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The Legal and Philosophical Dichotomy between Land and Property

A Transformative Justice Approach to the Rights and Wrongs of South African Property Law

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Introduction

The premise of this chapter is that since the advent and the promulgation of the Constitution of the Republic of South Africa, 1996 (Constitution), which came into force on 4 February 1997, South African courts have developed a rich body of jurisprudence that has contributed significantly to developing pre-existing notions of common property law, within a constitutional dispensation.[1] It is widely accepted that transformative justice is not a concept that has a finite period for its achievement. It is an elusive endeavour that must mirror the needs and aspirations of a changing and dynamic society. In its preamble, the Constitution contains an express goal to create 'a society based on democratic values, social justice and fundamental human rights' to 'improve the quality of life of all citizens and free the potential of each person'.

This chapter argues that it is incumbent upon South African society to critique, assess and probe whether the provisions embedded in section 25 (with or without an amendment) of the Constitution are in and of themselves adequate tools to deliver the goals of land justice and land reform within the current property law framework. This chapter asserts that it is critical to implement the provisions contained in section 25 of

[1] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC); *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (1) SA 46 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* 2010 (3) SA 454 (CC).

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the Constitution – but that there are underlying structural, systematic, social, economic and historical legacies, as well as legal impediments that continue to evade justice in its essence, even if the constitutional provisions were to be applied to the letter. To support this contention, the drafters of the Constitution appreciated the need to progressively develop principles of transformative justice beyond the role of the judiciary. The statement by the Department of Justice and Constitutional Development that it has committed to 'co-ordinating a focused national dialogue to review and assess the impact of 25 years of a constitutional democracy' and whether the intention of constitutionalism is realised (Department of Communications and Information Systems, 2020) finds relevance in the context of the call for an effort to develop a system of property laws that finds its expression, grounding and meaning in the South African population.

The Principle of Transformative Justice

The Preamble of the Constitution states that the Constitution was adopted as the supreme law of the country to, among other goals, 'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'; lay the foundation for a democratic and open society; and improve the quality of life of all citizens. Evident in the goals laid out in the Constitution is the desire to facilitate the migration from one form of rule or government to another – an example of an incoming government establishing principles aimed at justice during a period of transition.

Transitional justice denotes measures adopted by the government of the day to address a departing regime's legacy of repression and violence during a period of political transition (Gready & Robins, 2014: 340). Such methods include truth commissions, the repeal of old discriminatory laws for the creation of new laws, and the creation of new bureaucratic structures (Daly, 2001–2002: 73). Measures one can note as products of the principles of transitional justice in the realm of land reform would include section 25(1) and 25(7) of the Constitution[2] and the various pieces of statute flowing from these provisions. The

[2] Section 25(1) of the Constitution provides that 'no one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'; section 25(7) of the Constitution provides that 'a person or community dispossessed of property after July 1913 as a result of past racially discriminatory laws or

aforementioned sections of the Constitution indicate a clear transition from deprivation to express protection against it. Transitional justice has also meant selecting legislation deemed useful and non-discriminatory for use in the legal system of the incoming regime. An example of this, as illustrated in the discussions to follow, is the Deeds Registries Act 47 of 1937.

Though necessary for the seamless introduction and establishment of a new dispensation, one can note that transitional justice serves merely to usher and facilitate. Transitional justice lacks the specificity to substantively address the ills that attach themselves to the new dispensation as legacies of the past government. It is in this way, one can opine, that a state finds itself with parallel legal and political realities – the understanding that one has heightened freedoms under the new political dispensation while one's lived reality does not mirror the outcomes envisioned by the new legislation and policy.

In this context, we find the principle of transformative justice. Transformative justice is focused not only on the legal and overarching political framework. The principle of transformative justice emanates from the criticism of traditional approaches to nation formation (for example, truth commissions and criminal trials) for providing forms of justice which 'do not resonate with and are not embedded in communities, cultures and contexts' (Hoddy, 2021: 341). Transformative justice involves 'change that emphasises local agency and resources, the prioritisation of process rather than preconceived outcomes, and the challenging of unequal and intersecting power relationships and structures of exclusion' (Hoddy, 2021: 341). One can thus opine that this is a process that entails the meaningful participation of the polity, particularly those previously marginalised, in the formation and development of the legal and social framework of the country. Transformative justice proposes that 'empowerment and participation' be at the centre of nation formation (Hoddy, 2021: 341). There have been few examples of the application of this principle in practice. This chapter, having had regard to South African political history and the legislative structure of the South African property system, aligns with the approach and uses the principles gleaned from it to provide a critique of the South African property law in its current form as well as propose measures for the achievement of transformative justice.

practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress'.

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Considering this, it is critical that the transformative potential of section 25 of the Constitution is realised and implemented – not only by our courts but also in the realm of policy development. While, as argued later, shortfalls and spaces for greater inclusion remain in section 25, we provide a short overview of the property clause's potential for transformation.

Transformation and Section 25 of the Constitution

Section 25 contains three primary pillars, which are a vehicle for transformation. First, it provides in section 25(3) that where property is expropriated, the compensation payable must reflect an equitable balance between the public interest (that is, the purpose for which the property is expropriated) and the interests of those affected (that is, the landowner's loss as a result of the expropriation). Section 25 lists five factors (which rank equally) in determining what will count as 'just and equitable' compensation. Market value is only one of these factors. The mechanism envisaged in section 25 is a flexible one that permits payment of compensation on a scale which can be adjusted based on the circumstances of each case, ranging from above-market value compensation to below-market value compensation and arguably even nil compensation in certain limited circumstances (Ngcukaitobi, 2021: 184).

Secondly, section 25(5) expressly enjoins the state to enable citizens to gain access to land on an equitable basis by taking reasonable legislative and other measures within its available resources.

Finally, section 25(6)–(9) envisages the creation of a range of statutes aimed at transforming land ownership patterns through restitution, strengthening tenure security, and achieving broader land and water reform measures. Some of these statutes have now been created – including the Extension of Security of Tenure Act 62 of 1997, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, the Land Reform (Labour Tenants) Act 3 of 1996 (LTA), the Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA), the Upgrading of Land Tenure Rights Act 112 of 1991 (ULTRA) and the Restitution Act 22 of 1994.

However, a key provision that has remained under-utilised is section 25(3), which allows for a flexible compensation regime guided primarily by considerations of justice and equity as opposed to market value. The intention of the drafters of the Constitution was clearly to enable a move away from the market-based pre-constitutional approach and to make

land reform more affordable for the state when considerations of justice and equity permitted payment of below-market value compensation.

Historically and for policy reasons, the South African state has implemented what is known as the 'willing buyer, willing seller' principle of compensation for expropriation or acquisition of land, including for land reform purposes. This principle dictates that where property is expropriated in the public interest, the compensation paid for it should be equivalent to the price a willing buyer would have paid a willing seller for it on the open market. The Constitution does not mandate the willing buyer, willing seller principle. It was a policy choice that reflected the post-1994 shift of the African National Congress (ANC) from a radical Marxist-leaning liberation movement focused on expropriation-centred land reform towards a neoliberal and investor-friendly approach (Lahiff, 2007: 1580). The approach has been criticised as a major obstacle to transformation in that it allows land reform to be 'dictated by one of the most conservative elements in South African society [i.e. landowners] and one with a vested interest in maintaining the current – highly unequal – structure of the agrarian economy' (Lahiff, 2007: 1593).

Since approximately 2013, however, the ANC has indicated a desire to move away from the willing buyer, willing seller model towards one focused on payment of below-market value compensation – and possibly expropriation without compensation in some cases. This shift can be demonstrated with reference to recent legislative developments in this area, such as the Property Valuation Act 17 of 2014, which established the office of the Valuer-General for purposes of valuing land identified for land reform and sets out guidelines and factors for such valuations. Planned developments include the (now failed) amendment to section 25 of the Constitution and the Expropriation Bill B23-2020. The constitutional amendment aimed to insert a proviso in section 25 to the effect that compensation for expropriation for land reform purposes may, in certain circumstances, be nil. The Expropriation Bill that is under consideration by the National Council of Provinces at the time of writing aims to repeal the old Expropriation Act of 1975 and to bring the compensation regime in line with the principles espoused in the Constitution.

The question of whether the Constitution implicitly allows nil compensation is beyond the scope of this chapter. However, it is clear that section 25 contains a clear transformative mandate which enjoins the state to pass legislation aimed at land reform and enables it to pay below-market value where that would be just and equitable.

Support for the notion of a concerted and direct effort at reforming property laws finds expression in both the interim and current Constitutions. In other words, beyond the presence of section 25 within the Bill of Rights, it was the intention of the drafters of the Constitution that Parliament and the Executive would, in parallel (with the promise of a constitutional interpretation and application of laws by the courts), contemporaneously seek to either amend and/or repeal laws that work at odds with the constitutional framework after the dawn of democracy.

Schedule 6 of the Constitution is a provision that is hardly considered, debated and applied in the context of property law and land reform, yet it provides a useful lens within which to analyse the role of the law in the discussion on the rights and wrongs of property law in South Africa and how to address the dichotomy between land reform and property laws.

Schedule 6(2)(1)(a) of the Constitution provides that 'all law that was in force when the new Constitution took effect continues in force, subject to any amendment or repeal and . . . consistency with the Constitution'. The drafters of the Constitution, therefore, understood that the promulgation of the Constitution and, in particular, section 25 could not, by its mere interpretation and application by the courts, simply eradicate the oppressive body of common laws and legislation that existed prior to 1996. Schedule 6(2)(1)(a) is, therefore, authority for the proposition that the Constitution necessitates a direct, focused and intentional need to transform, repeal and amend the common law in so far as it is at odds with the Constitution. In other words, it was not enough that section 25 was promulgated. It remained incumbent upon Parliament and the Executive pointedly to develop laws and policies aimed at achieving the goals of substantive justice. The court in *Soobramoney*[3] (para. 8) pointed to the conditions of rampant poverty, racial disparities in wealth and the deplorable conditions in which the overwhelming number of South Africans existed prior to the adoption of the Constitution. In essence, therefore, while the law would be developed and interpreted as provided for in section 39(2) of the Constitution,[4] positive action and conduct in the form of pointed legislation, policy and common-law reform were required. This chapter assesses whether Parliament has exercised its

[3] *Soobramoney v Minister of Health (Kwa Zulu Natal)* 1997 (1) SA 765 (CC).

[4] When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

powers adequately to bridge the dichotomy between property laws and land reform in a transformative and meaningful way.

We have briefly discussed the transformative potential of section 25. While section 25(1) of the Constitution protects against the arbitrary deprivation of property unless, by a law of general application, it is useful and necessary to delve deeper and to assess the transformative potential and aspiration of this protection to have meaning and substance, in a large-scale and intentional way. The constitutional provision must be applied within its historical context, especially in light of widespread inequality and an inequitable and skewed property rights regime. The Presidential Advisory Panel on Land Reform and Agriculture (PAPLRA) states that 'an estimated 60% of South Africans have no recorded land or property rights' (PAPLRA, 2019: ii). This endeavour necessitates an assessment of the status of the current property rights regime in South Africa and if the regime, in and of itself, impedes or elevates land reform objectives. It is trite that Roman-Dutch law is a notable source of the South African law of property. The existence of the Constitution does not, on its own, automatically eradicate or dismantle the legacy of inequality which the South African law of property in its current state carries.

Left unchallenged, common-law principles, in their interaction with the structure of South African property law, particularly as they relate to ownership, only serve to perpetuate inequality and the exclusion of the majority of South Africans. Sachs J wrote in the leading *Port Elizabeth Municipality* case:[5] 'complex socio-economic problems . . . lie at the heart of the unlawful occupation of land in urban areas'; and under apartheid *dispossession* was nine-tenths of the law.

Sachs J was of the view that Roman-Dutch law conceptions of the ownership of property may appear neutral on the face of it, but in fact they carry racist notions in their essence (para. 10). This chapter asserts that common-law conceptions of ownership continue to find application in commercial, formal sectors of society and are enjoyed largely by the economically active and white minority,[6] while the black majority has largely remained in the periphery of property law protection, relying heavily on the elusive land reform promise. In 1997, the year that the Constitution came into force, it is estimated that 32 per cent of South

[5] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).

[6] The Presidential Advisory Panel on Land Reform and Agriculture (PAPLRA, 2019: 43) provides that 'approximately 72% of land is held privately in freehold and leasehold'.

Africa's population lived in the former TBVC (Transkei, Bophuthatswana, Venda and Ciskei) states and that 63.6 per cent of those inhabitants did not enjoy formal property rights protection (PAPLRA, 2019: 69). This statistic is juxtaposed against approximately 72 per cent of land being held privately in freehold and leasehold.

Schedule 6(2)(2)(b) provides that: 'old order legislation that continues in force . . . continues to be administered by the authorities that administered it when the new Constitution took effect'. Schedule 6(2)(2)(b) fortifies the view espoused in this chapter that the mere existence of the Constitution and, indeed, the provisions of section 25 were understood by the drafters of the Constitution not as a means to an end, but rather that there needs to be a revision, reimagining, reworking of common-law principles of property law that continue to permeate and define social and economic relations twenty-six years after the promulgation of the Constitution. In applying the principles of transformative justice discussed earlier, one can thus opine that the transformative endeavour must entail assessment and revision of the private and common-law principles of property which permeate the lived experiences of South Africans. In this vein, an over-reliance on the courts, and in particular the Constitutional Court, to interpret provisions of section 25 of the Constitution would not serve to speed up the slow pace of land reform. This is in the context of an overwhelming majority of historically dispossessed South Africans who have little to no access to the courts to benefit from the development of the common-law notions of ownership and the possible inclusion of indigenous thought systems into South African property law via the judiciary.

With the Constitution being a court of appeal and of final instance and section 25 being a constitutional provision, it bears mention that it would be a hefty burden on the judiciary to single-handedly carry the task and delivery of transformative justice and land reform, without Parliament and the Executive actively undertaking a review of current property laws to bring them in line with South African realities. This would entail South African property law reflecting in policy the values and principles that emanate from indigenous South African systems of tenure (Mabasa, 2021: 67).

This chapter attempts to bring to the fore the inherent, underlying conceptual, legal and philosophical differences between property law and land reform, and ultimately calls for a coherent, purposive upliftment and reimaging of property laws to strengthen land reform objectives.

The Wrongs and Rights of Property Laws

As a member of the Presidential Advisory Panel and the only attorney in a ten-member panel of experts, professionals, academics and business-people, I authored the section dealing with 'what constitutes property in South African law'. Similar to the observation by Sachs J cited earlier in this chapter, I bemoan the fact that despite the superstructure that is the Constitution, Roman-Dutch and English law remains dominant in our legislation in the post-democratic era (PAPLRA, 2019: 69). I point out various examples that include a central piece of legislation in property law which was promulgated in 1937 – the Deeds Registries Act. This Act only recognises the mortgaging of real rights to land and rights of security over leases, servitude and mining rights. The Act is not, on its own, perverse. Its shortcoming is that it only applies to a small formal, commercial and economically active segment of society. Although this Act is blind to which race may rely on it, it presupposes land transactions that have been written down and registered in the Deeds Registry. By virtue of its inherent conceptions derived from common law regarding registrability and principles of ownership and possession, this Act excludes approximately 31 million South Africans who hold and dwell on land outside the formal property system (PAPLRA, 2019: 69).

The Alienation of Land Act 68 of 1981 is another piece of legislation that predates the Constitution, remains valid and does not take into account the property ownership disparities in South Africa. A central feature of the Act is that the purchase and sale of land must be in writing in a deed of sale and signed by the parties. On the face of it, this legislation appears innocuous. However, underneath the lofty concepts of property law is the fact that the overwhelming majority of South Africans cannot benefit from the legal protection of this Act. This is because only the real rights of those whose names appear on the Deeds Registry may seek the protection of the Act. As already mentioned, South Africa remains a divided society which largely has no protection under property laws. As such, I call for the review, assessment and amendment of the legal definition of 'real rights' and 'property' to align with a multi-faceted approach to land holding that is not dominated by individual tenure. As observed by Brits (2018: 363), most transactions in the informal or customary sector are not recorded in writing, which limits the ability of property laws to resolve land rights as they pertain to communities.

While property laws protect those who have legally recognised and strong property rights, Parliament has perpetuated the exclusion of

people without secure tenure in the way that it has persisted with the introduction and continuation of a weak tenure system – which largely affects the black majority. Next, this chapter assesses how the courts have interpreted legislation as it relates to the existing systems of tenure.

Development of the Common Law towards the Protection of Informal Rights

Baleni v Minister of Mineral Resources

This matter dealt with an Australian company's application for a mining right over communal land in the Xolobeni area in the Eastern Cape. The main issue was whether mining rights could take precedence over informal land rights. The community argued that the granting of the mining right amounted to a deprivation of their informal rights to property in terms of section 2(1) of IPILRA. Considering this, the community argued that its consent was required before the mining right was granted. The mining company opposed the community's view on the basis that section 23 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) only requires consultation with the affected community prior to awarding a mining right and not during the application process for that right. It also argued that the rights in the MPRDA trump IPILRA on the basis that the MPRDA is the chief statute governing mining and that the MPRDA provides in section 4 that the interpretations consistent with its objects must be preferred over interpretations inconsistent with those objects. The court ruled that mining operations interfere substantially with the agricultural activities and general way of life of the community, which constitutes deprivation as espoused in section 25 of the Constitution. Furthermore, the court stated that both IPILRA and the MPRDA are statutes aimed at redressing the South African history of economic and territorial dispossession under apartheid and, as such, should be read together. Moreover, IPILRA places an additional obligation on the Minister of Mineral Resources to seek the consent of affected communities in terms of customary law as opposed to mere consultation as required by the MPRDA. Where land is held on a communal basis, the community must be allowed to consider the proposed deprivation and make a collective decision regarding their custom and community on whether they consent to the proposed disposal of their land. Consequently, the Minister was prohibited from granting a mining right to the mining company until the company had complied with the provisions of IPILRA.

The *Baleni* judgment[7] was a ground-breaking precedent which affirmed the rights and interests of communal and informal land rights holders and emphasised the importance of consultation with such communities. In fact, the rights of such communities have been elevated above common-law landowners in that what is required is their consent as opposed to consultation only (para. 76). The result of this judgment is that a failure to obtain the consent of the community holding informal rights before granting a mining right may expose a mining right holder to judicial review and may ultimately prove fatal to such a mining right.

Maledu v Itereleng Bakgatla Mineral Resources

In this case,[8] Bakgatla Mineral Resources held mineral rights in respect of land that was registered in 1919 in the Ministry of Rural Development and Land Reform and held in trust on behalf of the Bakgatla-Ba-Kgafela community. In preparation for its mining activities in 2008, Bakgatla Mineral Resources concluded a lease agreement with the Bakgatla-Ba-Kgafela Tribal Authority and the Minister. In 2014, when preparation for full-scale mining operations commenced, these operations badly impacted the farming operations of the community, and they obtained a spoliation order against Bakgatla Mineral Resources. In retaliation, Bakgatla Mineral Resources lodged an eviction application in the High Court to interdict the community from entering the farm.

The community, however, argued that the Tribal Authority did not have sufficient authority to speak for them and that they did not consent to mining on their land – they had not been properly consulted as was required under the terms of the MPRDA. The mining companies had failed to establish that the community had had a reasonable opportunity to participate in the resolution which authorised the conclusion of the surface lease agreement.

The High Court granted the application, and the Supreme Court of Appeal (SCA) refused to grant leave of appeal of the High Court's decision, so Bakgatla Mineral Resources approached the Constitutional Court, which granted the leave to appeal.

The apex court identified the issues for determination as, first, whether the dispute resolution mechanism created by section 54 of the MPRDA

[7] *Baleni and Others v Minister of Mineral Resources and Others* 2019 (2) SA 453 (GP).
[8] *Maledu and Others v Itereleng Bakgatla Mineral Resources (Pty) Ltd and Another* 2019 (2) SA 1 (CC).

was available to Bakgatla Mineral Resources. Secondly, whether section 54 precluded Bakgatla Mineral Resources from approaching the courts for an eviction order without first exhausting this process and, lastly, whether the community had consented to being deprived of their land rights in the farm in terms of section 2 of IPILRA.[9]

The court found that section 54 of the MPRDA employs mandatory language; therefore, this dispute resolution mechanism must be exhausted before approaching the courts for redress. In this regard, the court held that Bakgatla Mineral Resources was obliged to take all reasonable steps to exhaust the section 54 process, which they had already initiated before approaching the court, and while this process is still undergoing, mining operations cannot proceed as this would undermine the independence of the section 54 process. Over and above this, section 2(4) of IPILRA required the community to have been given sufficient notice and be afforded a reasonable opportunity to participate in person or through representation in the meetings where decisions to dispose of their land were taken. In the circumstances, there was no evidence that this process had taken place, so the decision of the High Court was overturned.

Maledu again emphasised the importance of proper consultation with affected communities, particularly those that hold informal rights under IPILRA. It recognised that tribal authorities do not automatically speak for the communities they ostensibly represent and rejected the old approach of concluding agreements with tribal leaders and authorities without consultation with communities themselves. It also highlighted the importance of exhausting the internal appeal process under section 54 of the MPRDA.

Rahube v Rahube

This matter involved siblings, Ms Matshabelle Mary Rahube and Mr Hendrina Rahube, who lived in a property in 1970.[10] When the grandmother passed on in 1978, there was no documentary proof of her ownership. Ms Rahube moved out of the home in 1973 and moved back in 1977 when her marriage broke down. Mr Rahube became the owner of the property by virtue of his land tenure rights having been

[9] Which stipulates that no person may be deprived of their informal right to land without their consent.

[10] *Rahube v Rahube and Others* 2019 (2) SA 54 (CC).

converted to full ownership under section 2(1)(a) of ULTRA, which provides for the automatic conversion into ownership of any land tenure right.

His tenure rights were conferred by a deed of grant, which provided for the issuing of a deed of grant in respect of residential units but limited its issuing to the head of the family who desires to purchase a dwelling for occupation by him and members of his family for residential purposes.

The High Court had declared section 2(1) of ULTRA unconstitutional in that its inherently gendered automatic conversion mechanism was inconsistent with the right to equality in section 9 of the Constitution. The basis for the declaration of invalidity was that a woman could, in terms of customary law, not be a 'head of the family', thus perpetuating the exclusion of women from land rights ownership. To this end, the High Court reasoned that the conversion of tenure rights did not make provision for a dispute resolution mechanism. It defied the *audi alteram partem* principle, and the court accordingly held that it was inconsistent with the right of access to courts in section 34 of the Constitution.

Thereafter, the Constitutional Court was approached to confirm the High Court's order. Here the Constitutional Court held that the Proclamation envisaged a situation where only men could be the head of the family, with women relatives and unmarried sons falling under their control. Consequently, a provision in the statute that differentiated between groups of people did so without a legitimate governmental purpose and is irrational and unconstitutional due to its inconsistency with section 9(1). Moreover, it would undermine the purpose for which ULTRA was enacted – as legislation focused on land reform to redress the injustices caused by the colonial and apartheid regimes. On this basis, the Constitutional Court confirmed the order of the High Court.

Mwelase v Director-General for the Department of Rural Development and Land Reform

This decision, which was the last judgment delivered by Cameron J on his last day as a Justice of the Constitutional Court, involved labour tenants who all occupied land on the Hilton College Estate in KwaZulu-Natal.[11] These labour tenants lodged applications under the LTA with the Department of Rural Development and Land Reform

[11] *Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* 2019 (6) SA 597 (CC).

before the cut-off date of 31 March 2001. However, the Department failed to process the applications submitted before the cut-off dates. This then necessitated the labour tenants approaching the Land Claims Court (LCC), challenging the Department's failure to process their applications in time.

Because of this failure, the LCC ordered the appointment of a Special Master for labour tenants to assist the Department in implementing the LTA. However, the LCC found that the labour tenants had not established that the Minister was in contempt of its order, and the SCA unanimously dismissed the appeal against the LCC's exoneration of the Minister. Subsequently, the labour tenants approached the Constitutional Court for leave to appeal against the LCC and SCA findings.

The Constitutional Court delivered a scathing judgment in which it expressed its frustration with how poorly the government is administering labour tenant applications as well as other forms of land reform. To this end, the court criticised the government's failure to protect and secure the informal land rights of the destitute and to cure landlessness that was created by the apartheid system.

Delius and Bernart (2021: 100) suggest that legislative reform is a route to enhance land rights and that land rights could be converted into privately held titles. This chapter supports the notion of reforming current property laws to recognise and protect land rights and, as such, recognise 'family rights', family grazing land and a multitude of forms of tenure.

Conclusion

As discussed in this chapter, the South African Constitution is the supreme law of the country. Though the Constitution, among other protections, prohibits the arbitrary deprivation of property, a discrepancy exists in respect of who the existing conceptions of ownership in South African property law cater for and protect. South Africans whose property custodianship exists outside the prescripts of what is regarded as 'ownership' and consequently what is regarded as 'private property' are excluded from protection by South African property law. Consequently, one can opine that participation in those sectors of the economy leans on private property ownership. In that respect, this chapter proposes that a transformative justice approach be adopted in developing and promulgating South African property law. As discussed, transformative justice is a novel concept that arose as a critique of transitional justice. The principles emanating from the concept are thus relatively untested.

Despite this, and having had regard to the principles of transformative justice and the South African Constitution, South Africa is well-placed to adopt the principles emanating from transformative justice.

This chapter discusses case law where the court has had to recognise the inequalities emanating from the disparity between land reform and property ownership. This disparity can only be addressed by the legislature taking an active role in the integration of indigenous thought systems, as it relates to the concept of property ownership, into property law as it stands. Such an approach, this chapter proposes, will ultimately serve to remedy the continuous legal battles faced by those on the periphery of the protections of the current conceptions of ownership.

The Constitution in section 34[12] unequivocally provides all with the right of access to justice. Notwithstanding the aforementioned provision, there exist numerous barriers to South Africans' right to access courts. Particularly relevant among these is spatial inequality. In 2020, the South African Department of Statistics reported that the poorest South Africans are located in the rural peripheries of the country (Department of Statistics South Africa, 2020: 18), outside of urban areas where courts are ordinarily located. In 2018, the South African Human Rights Commission reported that 64 per cent of black people in South Africa live in poverty (South African Human Rights Commission, 2018).

Having regard to the above statistics, the costs of legal proceedings and the periods that legal proceedings typically span, it is untenable for South African courts to be charged with the responsibility to lead the transformation of select areas of South African property law, as discussed. Such an approach would perpetuate the exclusion of those who are the subject of transformative justice.

This chapter emphasises that it is incumbent upon the legislature and the executive to lead the transformative justice agenda insofar as it relates to the South African law of property and land reform.

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