redistribution.

2.5 Evaluating the progress made to date by the government and the Commission on Restitution of Land Rights

The Bill of Rights in the new Constitution guarantees existing property rights; but it simultaneously places the state under a constitutional duty to take reasonable steps to enable citizens to gain equitable access to land and to provide redress.⁴⁵ The biggest constitutional issues involve conflicts of interest between those who benefit from restitution claims and those whose existing rights are affected by such claims. The Restitution Act – the earliest land reform law promulgated by the new government – was initially authorised by Sections 121-123 of the 1993 Constitution and came into operation on 2 December 1994.⁴⁶

The speed with which the Act was promulgated was an indication of the high priority of the restitution process for the newly elected ANC government.⁴⁷ When the 1996 Constitution became operative on 4 February 1997, Section 25 (7) became the new source of constitutional authority for the restitution process. This section now authorises the restitution of land rights in terms of the Restitution of Land Rights Act of 1994, provided that persons who have been dispossessed of land qualify in terms of the Act for equitable redress.

Since 1994, the Act has been amended several times to streamline and facilitate the process and to bring it in line with the 1996 Constitution. Information was obtained from the Land Claims Commission office in Bloemfontein:

*“The number of cases referred to the Land Claims Court during the period March to December 2005 was on average between two and three cases monthly. In January 2006, there was a dramatic increase in the number of cases that were referred to the Land Claims Court, with the majority of these 25 cases referred to court emanating from KwaZulu Natal. The cases were referred to court, in most cases, by the current owners of land that was subject to a restitution claim”.*⁴⁸

The following evidence was produced to prove these statements. See Tables 2.1 – 2.4:

⁴⁵ Department of Land Affairs White Paper on South African Land Policy (1997) “Constitutional issues”.

⁴⁶ Section 121 of the 1993 Constitution set out an entitlement to claim restitution while sections 122-123 established a Commission on Restitution Rights and vested certain powers in the courts.

⁴⁷ Theunis Roux. “Chapter 3: The Restitution of Land Rights Act” in G Budlender, J. Latsky & T Roux. *Juta’s new Land Law* (1998) 2 A-4 footnote 3 explains how the Act was promulgated within 7 months of the new government, 1994.

⁴⁸ Commission on Restitution of Land Rights Annual Report for the year ended 31 March 2006.

2.1

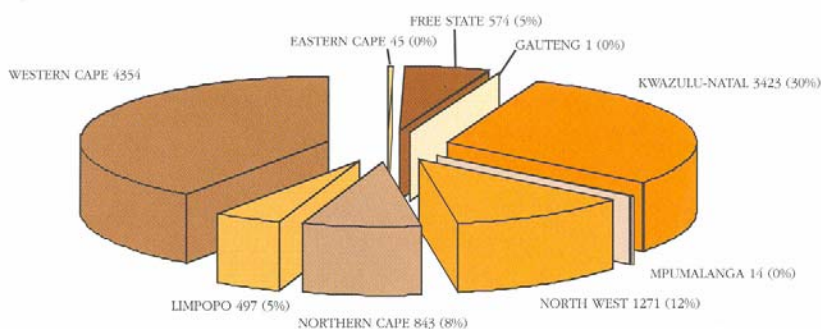
**Settled Restitution Claims
for the Financial Year: 1 April 2005 - 31 March 2006**

Province	Claims	Rural	Urban	House Holds	Beneficiaries	Ha	Land Cost	Fin Comp	Grants			Total Award
									Development	RDG	SPG	
Eastern Cape	45	24	21	299	1 054	4 031	6,722,482.00	5,246,992.00	191,520.00	684,000.00	328,320.00	13,173,314.00
Free State	574	1	573	767	8 907	15	0.00	22,845,755.00	7,874,500.00	1,557,000.00	747,360.00	33,024,615.00
Gauteng	1	1	0	33	144	0	0.00	1,053,657.00	0.00	0.00	0.00	1,053,657.00
KwaZulu-Natal	3 243	249	2 994	10 931	64 486	92 092	139,139,422.00	290,679,256.00	147,66,328.00	12,258,000.00	5,883,840.00	595,626,846.67
Mpumalanga	14	13	1	411	5 837	8 019	160,701,931.00	189,000.00	0.00	1,185,000.00	568,800.00	162,644,731.00
North West	1 271	3	1 268	1 515	8 520	3 764	4,728,613.36	49,451,231.00	40,000.00	279,000.00	133,920.00	54,632,764.00
Northern Cape	843	64	779	1 367	8 079	4 688	20,560,513.52	43,073,490.00	2,448,875.00	1,587,000.00	761,760.00	68,431,638.52
Limpopo	497	364	133	5 756	25 660	51 515	393,617,270.00	5,874,936.00	8,494,640.00	16,728,000.00	8,029,440.00	432,744,286.00
Western Cape	4 354	0	4 354	4 321	12 142	0	0.00	118,075,270.00	0.00	0.00	0.00	118,075,270.00
TOTAL	10 842	719	10 123	25 400	134 829	164 124	725,470,231.88	536,489,587.91	166,715,863.00	34,278,000.00	16,453,440.00	1,479,407,122.79

1. These statistics have been compiled based on the information reflected in the Database of Settled Restitution Claims.
2. In order to improve the accuracy of our statistics, the Database of Settled Restitution Claims is an ongoing basis subjected to a process of internal auditing.

2.2

Settled Restitution Claims for Financial Year 2005/2006



2.3

**Statistics on Settled Restitution Claims
Rural and Urban: 1 April 2005 - 31 MARCH 2006**

	Urban Claims Settled	Rural Claims Settled	Total no of Claims settled	Beneficiaries Involved
Claims Settled	10 123	719	10 842	134 829
TOTAL	10 123	719	10 842	134 829

- 1.
- 2.

**Projected Settlement of Claims
from April 2006 - March 2008**

RLCC	2006/2007		2007/2008	2008/2009
	Urban	Rural	Rural	Residual ⁹
Eastern Cape	222	114	100	106
Free State	90	67	36	25
Gauteng	2	16	14	25
KwaZulu-Natal	362	770	626	560
Mpumalanga	24	692	458	310
North West	0	124	115	75
Northern Cape	70	160	112	80
Limpopo	6	595	516	310
Western Cape	294	565	274	130
TOTAL	1076	3105	2251	1621

2.4

⁹Residual:

1. Claims in Land Claims Court as a result of disputes.
2. Claims with community/family disputes.
3. Claims where claimants are untraceable.
4. Delays in submitting required information/documents.

Evaluating what has been done to date, and what still has to be done, it can be said that the way forward, if success is to be achieved, should constitute a partnership with government, civil society, farmers and all other stakeholders who have an interest in the reform policy. Further recommendations are in the form of the government developing a comprehensive implementation plan, identifying legislative and policy reforms, and taking into consideration constitutional issues like human rights to property and monitoring the progress.

During an interview with Eddie Nkomazana Communication RLCC FS, of the Department of Land Affairs, on the 6th of November 2006, he produced two letters from claimants who were interviewed after receiving their land, as proof that land reform and human rights are a reality and that positive results have been achieved.

The first interview was with Anna Bok of Kakamas, and the second with Selma Pharo of Vaalplaas.

First interview:

“Ek is vandag so bly om hier te glo dat hier so baie mense as deel van die Kakamas gemeenskap is ek eniglik dankbaar aan die kommissie vir die barmhartige manier wat hulle tewerk gegaan het om ons eise te finaliseer. Alhoewel die proses lank geneem het, is ons gelukkig dat ons eise afgehandel is. Ons regte en menswaardigheid wat deur die vorige stelsel ontnem is, is weereens aan ons terugbesorg sodat ons nou met ons lewens kan voortgaan. Die grondwet gee ons regte wat ons nooit voorheen gehad het nie, en die kommissie gee ons land wat ons voorheen verloor het, en beide het ‘n positiewe uitwerking op ons gemeenskap gehad”.

Anna Bok – beneficiary of Kakamas Land Claim

Second interview:

“Ek is vandag so bly dat so baie mense hier is. Vandag praat die Here met my, vandag sê die Here vir ons dat vandag op 24 September 2004 Erfenis Dag vlieg ons met vlerke. Dit was baie seer toe ons van die grond geskop was. Dit het gevoel asof ons getreur het. Die grond is naby ons harte. Ons is tog so dankbaar vir die Kommissie en die regering dat hulle dit moontlik gemaak het vir ons om die grond terug te kry. Ons het so baie slegte dinge deurgemaak as gevolg van ongodelike optrede van mense en die apartheids

regering. Na 'n tyd het dit gevoel asof ons nooit die grond terug kry nie. Maar vandag is ons hier en ons vlieg met vlerke”.

Ms Selma Pharo, beneficiary of Vaalplaas Land Claim

2.6 Conclusion

Since the current government came to power, much has been achieved in terms of policy development and land reform implementations. The Land Reform Pilot Programme was launched at the end of 1994, to develop equitable and sustainable mechanisms of land redistribution. The Restitution of Land Rights Act, 22 of 1994, was approved by Parliament in 1994 and the Commission on Restitution of Land Rights was established in 1995. The Land Reform (Labour Tenants) Act, 3 of 1996 provides security of tenure to labour tenants; the Interim Protection of Informal Land Rights Act, 31 of 1996 is a holding measure which protects the interests of people who have informal rights to land while an investigation is in progress; the Communal Property Association Act, 28 of 1996 provides a legal mechanism to accommodate the needs of those who wish to hold land collectively; and the Amendments to the Upgrading of Land Tenure Right Act, 112 of 1991, bring this Act into line with government's policy on the conversion of rights to land. In order to achieve the re-assignment, delegation and rationalisation of land legislation and institutions, the Land Administration Act, 2 of 1995, was adopted.⁴⁹

The importance of Land Reform in South Africa arises from the scope of land dispossession by whites on the basis of racial classification. The land reform programme aims to create stability, provide resources for the creation of livelihoods and restore dignity between black South Africans, by providing human rights as per the 1996 Constitution and the Bill of Rights.

It is a fact that land reform is a critical and pivotal factor in our nation's quest to eradicate poverty, promote economic growth and sustain development. This is encapsulated in our 1996 Constitution, which underwrites the three-element approach of restitution to return land to those forcibly removed, redistribution for the resettlement of the landless of our country, and the call on the state to ensure tenure of security for people who live under insecure tenure.

⁴⁹ White Paper on South African Land Policy Land Affairs Department Land Affairs RSA.

The restitution process in South Africa has come a long way to restore land rights to the victims of racial dispossession in a just and equitable manner (see Figures 2.1-2.4, Chapter 2 of treatise. The values and principles entrenched in our Constitution are aimed at the transformation process of the South African Society, which started when the new democratic government came into power in 1994. These values and principles are aimed at changing from injustice to justice, from inequality to equality, from oppression to democracy, from conflict to reconciliation, from no human dignity to human dignity, from no political rights to political rights, etc.

Chapter 2 of the Bill of Rights underscore an open and democratic society based on human dignity, freedom and equality. This has all been introduced by the first democratic government in 1994; in other words restoring human dignity in the sense of human rights for a free and open society, so that democracy can prevail.

The transition means that old discriminatory laws have been abolished, and that new democratic laws are promulgated, such as the 1996 Constitution and the Bill of Rights. The new Constitution therefore includes ideals to promote human dignity, freedom and equality as explicated and protected by the Constitution. The idea is that the Constitution embodies and signals a new point of departure in South African history concerning land reform.

By doing this, the Constitution becomes the guiding principle for all legal development, land reform and the restoration of human dignity.

CHAPTER THREE

HUMAN RIGHTS AND PROPERTY

3.1 Introduction

The Constitution seeks to protect the socio-economic rights of citizens. In order to bolster access to rights, a positive obligation is imposed on the state to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of rights. In the past ten years, since the adoption of the Constitution, the courts at various levels have been engaged in a process of balancing of rights. Such a balancing was explicitly recognised by the court in *Port Elizabeth Municipality v Various Occupiers*. The Court, interpreting the right to property, observed that, while the Constitution recognised the right to own, use and occupy property, it also identified and protected the land rights of the dispossessed. These rights were not delineated in unqualified terms, but presupposed the adoption of measures by the state to open access to land.

The right to property sometimes clashed with the steps taken to eradicate the homelessness of the dispossessed. The Court held that the judicial function in those circumstances was not to establish a hierarchy of rights, but rather to balance and reconcile the competing rights and interests in a just manner.

When considering the three elements of land reform compared with Constitutional issues and relevant case law, the balancing and the reconciliation of rights and interests in a just manner will be the barometer.

3.2 First element: Land Restitution

The essence of the restitution process is that individuals and communities who have been deprived of land rights as a result of apartheid land laws and practices (and who qualify in terms of the requirements set out in the Restitution Act) are entitled to claim restitution of their land rights, or other equitable redress. When the 1996 Constitution became operative on 4 February 1997, Section 25(7), which is slightly broader than the 1993 provisions, became the new source of constitutional authority for the restitution process. The essential requirements are that a person or community can institute a restitution claim if that person

or community was dispossessed of a rights in land after 19 June 1913 as a result of a racially discriminatory law or practice and did not receive just and equitable compensation or consideration, provided the claim was lodged in time.⁵⁰ Both natural and legal persons can claim.⁵¹ A direct descendant of a person, who otherwise qualifies, but has not claimed restitution, is allowed to claim under certain circumstances.⁵²

Once a claim has been lodged, the relevant regional commissioner must ensure that it meets the qualifying criteria in Section 2 of the Restitution Act,⁵³ and that the claim has been lodged in the prescribed manner and that it is not frivolous or vexatious.⁵⁴

Once a regional commissioner has accepted a claim, it must be published in the Government Gazette. Such publication has important implications, meaning that nothing may be done on that property without notice to the commissioner.

Case law relevant to the issue of land restitution is Richtersveld Community v. Alexkor Ltd, as referred to above. Accordingly, the three cases will be discussed, as the matter was heard firstly by the Land Claims Court (LCC), secondly by the Supreme Court of Appeal (SCA) and finally by the Constitutional Court (CC).

Richtersveld Community and Others v Alexkor Ltd and Another 2001 3 SA 1293 (LCC)

Division : Land Claim Court

Date : March 22, 2001

Summary of the case

This is a claim for restitution of rights in the Land Claims Court in terms of Restitution of Land Rights Act 22 of 1994 Section 2(1) – in other words dispossession as a result of past racially discriminatory laws and practices. The applicants averred that they were communities dispossessed of their land rights in the Richtersveld area due to racially discriminatory laws or practices.

In their claim statement in the Land Claims Court, the plaintiffs assented that the people of Richtersveld held title to the subject land and that such title was not at any time prior to 19

⁵⁰ Section 2 of the 1994 Act as amended, compare Section 25(7) of the 1996 Constitution.

⁵¹ DL Carey Miller (with A Pope). Land title in South Africa (2000), 329.

⁵² Section 2(1) (c) read with Section 1 of the 1994 Restitution Act.

⁵³ DL Carey Miller (with A Pope). Land title in South Africa (2000), 340-362, footnote 212.

⁵⁴ DL Carey Miller (with A Pope). Land title in South Africa (2000), 341 footnote 212.

June 1913 lawfully extinguished or diminished. They submit that this title falls within the definition of the “Right in Land” as contained in the Restitution of Land Rights Act 6 (6). The plaintiffs alleged that they were dispossessed of their land rights by legislative and executive state action after 19 June 1913, as a result of racially discriminatory laws and practices. They confirm that they did not receive any compensation with respect to the dispossession. Although the claim is for restitution of land rights, the claim was not referred to the Land Claims Court via the Land Claims Commission, but rather by the plaintiffs approaching the Land Claims Court directly. The plaintiffs are however entitled to such an action in terms of Chapter IIIA of the Restitution Act. This is not always recommended, as the Court does not have the benefit of investigation or reports by the Land Claims Commission.

As a first alternative, the plaintiffs alleged that the people of Richtersveld acquired ownership of the subject land, requesting an order declaring such ownership. As a second alternative, they requested an order declaring that the people of Richtersveld hold public servitude over the land.

In the first plea, the first defendant alleged that whatever rights the people of Richtersveld might have had with respect to the land were extinguished before 19 June 1913. In the second plea, the first defendant pleaded that the Court was not competent for inquiry into the issue of aboriginal title. In the third plea raised by the first defendant, they requested that the case be dismissed. The first and second pleas were later withdrawn.

Court Ruling

The court held that at the time of the annexation of Namaqualand, all ungranted land was owned by the Crown and the doctrine that every title to land should have originated with a grant made by the Crown or with their consent. In the present case it has not been proved that at the time of dispossession there existed a custom that had become law in terms of which the state was obliged to recognise the rights of the plaintiffs over the subject land. Court held further that a person or community dispossessed of property after 19 June 1913 as a result of racially discriminatory laws or practices is entitled to restitution of that property or to equitable redress. The court held further, that to determine whether a particular law or practice had resulted in a dispossession, that law or practice had to be a both factual and legal cause of dispossession.⁵⁵ Accordingly, the court held that there was no evidence that the authorities had deliberately failed to recognise any legal rights that

⁵⁵ To determine the legal cause, the Court had to identify the most immediate or direct cause, also known as the determinative cause.

the community might have in respect of the land. The only rights that the first plaintiff proved lost in respect of the subject land, originated from beneficial occupation of the subject land. Therefore the first plaintiff failed to establish two essential elements of the restitution claim, namely that dispossession is of a kind that would support a claim for restitution and that it resulted from a racially discriminatory law or practice. The first, second, third, fourth and fifth plaintiffs claim to be communities. The Court held that, if they are not communities or parts of communities, their restitution claim must fail. The claim by the sixth plaintiffs was not seriously pursued. No relief for the sixth plaintiff was motivated in the plaintiff's heads of argument.

Evaluation of the Case

When evaluating the Richtersveld case in the Land Claims Court, it can be said that the Restitution Act Section 2 states clearly that a claim must comply with the requirements of the above-mentioned section. What made the above-mentioned case unique, was that the Land Claims Court had to decide whether a community could claim restitution for a deprivation of land that took place before the cut-off date (19 June 1913).

The Court however found that the incorporated land became Crown (state) land long before 1913, and that it was regarded as state land before and since 1913. During the Court proceedings, the community could not prove on a balance of probabilities that they were deprived of ownership after 19 June 1913. It also emerged during the proceedings that the community did however lose their occupation, but it was not racially motivated, as clearly stipulated in Section 2 of the Restitution Act as a requirement. The true reason why the community lost their occupation is the result of efforts to secure controlled mining of diamonds in the area, and race did not play a role. When considering the finding of the Court, it can be seen clearly that the Court made a judgement based on the Restitution Act Section 2, by dismissing the applicant's case for the two reasons stipulated, as mentioned above:

- (a) The community lost the ownership of the mentioned land before the cut-off date in 1913; and
- (b) The dispossession was not racially inspired.

The applicants in this case, the Richtersveld Community, lost the case and took it on appeal to the Supreme Court.

Richtersveld Community and Others v Alexkor Ltd and Another 2003

(6) BCLR 583 (SCA)

Division : Supreme Court of Appeal

Date : March 24, 2003

Summary of the Appeal Case

The area in dispute is Richtersveld in the Namaqualand, which was later incorporated in the Cape Colony. The Appellants in this case consisted of communities in this area who claimed that they have been dispossessed of their land in Richtersveld as a result of racially discriminatory laws and practices. Their claim was for the restitution of their lost land rights in terms of the Restitution of Land Rights Act 22 of 1994. The land in dispute was owned by Alexkor Ltd, which was also the First Respondent. This was a company created by statute and the state was the sole shareholder in the company. The area was known for its diamonds, and discoveries were made in the mid-1920. In 1994, the Second Respondent, the government, granted the land in dispute to the First Respondent, with all mineral rights.

First the Land Claims Court (the Court a quo) had to establish if the Applicants had been dispossessed of the land and also their rights as a result of racially discriminatory reasons or practices. Prima facie the Court found that the Applicants' case had no merit. The Court was of the opinion that not all dispossessions under racially discriminatory laws and practices could fall under a restitution claim. In other words, dispossessions that did not fall under a law or practice designed to bring about "spatial apartheid", did not qualify as dispossession for the purpose of the Restitution Act. Because of this, the Court had to follow its earlier judgements in the case Minister of Land Affairs v Slamdien 1999 (1) BCLR 413 (LCC). The Court ordered absolution from the instance (dismissed the case), but made a recommendation to the Minister of Land Affairs that alternative, appropriate relief be investigated. The Court a quo's judgement has been reported as the Richtersveld community and others v Alexkor Ltd and Another 2001 (3) SA 1293 (LCC).

The Supreme Court of Appeal unanimously upheld the appeal (the appeal was successful). One of the reasons for the success of the appeal was that the Court held that the real ratio of the judgement in the Slamdien case was not the absence of "spatial apartheid" measures, but rather the Act that limited restitution remedies to people who had been discriminated against in the exercising of their land rights.

The Restitution Act was designed to give effect to Section 9(3)(b), 121, 122 and 123 of the interim Constitution of 1993 (now Section 25 of the 1996 Constitution). Section 121(2)(b) read with Section 8 (2), provided for restitution to any dispossession of land rights, which would have been inconsistent with the prohibition of racial discrimination contained in Section 8(2) of the 1993 Constitution. Considering the final Constitution of 1996 Section 25(7), widened the right to restitution for any dispossession “as a result of past racially discriminatory laws or practices”.

Court held

When considering the Richtersveld case, the Land Claims Court’s denial of such rights was based upon the fact that there was no racial discrimination. The Land Claims Court found that this requirement had not been met. The Court further held that not all dispossessions under racially discriminatory laws and practices could support a restitution claim. Therefore the Land Claims Court is stating that dispossession that did not occur under a law or practice designed to bring about “spatial apartheid” does not qualify as dispossession for the purposes of the Restitution Act.

In dismissing the Appellants’ case in the Land Claims Court, the applicant was of the opinion that the state failed to recognise and protect their rights. The Land Claims Court however stated that the denial of such rights was not demonstrated, or based upon any racial discrimination. The Supreme Court found that in so doing, the Land Claims Court erred. Their approach ignored the effect of the laws and practices on the Applicants’ rights. The Court therefore failed to consider the indirect racial discrimination relied upon by the Applicant⁵⁶.

The Court set aside the order of the Land Claims Court a quo and replaced it with an order declaring that, the First Plaintiff was entitled in terms of Section 2(1) of the Restitution of Land Rights Act 22 of 1994, to restitution of the right to exclusive beneficial occupation and use, akin to that held under common-law ownership, of the subject land, including its minerals and precious stones.

The applicants, the Richtersveld Community, won their case in the Supreme Court of Appeal. This decision was then contested by the respondent, Alexkor, in the Constitutional Court.

⁵⁶ Taking all these factors into consideration, the Supreme Court of Appeal decided to uphold the Appeal

Alexkor Ltd and Another v Richtersveld Community and Others 2003

(12) BCLR 1301583 (CC)

Division : Constitutional Court

Date : October 10, 2003

Summary of the Case

In earlier proceedings before the Land Claims Court, the First Respondent's claim was dismissed. On appeal to the Supreme Court of Appeal, it was held that the state's dispossession of the land rights of First Respondent occurred during the 1920s, after diamonds were discovered on the land, and that this dispossession was the result of racially discriminatory laws or practices. The judgement of the Supreme Court of Appeal is reported as *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) BCLR 583 (SCA).

The first appellant (Alexkor) was granted leave to appeal to the Constitutional Court. A late application by the second appellant, (the Government) was granted.

On appeal to the Constitutional Court, it was contended by the Applicant that the Supreme Court of Appeal has erred in its findings that:

- The First Respondent's rights survived annexation by the British Crown in 1847;
- The First Respondent had a right to the land in 1913; and
- The First Respondent was dispossessed of the land through racially discriminatory laws and practices.

The First Respondent argued that these were questions beyond the Constitutional Court's jurisdiction; and alternatively that the Supreme Court of Appeals' decision was correct.

As to the jurisdiction argument, the Constitutional Court found that the case does raise constitutional matters, because of issues related to the interpretation of an Act that provides as follows:

"A person or community dispossessed of property after 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to Restitution of that property or equitable redress."

Therefore the issues in the appeal relating to the interpretation and application of Section 2(1) of the Restitution of Land Rights Act 22 of 1994, were all “constitutional matters” over which the Constitutional Court had jurisdiction. Furthermore, Section 167(3)(c) of the Constitutional Court was also the final arbiter on “whether an issue is connected with a decision on a constitutional matter.”

Court Held

The Constitutional Court examined the nature of the First Respondent’s title, and concluded that the true character of the title that the Richtersveld community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the use of water, grazing and hunting, and exploiting the natural resources of the land, both above and beneath the surface. The Constitutional Court further held that ownership of the minerals and precious stones also vested under indigenous law.

Therefore the conclusion of the Supreme Court of Appeal, that indigenous rights to private property in a conquered territory were recognised and protected after the acquisition of sovereignty, so that the rights of the Richtersveld community survived annexation, was correct. The indigenous law ownership of the Richtersveld community remained intact, as on 19 June 1913.

The Constitutional Court found in favour of First Respondent in respect of all three issues raised by First Appellant. The Constitutional Court dismissed the appeal, but made a minor amendment to the order of the Supreme Court of Appeal, ordering that:

“The order of the Supreme Court of Appeal is amended to read as follows”

‘...the appeal succeeds with costs including the costs of two counsel. The orders of the LCC are set aside and replaced with an order in the following terms:

It is declared that, subject to the issues that stand over for later determination, the First Plaintiff [the Richtersveld Community] is entitled in terms of Section 2(1) of the Restitution of Land Rights Act 22 of 1994 to restitution of the right to ownership of the subject land (including its minerals and precious stones) and to the exclusive beneficial use and occupation thereof.”

The Second Appellant was criticised for the delay in seeking special leave to appeal, and was ordered to pay the costs of late application on an attorney and client scale.

The Constitutional Court case was thus in favour of the Richtersveld Community (Respondents) in a very significant ruling relating to land restitution, human and property rights.

Constitutional Issues

If the outcome of this case study is compared to constitutional issues, it can be said that the Bill of Rights in the new Constitution guarantees existing property rights, but it simultaneously places the state under a constitutional duty to take reasonable steps to enable citizens to gain equitable access to land, especially for those who were dispossessed of property after 19 June 1913, as a result of past discriminatory laws or practices. The biggest substantive constitutional issue raised by the restitution process involves on the one hand those who benefit from restitution and those whose existing rights are affected by such claims.

As far as expropriation of private land for purposes of restitution is concerned, it has been authorised explicitly in amendments to the 1994 Act; once implemented, these expropriations would be undertaken in terms of the provisions of Section 25 of the Constitution and the Expropriation Act 63 of 1975.⁵⁷ When the expropriation route is followed, it should not cause any problems, provided that the expropriation and transfer form part of a legitimate land reform process. Concerning human rights and property, Governments shall respect and ensure individual rights without distinction of any kind, by passing laws that give effect to these rights, and by providing any person whose rights have been violated with an enforceable remedy by law.⁵⁸

Restitution of State Land is possible if the state certifies restoration as feasible. Section 33 of the Restitution Act provides specifically for matters to be considered by the Court in deciding restitution claims. Examples are the desirability of remedying past violations of human rights, the requirements of equality and justice, or any other factor that the court considers relevant and consistent with the spirit and objectives of the Constitution.

Compensation can include both compensation for the value of the land and for additional direct financial loss caused by the original dispossession, as well as an amount for hardship, such as emotional suffering.

⁵⁷ The Restitution of Land Rights Amendment Act 48 of 2003 inserted Section 42 E into main Act of 1994 to authorise the minister to purchase, acquire or expropriate land and Rights in land for restitution purposes.

⁵⁸ English & Stapleton, *The Human Rights Handbook*. Juta, 1997, p.18.

3.3 Second element: Land Redistribution

The redistribution of land consists of various laws and programmes aimed at making land available to people with insufficient or no land. The purpose is to establish a more equitable distribution of land. This aspect of land reform finds its authority in Section 25(5) of the 1996 Constitution, which provides that the state must take reasonable measures within its available resources to foster conditions that enable citizens to gain access to land on an equitable basis.

Section 25(5) of the Constitution delineates a socio-economic right, requiring the state to implement measures aimed at achieving land redistribution.⁵⁹ Section 25(6) read with Section 25(9) of the Constitution, imposes an obligation on the state to enact legislation relating to land redistribution and reform. The Development Facilitation Act of 1995 was introduced to provide for additional land reform matters not arising from specific historical land claims, in other words to promote redistribution of land through the greater availability of land.

The act must be regarded as an attempt to control and promote a variety of land-reform initiatives of a redistributive nature. This involves making enough and suitable land available for development purposes, and providing suitable mechanisms by which the land can be used to give access to land quickly and cost effectively. The central aim of the Land Reform Pilot Programme of 1995 is to develop efficient, equitable and sustainable mechanisms of land redistribution in rural areas.

The following case heard in the Land Claims Court makes an interesting finding on the redistribution of land in the process of land reform.

⁵⁹ In *Government of the Republic of South Africa v Grootboom* 2001(1) SA 46 (cc) para 42.

Mahlangu NO v Minister of Land Affairs and others 2001 2 ALL SA 190 (LCC)

Division: Land Claims Court

Date: 2001

Summary of the Case

The Claimant lodged a claim to the Land Claims Court for the restitution of a certain property in terms of the Restitution of Land Rights, Act 22 of 1994. The Third Respondent found that the claimant's claim did not meet the requirements of Section 2 of the Restitution Act to claim, due to the fact that the claimant could not prove that they had been dispossessed of their property. The recommendation of the Third Respondent was therefore that the matter be dealt with under Section 6 (2)(b) of the Restitution Act, as a redistribution claim.

Upon which the First Respondent attempted to sell some of the land, whereupon the claimant launched proceedings in the High Court to interdict the sale. However, the matter was settled out of court on the basis that the First Respondent would not alienate the land without 30 days' notice to the applicant. In 1999, the First Respondent, acting in terms of the settlement, indicated via a letter to the claimant's attorneys her willingness to sell a portion of the property.

Court Held

- In order to establish whether the applicant disclosed a prima facie case to be granted relief, the Court enquired whether the Applicant had a "serious question to be tried". This was weighed against the balance of convenience.
- The Court is required to weigh the apparent strength of the Applicant's case in terms of the final relief, on the one hand, and against the balance of convenience on the other (balancing of rights to achieve equilibrium).

The issues emerging for determination were:

- Whether the Applicant's failure to apply for the review of the land to the Regional Land Claims Commission is a barrier to an application for direct access in terms of Section 399 of the Restitution Act;
- Whether the matter is res judicata;

- Whether the Applicant's acceptance of referral of the matter in terms of Section 6(2)(b) to be dealt with as a redistribution matter amounts to a waiver of rights to restitution in terms of the Act;
- Whether the Court had jurisdiction to determine the Applicant's aboriginal claim dating earlier than 19 June 1913. (A jurisdiction argument is always an interesting point, but can end a case quickly if it is found that the Court has no jurisdiction and the case is dismissed as a result).
- Whether the claimant suffered a dispossession as defined in the Restitution Act;
- Whether the balance of convenience favours granting relief.
- Concerning the first issue, the Claimants were satisfied with the decision of the Court, stating that under a redistribution programme, no one has a claim to a specific plot of land.
- With regard to the second matter, the counsel for the First and Second Respondents argued that the matter was res judicata.
- With regard to the third issue, the Court found that, although the claimants referred the claim for redistribution, this does waive the right of the Applicants to claim restitution under the Act.
- Concerning the fourth issue, which is the cut-off time on 19 June, 1913; the Court has no jurisdiction to hear cases pertaining to a prior date.
- With regard to the fifth issue, the Court found that the Applicant did not specify clearly the date of dispossession or the reasons for the loss of property. This means that there is no serious question to be tried.
- The Court concluded that the Applicant did not demonstrate a serious question to be tried, and therefore the balance of convenience favoured the Respondents.

Case Evaluation

When evaluating the case of *Mahlangu No v Minister of Land Affairs*, it can be said that *de Novo*, the Applicants, did not have a *prima facie* case. Once again a claim was lodged for restitution of property but the Applicants' claim did **not** meet the requirements of Section 2 of the Restitution Act, because the Applicants could not show that they had been dispossessed of the property. The question that now arises is whether this application was frivolous and vexatious. Should the judge have dismissed the case due to the fact that the applicants had *no locus standi*? The Third Respondent recommended that the Court must consider the application under Section 6(2) of the Restitution Act and deal with the matter as a redistribution claim. The Respondents in this case however acted irresponsibly by attempting to sell a portion of the property whilst proceedings were underway. The reason for this is that, when a regional commissioner has accepted a claim, it must be published in the Government Gazette. This publication has important implications, namely; no person may improperly obstruct the passage of the claim, and no person may **sell**, exchange, donate, lease, subdivide, rezone or develop the land without giving the commissioner prescribed notice. When consider the case in *casu*, the Applicants had to apply for an interdict to prevent the Respondent from alienating any of the property pending finalisation of the claim. In other words, it can be said with confidence that the Respondent did not comply with the applicable regulations. One wonders, in cases like these, what type of legal aid the Respondent's attorneys actually rendered their clients.

When considering the merits of the applicant's case, one feels that this case should not even have been entered into the Court. It is an example of a case with no merit and a total waste of the taxpayer's money. The Court's finding that the Applicants did not have a serious question to be tried shows that this case should have been dismissed *de novo*, with costs.

The application was dismissed.⁶⁰

Constitutional Issues

Most of the actual work on provisions of access to land in terms of Section 25(5) takes place in the form of government policy making. Many black people were prevented from acquiring access to urban land by apartheid laws. They found themselves restricted or

⁶⁰ *Mahlangu No v Minister of Land Affairs and Others* 2001 2 ALL SA 190 (LCC).

removed from urban areas in terms of pass laws, or by racially discriminatory legislation. A consequence of this uneven pattern of urban land distribution caused the poor to locate in inaccessible and remote areas, and poverty-stricken and crime-ridden circumstances. It is important that the redistribution programme be designed in a manner that will allow it to respond to different needs and circumstances in appropriate ways so that it contributes to the alleviation of poverty and economic growth, with the restoration of human rights.

In cases such as the above, it can be concluded that it is preferable for such land claims to be dealt with through a comprehensive programme of redistribution, rather than as individual claims for restitution. One possible way of addressing such claims is through access to commonage. A reallocation of commonage to poor residents, who wish to supplement their income, could address local economic development and provide an inexpensive land reform option. The term commonage is traditionally given to land owned by a municipality or local authority, usually acquired through state grants or from the Church. It differs from other municipality-owned land in that residents have acquired grazing rights on the land, or the land was granted expressly to benefit needy local inhabitants.

According to a spokesman at the Department of Land Affairs, the Department is committed to ensure that existing commonage land is used as far as possible for land reform purposes, and the Department will support the purchase of additional land for commonage purposes where necessary.

3.4 Third element: Security of Tenure (Labour Tenants) Act 3 of 1996

The Land Reform (Labour Tenants) Act 31 of 1996 is intended to strengthen labour tenants' land rights and to increase access to agricultural land.⁶¹ In order to qualify for any of the protective measures in the act, a prospective Applicant therefore first has to prove that he or she is a labour tenant as defined in the Act.

Section 1 of the Act defines a labour tenant as someone residing or with the right to reside on a farm with the right to use cropping or grazing land in exchange for labour. The protection envisaged by the Act works in two directions. On the one hand it provides tenure security for labour tenants by confirming their right to occupy the land in question

⁶¹ In this regard the Act has both restitution and tenure reform facets. see D.J. Carey Miller (with A Pope) Land title in South Africa (2000) 525.

and or the other it ensures that they cannot be evicted from the land. In terms of the act, the owner or lesser may only evict labour tenants if it is fair and equitable to do so.⁶²

The act precludes evictions against labour tenants who are older than 60 or cannot provide labour personally.⁶³ Labour tenants who satisfy all the requirements in Section 1 of the Tenure Act may apply for an award of land or land rights and for financial assistance.⁶⁴

The case of Zulu below illustrates the relevant issues relating to security of tenure and the land reform process in South Africa.

Zulu and Other v Van Rensburg and Others (1996) 2 ALL SA 615 (LCC)

Division: Land Claims Court

Date: May 17, 1996

Summary of the Case

The owner of certain farms had, upon his death, granted right of use over his property to his wife. This was held in trust by Volkskas Limited, on behalf of two beneficiaries.

Subsequently, the farms were taken over by Mr. X, who conducted farming practices on behalf of the deceased farmer's wife. Mr. X and the widow fell in love and were married.

Prior to the original owner's death, the Second and Third Applicants, as well as the husband of the Sixth Applicant, resided on the farms, with certain grazing rights, in return for which they provided labour. When Mr. X assumed control of the property, the Second and Third Applicants, and the husband of the Sixth, entered into an agreement in terms of which they would have the right to continue residing with their families on the farms and to graze their stock on the property. In return they would provide labour to Mr X.

Similar agreements were reached with the First, Fourth, Fifth and Sixth Applicants, using the original agreement with the original farmer as a guideline.

At this stage, all applicants regarded Mr X as the new owner of the farms. In 1992, the estate of Mr. X's new wife was sequestered. In 1995, Mr. X entered into a written agreement in terms of which he purported to buy the right of use of the farms from the trustee of his wife's insolvent estate. Two months later,, Mr. X entered into another agreement, whereby he purported to sell the right of use to a partnership, including the First and Second Respondents.

⁶² Silberg and Schoemans. The Law of Property (4th ed 2003) 493.

⁶³ Section 9 of the Extension of Security of Tenure Act 62 of 1997.

⁶⁴ Silberg and Schoeman's. The Law of Property (4th ed 2003) 496.

The Respondents took control of the farms and adopted the attitude that the second agreement terminated the agreement between Mr. X and the Applicants. The Applicants were informed that they would have to enter into written contracts with the Respondents, in terms of which they would be entitled to continue residing on the farms in return for supplying labour. The Applicants would also be required to dramatically reduce the number of their cattle.

At the beginning of 1995, a meeting was held with the Applicants, during which the First Respondent threatened to evict them if they did not enter into the proposed written agreement. However, no final written agreement was reached. By March 20, 1996, the Respondents and Mr X delivered a written notice to each Applicant, stating that they would be evicted if they failed to vacate the farms and remove their stock. One of the paragraphs in the eviction notice gave the Applicants until 20 June 1996 to vacate the farms and remove their stock, while another paragraph gave them seven days to remove all their stock.

Upon receiving the notice, the Third Applicant concluded a written agreement with the Respondents. The other Applicants did not enter into any agreements, nor did they remove their stock within the seven-day period. On 18 March 1996, their stock was impounded in terms of the Natal Ordinance 32 of 1947.

The Applicants brought an urgent application to the Land Claims Court, claiming to be labour tenants, as contemplated in the Act. They contended that they were in peaceful and undisturbed possession of their stock and sought a mandament van spolie. The Respondents argued that the Applicants were not labour tenants, that the impounding occurred in terms of the pains ordinance, which preclude granting a mandament van spolie and that, in any event, the Applicants had not made a case for such relief. The Third Applicant alleged that he had signed the agreement under duress and that it deprived him of his rights as a labour tenant. The Respondents submitted that the agreement had been entered into willingly and that the Third Applicant was never a labour tenant. The Respondents also raised two points in Limine:

1. That the urgency of the matter was of the Applicants' own making and that the application for condonation of non-compliance with the forms, service and time limits prescribed by the Rules of the Supreme Court should therefore be refused; and

2. that the Land Claims Court lacked jurisdiction to grant a mandament van spolie.

Court Held:

- On the facts before it, the Court held that the Applicants had not delayed unduly in bringing this matter to court, and that the circumstances justified an urgent ruling.
- With regard to the issue of jurisdiction, the Court accepted the contention that it was a creature of statute, and that the Court had to exercise its powers within the four corners of the Restitution of Land Rights Act 22 of 1994. The English text of Section 33(2) of the Land Reform (Labour Tenants) Act 3 of 1996 (“the Act”), requires the Court to determine “any justiciable dispute” arising under the provisions of the Act. The Court found that, where there was a complaint regarding the infringement of the right of labour tenants not to be evicted (as in this matter), a justiciable dispute was arising from the provisions of the Act.
- Apart from the jurisdiction conferred by Section 33(2) of the Act, Section 5 implied that it was the Court’s function to determine disputes concerning the alleged unlawful eviction of labour tenants.
- The Court then considered whether the Applicants could be accurately defined as “labour tenants” as stipulated in Section 1(xi) of the Act. The court held that all requirements as set out in the definition Paragraphs (a), (b) and (c), had to be complied with in order to qualify as a labour tenant. It was common cause that the Applicants complied with the requirements of paragraphs (a) and (b) of the definition. The outstanding disputes therefore was whether the parent or grandparent of each Applicant resided on the farm in question, whether they had cropping or grazing rights, and whether the Applicants were farm workers and thereby excluded from the definition of labour tenant.
- The Court held that the Second Applicant met the requirements of Paragraph (c). This means that an Applicant is not required to show the compliance of his parents or grandparents with the definition of “labour tenant”. Residing on the farm while enjoying cropping and grazing rights is sufficient to comply with this definition (in a restitution claim, this would have been important).

- The Third and Sixth Applicants alleged that their fathers and grandfathers resided on the farms and provided labour to the original owner.
- The First, Fourth and Fifth Applicants alleged that their parents or grandparents satisfied the requirements of Paragraph (c).
- The Court accordingly concluded that the Applicants were not farm workers (in other words, no employer/employee relationship) and that, for the purpose of considering interim relief, they fulfilled the requirements of the definition of a “labour tenant”.
- The Court found that the Applicants clearly enjoyed the right to use the farms for grazing until the time of the wife’s insolvency.
- The Court held that, in the event that the Applicants did not have any rights by virtue of the agreements, a proper interpretation of the Act created a form of statutory labour tenancy, which includes the right to use the farms for grazing.
- The Court found that the Applicants would be severely prejudiced if they were not granted interim relief.
- On the facts, the Court held that the Applicants made a case for interim relief and ordered the return of the stock and the restoration of land use for grazing.

Evaluation of the Case

When evaluating this case under land tenure, it can be said that the Court once again considered the Labour Tenants law, namely Act 3 of 1996 Section 1, where it stipulates clearly that a person has to satisfy all three requirements to qualify as a labour tenant and that they are distinguished from a labour tenant by the fact that a farm labourer is paid predominantly in cash. A labour tenant’s main remuneration consists of the right to use the land for grazing, cropping, etc.

When considering the finding of this case, it can safely be said that the applicant had *Locus Standi*, and that a ruling concerning the matter was needed. Once again the applicant was measured according to the requirements of the Tenure Act, as to whether he qualifies as a labour tenant. On the merits of the case, as already mentioned, the Court found that the Applicants would be severely prejudiced if they were not granted

interim relief. The Court was also satisfied that the Applicants made a case for interim relief. Once again, this is an interesting example of the balancing of rights between an owner of property and a tenant who has historically been discriminated against.

A further well-known example of the Security of Tenure is the Modderklip case. It also fits perfectly with the theme of the treatise, which is the balancing of rights between the public and the individual. In this case, a large group of people illegally occupied a portion of a farm. By the time the landowner utilised his rights and obtained an eviction order, the illegal occupiers had grown in number to 36 000, and the sheriff insisted on a deposit of R1.8 million to execute the eviction. Logically the state refused to contribute to the costs of the eviction. The High Court however granted a structural interdict, ordering the government to produce a plan to end the unlawful occupation and to find alternative accommodation for the squatters.⁶⁵

The Supreme Court of Appeal came up with an appropriate order, declaring that the fundamental rights of both the landowner (individual) and the squatters (public) had been impaired (balancing of rights to reach equilibrium) and that the squatters were allowed to remain on the land until alternative accommodation was made available by the local government.

Moreover, that the landowner (individual) was entitled to constitutional damages (calculated in terms of the Expropriation Act 63 of 1975) for the loss of land use during the period of occupation, and that the state had failed to provide alternative land for the illegal occupiers.⁶⁶

It can therefore be said that the balancing of rights and reaching equilibrium are necessary when evaluating land reform policies in relation to human rights.

Constitutional issues and tenure:

In South African law, various rights to property are recognised, of which ownership (as real right) is one. Ownership is therefore a legal relationship between an owner and a thing or things, which implies that the owner can exercise certain entitlements in respect of the thing or things. Economic, social and political considerations also resulted in the concept of ownership being radically amended and developed in the interest of the whole community. Examples of this are the abrogation of the Group Areas Act 36 of 1966 and

⁶⁵ Modderklip Boerdery (EDMS) BPK v President of the RSA 2003(6) BCLR 638 (T).

⁶⁶ President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd 2004 (6) SA 40 (SCA)

the promulgation of, amongst others, the Development Facilitation Act 67 of 1995, the Land Reform (Labour Tenants) Act 3 of 1996, the Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 which in theory make ownership of immovables accessible to all population groups. The purpose of tenure reform is to increase the value and security of existing land tenure rights. Most laws in this category serve this purpose by providing strict rules, requirements and procedures that must be met before an occupier's or user's rights may be terminated and before the occupier or user may be evicted. This aspect of land reform is authorised by Section 25(6) of the 1996 Constitution, which provides that a person or community whose tenure of land is insecure because of past racially discriminatory laws or practice is entitled to secure tenure or other redress as provided for in a Law of parliament. The act provides for mediation in cases of conflicting claims as well as for alternative land and for compensation to the landowner. For purposes of tenure, the most important function of the act is to provide requirements to protect labour tenants against unfair or unlawful evictions. The South African tenure reform laws have so far survived several constitutional challenges, although the most serious constitutional issue with regard to their application is perhaps not their constitutional validity as much as the extent to which the constitutional and statutory reform measures are allowed to amend, change or develop the common law.⁶⁷

3.5 Conclusion

To ensure that the 1996 Constitution conformed to the principles of justice, the Constitutional Court was required to certify the draft. The 34 Constitutional Principles were then accepted as the framework for the creation of a democratic state with a Supreme Constitution, in which the fundamental rights and freedoms of all citizens are protected. Apart from observing the rule of law, the Constitution also requires the government to respect the principles of democracy and human rights. At least since the French and American Revolutions, it has been accepted that no person or institution has a divine right to govern others. In terms of the Bill of Rights, it can be said that the Bill of Rights instructs the state to use the power that the Constitution gives it in ways that do not violate fundamental rights and to promote and fulfil those rights.

The 1996 Constitution also made significant changes to the power of the courts to enforce the Constitution. Under the 1996 Constitution, the Constitutional Court held in the

⁶⁷ AJ van der Walt & GJ Pienaar. Introduction to the Law of Property, Fourth Edition. Juta, 2004.

Pharmaceutical Manufactures case, that there is only one system of law. It is shaped by the Constitution, which is the supreme law. All law, including the common law, derives its force from the Constitution and is subject to constitutional control.⁶⁸

The duty of the courts is therefore to ensure that ordinary law conforms to the Bill of Rights in the rights and duties that it confers. The Constitution places a range of duties on all role players in this process of transformation in the new South Africa. These duties rest on legislature to formulate reform laws, on the judiciary to interpret and apply these laws clearly, and on the individual to respect these laws, so that the Constitution can come alive in everyone's life and fulfill its role in making the country more democratic, free and fair, with the necessary human rights so that human dignity can prevail.

Through an examination of case law in relation to the three elements of land reform policy in South Africa, this chapter has illustrated how the balancing of rights has been interpreted by the applicable courts. The way in which the implementation of land reform policies is mediated by the legal system through the application of human rights standards is elucidated.

⁶⁸ Pharmaceutical Manufacturers Association of SA: In RE: Ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC) para 44.

CHAPTER FOUR

TOWARDS THE FUTURE ...

4.1 Conclusion

One of the most problematic aspects of the property clause (Section 25 of the Constitution, 1996) is the relationship between land-reform initiatives and the protection of existing human rights, as indicated in the Bill of Rights in Chapter 2 of the Constitution of 1996.

When considering the three elements of land reform in relation to human rights, as discussed in Chapter 3, it is clear that the state has to date of necessity adopted a juristic stance in testing land reform policies. However, it is worrying that the state has a responsibility and a wide legislative power to introduce and enforce regulatory controls over property in the public interest, even if the imposed regulations affect existing human rights.

It is accepted world wide that land reform is a legitimate part of the state's duties to be undertaken in the public interest, and also that the protection of property has to be regarded as part of a process of establishing an equitable constitutional balance between the interest of individuals and the public. In this balancing process, the individual property holder's rights should be measured against the rights of the public over the use of property and the distribution and exploitation of property.

Therefore rights can only be protected in so far and in such a way as is indicated by this balance, and by the values of an open and democratic society based on human dignity, the promotion of equality and freedom.

The protection of property as a fundamental right should neither threaten nor limit rights unreasonably or unfairly. Consequently, it should not impede, but rather promote and encourage land reform. It is of importance that the property clause in the Constitution, Section 25 of 1996, not be confused or compared with traditional, private-law protection of property. In private law, the purpose of property protection is to absolutely insulate the rights in question from any invasion or interference that is not based on the owner's permission.

In Constitutional Law, the purpose of the property clause is to ensure that a just and equitable balance is achieved between the interests of private property holders and the public in the control and regulation of property use. The case law used to illustrate the three elements of land reform as it has developed over the past ten years since the adoption of the new constitution, has established a position regarding property and its protection in the constitutional context. The issue must be seen in view of the special and unique function and purpose of the Bill of Rights. This however, does not mean that existing property holdings are guaranteed absolutely against any interference or invasion not authorised or consented to by the owner. In other words, no constitutional property clause can guarantee existing property holdings indefinitely and absolutely. And no property guarantee can survive the existence and absolute insulation of unjust and inequitable distribution. But the principle remains that the notion of a constitutional democracy requires some justice and equity in the distribution of land. It seems reasonable to argue that an important part of the function of the new Constitution was to free land and property from the constraints of apartheid laws and to promote the distribution of property and security of land tenure

It can be said that the courts have a definite constitutional function in controlling the constitutional validity and justification of legislative limitations on property rights.

The *juris prudence* of the European Court of Human Rights is instructive in this regard: the court accepts that it needs to leave a wide “margin of appreciation” for individual member states to decide on the wisdom and suitability of regulatory controls over property. South African courts can find extremely valuable examples, suggestions and support in foreign law.

The constitutional approach to the property clause suggests that a wider rather than narrower concept of property is appropriate for constitutional questions; for example that the compensation issue can be seen as part of the balancing process rather than just private law reparation. This makes it possible to see the protection of existing property rights and the promotion of land reform as related and equally important.

In this constitutional process, the idea is not so much to solve the inherent tension between individual property interests and the public interest in property, but rather to maintain an equitable balance.

In the spirit of the new democracy, a land reform programme cannot exist without taking human rights into consideration. One of the major characteristics of apartheid Land Law was that the rights and interests of black people to use land were systematically eroded and disregarded. In the wake of the new Constitution, it now becomes possible that the effect of the 1996 Constitution was to overturn that position and create a situation where rights could be recognised, not only by way of land reform legislation, but also by taking human rights, democracy and freedom into consideration.

The major issue is still whether white South Africans are ready for the transformation of property, even with compensation as indicated in the Bill of Rights. Is land compensation the answer to the political settlement concerning the transformation of property? Are sufficient funds available for a meaningful redistribution programme? This could be the answer to this delicate and sensitive issue.⁶⁹

Article 1 of Protocol 1 on Human Rights states:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the condition provided for by law by the general principles of international law”.

Property rights are a part of a general right to a standard of living, life and dignity. It is based upon human rights as an integrated whole, which is linked to social and economic rights.⁷⁰ Article 26 of the International Covenant on Civil and Political Rights implies that land reform must be carried out without any discrimination based on race, class, sex or ethnicity: all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. The principle of non-discrimination is also embedded in the African Charter of Human and People’s Rights, the International Convention on the Elimination of all forms of Racial Discrimination, the Woman’s Convention and Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa. The new South Africa is concerned with human rights abuses, tackling issues of land reform, and the redistribution of wealth.

⁶⁹ Robertson, Michael. Land and Human Rights in South Africa: A reply to Marcus and Skweyiya (1990) SAJHR, 215.

⁷⁰ Hellum, Anne and Derman, Bill. Land reform and Human Rights in Contemporary Zimbabwe: Balancing individual and Social Justice through an Integrated Human Rights Framework, doi:10.1616/lj.worlddev.2004.

The Bill of Rights instructs the state to use the power that the Constitution gives it in ways that do not violate fundamental rights and which promote and fulfil these rights. Should the state fail to comply with these instructions, it will act unconstitutionally. One of the most important expressions in the South African Law is “*maxim ubi ius ubi remedium*”, - where there is a right there is a remedy.⁷¹ Equality, according to Section 9 (2) of the Constitution of the Republic of South Africa, Act no 106 of 1996, includes the full and equal enjoyment of rights and freedoms for all citizens. Special measures may be taken to ensure the protection or advancement of people disadvantaged by discrimination in the past. Section 37 of the Bill of Rights explains under which conditions a state of emergency may be declared. (Most international human rights instruments contain provisions similar to Section 37 of the Bill of Rights in South Africa).⁷² Human rights are now protected in the new South Africa by a supreme and justifiable Constitution. The suspension of rights will only be possible under the conditions prescribed by Section 37 of the Constitution of the Republic of South Africa, Act no106 of 1996.

It is clear that the 1996 Constitution contains the aspects and characteristics to play a definite role in the process of transformation in South Africa. This means that the property clause, like the rest of the Bill of Rights, has to be interpreted and applied on the values of the constitution in a functional way, making sure that constitutional rather than private law be emphasized.

In Chapter 1 and Chapter 3, this treatise shows that property for the purpose of Section 25 of the Constitution is a constitutional right. Its character as indicated in the 1996 Constitution implies that property questions cannot be addressed in terms of traditional or private law principles. This mean in practice that all property issues have to be regarded against the background of their constitutional relation: This will establish and maintain a just and equitable constitutional balance between the protection of private property and the promotion of public interest in land reform.

The protection of individual rights cannot be undertaken without due regard for public interest, just as regulatory controls over property in the public interest must have regard for the protection of the existing property interests of individuals. It can therefore be said that the Constitution both protects existing rights and authorises the promotion of land reform within the framework of Section 25 of the Constitution, and that every aspect of the

⁷¹ Currie, Ian & De Waal, Johan. The Bill of Rights, Fifth Edition, Juta 2005, p.23.

⁷² Article 15. European Convention for the Protection of Human Rights and Fundamental Freedoms, Art 27, American Convention on Human Rights, Art 4, International Covenant on Civil and Political Rights.

property clause has to be regarded as part of a constitutional effort in balancing individual interests and public interests in terms of a constitutional order.

There will be growing pains, but pearls cannot be born without pain. Indeed, according to William Caldwell “*every great work of art goes through messy phases*”.

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