

SOUTH AFRICA / JUDGMENT

Herbert NO and Others v Senqu Municipality and Others (2457/2016) [2018] ZAECHGC 92; [2018] 4 All SA 677 (ECG) (11 October 2018)

[2018] ZAECHGC 92

COURT

Eastern Cape High Court, Grahamstown

BEFORE

T Malusi

CASE / FILE NUMBER

2457/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION - GRAHAMSTOWN)

Case

No: 2457/2016

In

the matter between:

GRAHAM

ROBERT HERBERT NO

First Applicant

KEVIN

LAWRENCE COTTERELL NO

Second Applicant

DAWN

EARP

NO

Third Applicant

JAMES

THOKOANA MOTLATSI NO

Fourth Applicant

STEWART

STRAUSS TRUSWELL NO

Fifth Applicant

(In

their respective capacities as trustees of the

TEBA

PROPERTY TRUST (Reg No 194/93))

and

SENQU
MUNICIPALITY
First Respondent
REGISTRAR
OF DEEDS, CAPE TOWN
Second Respondent
THE
MINISTER OF RURAL
Third
Respondent
DEVELOPMENT
& LAND REFORM
TEBA
PROPERTY TRUST

JUDGMENT

MALUSI J:

- [1] This application concerns the vexed issue of land ownership. The application is opposed by the first respondent and the third respondent. The second respondent did not participate in these proceedings.
- [2] The Teba Property Trust (The Trust), represented by the five applicants, claims an entitlement to acquire ownership of the immovable property known as Erf 88, Sterkspruit (the property). In essence the Trust applies for conversion of its permission to occupy certificate to full ownership and transfer of the property from the first respondent to it.
- [3] The first respondent (Municipality) is currently the registered owner of the property. It has raised various legal and substantive grounds to oppose the relief sought by the Trust.
- [4] The second respondent (the Registrar) is a party in these proceedings by virtue of his interest in the matter and pursuant to the requirements of section 97 of the Deeds Registry's Act 47 of 1937.
- [5] The third respondent (the Minister) was belatedly joined as a party due to his interest in the matter. The trust seeks no relief against the Minister. In the main the Minister opposes the declaration of Constitutional invalidity.
- [6] The Trust launched the present application on 23 May 2016. The Municipality contemporaneously with the delivery of its answering affidavit delivered a notice in terms of rule 6(5)(d)(iii) of the Uniform Rules in which it raised a point of law. After the municipality filed the notice, the Trust amended its notice of motion to add a prayer seeking an order to declare unconstitutional the statutory provisions relied upon by the Municipality in support of the contentions advanced in the notice. The Trust later sought a further order consequential to the declaratory order.

- [7] At the hearing an order by agreement was granted condoning the failure by the Trust to comply strictly with the requirements of Uniform Rule 16A. A further order was issued by agreement to hear separately the issues arising from the question of law raised by the municipality and the declarator sought by the Trust. The remainder of the issues between the parties were postponed for hearing in due course.
- [8] It is necessary to provide a brief historical context to the application. The Employment Bureau of Africa Limited (TEBA) was originally incorporated on 14 March 1902 as the Witwatersrand Native Labour Association Limited. On 25 November 1966 the name was changed to the Mine Labour Organisation (Wenela) Limited. After other name change iterations the company was finally registered on 20 June 2000 to the current Teba Limited.
- [9] The Native Recruiting Corporation Limited (The NRC) was incorporated on 27 September 1912. It changed its name to the Mine Labour Organizations during November 1966. The NRC was deregistered in April 1996 and its business was acquired and continued by Teba which by that stage had already been administering
- and managing it. At that time the two companies were having precisely the same shareholding.
- [10] The Trust was originally established on 28 September 1978 to hold and administer the various property rights vesting in Teba which now occupies and conducts business on various properties in different centres throughout the Republic.
- [11] As correctly submitted on behalf of the Municipality the migrant labour system was the harsh consequence of the enactment of the two notorious Land Acts.[1] The principal purpose of the Land Acts was to prohibit Blacks from owning land beyond the areas reserved for them by these statutes. The migrant labour system, to borrow the words of Ngcobo J, 'constituted a key element in the edifice of apartheid'.[2] The trust and the aforementioned associated entities were a vital cog in the repugnant migrant labour system. The property at issue in this matter was to be used as a recruitment centre of migrant labourers.
- [12] On 6 September 1940, in terms of a written permission to occupy, authorization was granted to the NRC by the then secretary for Native Affairs for the company to occupy Lodge Number 1, village of Sterkspruit, district of Herschell, measuring 942 square roods. On 29 July 1976 the then secretary for Bantu administration and development approved the reduction of aforesaid site to the size of the present property.
- [13] The NRC ceded its rights in and to the permission to occupy to the Trust on 7 December 1989. At that time Sterkspruit fell within and under the jurisdiction of the nominal Republic of Transkei. The property had been registered in the name of the government of Transkei on 8 July 1983. On 6 June 2000 the registration of the property was endorsed that it vested in the province of the Eastern Cape. A simultaneous transfer was effected on the same day to the Sterkspruit Transitional Local Council. On 4 November 2006 the registration of the property was endorsed to reflect that it vests in the Municipality.

- [14] The Trust had engaged the Municipality in discussions regarding the purchase of the property from the Municipality since the year 1997. When after a decade of engagement the discussions did not yield the desired outcome the Trust instructed its attorneys during July 2007 to handle the matter on its behalf. For the next 9 years the Trust's attorneys engaged in discussions and exchanged correspondence with the Municipality in an effort to bring finality to the matter. The efforts of the Trust's attorneys were to no avail. As a last resort the Trust launched the present application.
- [15] In its founding affidavit the Trust contends that it is the legitimate occupier of the property as the holder of the permission to occupy in respect of the property. It avers that the permission to occupy is a land tenure right as envisaged in Item 2 of Schedule 2 of the Upgrading of the Land Tenure Rights Act 112 of 1991 (The Tenure Act). Accordingly it claims an entitlement to have that asserted right converted into ownership by the Registrar by registration of the property in the name of the Trust. Consequently it requires the Municipality to submit a deed of transfer to the Registrar for this purpose as provided in section 3(1) of the Land Affairs General Amendment Act 61 of 1998 (The Amendment Act).
- [16] In answer the Municipality contends that the Tenure Act which came into effect on 1 September 1991 at that time had no legislative effect in the area of the erstwhile Republic of Transkei. It asserts that the Tenure Act is old order legislation as defined in the Constitution, the statute having been enacted before the Interim Constitution took effect. It asserts further that in terms of the Constitution, old order legislation such as the Tenure Act does not have wider application, territorially or otherwise, than it had before the coming into effect of the Interim Constitution, unless subsequently amended to have a wider application. It stated that the Tenure Act was in 1998 amended by the Amendment Act by the inclusion of section 25A which provides that as from the coming into operation of the Amendment Act, the provisions of the Tenure Act excluding sections 3, 19 and 20 shall apply throughout the Republic. Accordingly, so it was submitted, section 3 of the Tenure Act does not apply to the property and the Trust's application falls to be dismissed.
- [17] In reply the Trust contends that section 1 of the Amendment Act and section 25A of the Tenure Act are inconsistent with the Constitution to the extent that they exclude section 3 of the Tenure Act from application to the whole of the Republic and that those sections are accordingly invalid to the extent of that inconsistency. It was further asserted that the Trust is entitled to an order that section 25A of the Tenure Act be read as excluding reference to section 3 therein.
- [18] Consequently, the issues for determination as agreed by the parties are the following:
- “(a) Whether section 1 of the Land Affairs General Amendment Act, 61 of 1998 (The Amendment Act) and section 25A of the Upgrading of Land Tenure Rights Act (The Tenure Act) are inconsistent with the Constitution of the Republic of South Africa to the extent that they exclude section 3 of the Tenure Act from application by virtue of section 25A of the Tenure Act to the whole of the Republic of South Africa. Whether the aforementioned sections are accordingly invalid to the extent of that inconsistency and whether the Trust is entitled to an order that section 25A of the Tenure Act be read as excluding the*

reference to section 3 therein.

Mr Ronaasen, who appeared on behalf of the Municipality, has raised the following issue in his argument:

(b) Whether or not the Trust's permission to occupy is a land tenure right."

[19] The Trust pivoted its claim to ownership of the property on section 3(1) of the Tenure Act. The section provides:

"3(1) Any land tenure right mentioned in schedule 2 and which was granted in respect of –

- (a) Any erf or any other piece of land in a formalized township for which a township register was or is opened either before or after the commencement of this Act; or
- (b) Any piece of land which is surveyed under a provision of any law and does not form part of a township,

Shall, upon the submission by the owner of such erf or piece of land at the Deeds Registry of a certificate of ownership, on the form prescribed for that purpose under the Deeds Act and made out in the name of the person who is the holder of the relevant land tenure right, be converted into ownership by the Registrar of Deeds by the registration of such erf or piece of land in the name of such person."

[20] The Tenure Act is what is known as 'old order legislation' defined in Schedule 6 of the Constitution which describes such as being legislation which had effect prior to the advent of the interim Constitution promulgated on 27 April 1994. Item 2(1) of Schedule 6 of the Constitution provides that any law in force when the Constitution took effect remained in force as long as it was consistent with the Constitution and had not been repealed or amended. Item 2(2)(a) provides further that old order legislation which continues in force in of terms sub-item (1) 'does not have a wider application, territorially or otherwise, than it had before the previous Constitution took effect unless subsequently

amended to have a wider application'. The legislature sought to amend the Tenure Act to provide it wider application.

[21] The Tenure Act was amended by section 1 of the Amendment Act which allowed for the inclusion of section 25A which provides as follows:

"25A Application of Act

As from the coming into operation of the Land Affairs General Amendment Act, 1998, the provisions of this Act, excluding sections 3, 19 and 20, shall apply throughout the Republic."

- [22] Mr Smuts, who appeared on behalf of the Trust, submitted that section 25A of the Tenure Act if read without the exclusionary provisions thereof (i.e. the words ‘excluding sections 3, 19 and 20’) gives effect to the purpose anticipated in Item 2(2)(a) of Schedule 6 to the Constitution. The purpose is to extend the application of the Tenure Act throughout the Republic of South Africa.
- [23] I agree. It appears the intention was to ensure consistency of application of the provisions of the Tenure Act throughout the Republic.
- [24] The Trust contends that section 25A of the Tenure Act incorporating the exclusionary provisions is inconsistent with the rights enshrined in sections 9(1) and 25(1) of the Constitution. It was submitted that if the section is read with the exclusionary provisions at issue in this matter severed then such inconsistency is removed. Mr Smuts conceded, correctly in my view, that the words ‘excluding sections 19 and 20’ do not affect the rights of the Trust and it accordingly has no standing to seek the removal of those words.
- [25] The Constitution provides for equality in section 9 which states:
- “1. Everyone is equal before the law and has the right to equal protection and benefit of the law.*
2. Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect and advance persons or categories of persons disadvantaged by unfair discrimination may be taken.
 3. The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language or birth.
 4. No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of sub-section 3(3). National legislation may be enacted to prevent or prohibit unfair discrimination.
 5. Discrimination on one or more of the grounds listed in sub-section 3 is unfair unless it is established that the discrimination is fair.”
- [26] The Trust complains that section 25A of the Tenure Act precludes it from converting its right of occupation to ownership and as such discriminates against it. The court is then required to determine whether or not unfair discrimination has arisen as contended by the Trust.
- [27] It is trite that the assessment whether or not there is unfair discrimination is done in a two stage enquiry. The Constitutional Court has expressed itself in the following terms[3]:
- “At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary when an attack is made on the provision in reliance on section 8 of the Interim Constitution. They are:*

- (a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of s8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
 - (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
 - (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination would have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.
 - (ii) If the differentiation amounts to discrimination does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness would be presumed. If on an unspecified ground, unfairness would have been established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his/her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there would be no violation of s8(2).
 - (c) If the discrimination is found to be unfair then a determination would have to be made as to whether the provision can be justified under the limitations clause (s33 of the Interim Constitution)."[4]
- [28] It was argued on behalf of the Trust that the exclusionary clause in section 25A unfairly and arbitrarily discriminates between the holders of two categories of land tenure rights and holders of the said rights are not treated equally. There are two categories of land tenure rights contemplated in the Tenure Act. On the one hand it is those rights referred to in Schedule 1 whose process for conversion to ownership is set out in section 2. On the other hand there are those rights referred to in Schedule 2 whose process for conversion to ownership is set out in section 3. It was submitted on behalf of the Trust that the rights in both categories are universally forms of statutory rights providing for the occupation by the holder of an erf or piece of land. The only apparent distinction between the two categories of rights for the purposes of the Tenure Act relates to the process prescribed for the registration of ownership in the relevant Deeds office.
- [29] The argument was developed to state that the consequence of the extension of the application of the Tenure Act to the whole of the Republic is to convert land tenure rights mentioned in Schedule 1 and section 2 of the Tenure Act in respect of erven or pieces of land falling within the erstwhile homelands into ownership. This affords the holders thereof the right to have said ownership registered in the relevant deeds register. In contrast the holders of land tenure rights mentioned in Schedule 2 and section 3 of the Tenure Act in respect of erven or pieces of land falling within the erstwhile homelands are not entitled to the registration of ownership thereof in their names due to the exclusionary provision in section

25A of the Tenure Act. It was argued that the exclusionary provision has the effect of unfairly and arbitrarily discriminating between the holders of the two categories of land tenure rights and the said holders are not treated equally. It was submitted that this

differentiation between the holders of the two categories of land tenure rights does not constitute 'mere differentiation'. The basis for the submission was that there is neither any 'government purpose' underlying the inclusion of the exclusionary provision nor is there a rational relationship between the differentiation and the ostensible purpose of the Tenure Act.

[30] Mr Ronaasen submitted that there is a clear distinction between the two categories of rights contemplated in the Tenure Act. It was evident that the rights contemplated in Schedule 1 read with section 2 of the Tenure Act were rights of leasehold and quitrent rights. These rights were to be converted into ownership by operation of law in accordance with section 2 of the Tenure Act. It was submitted these rights were 'strong, absolute' rights akin to ownership and had characteristics that distinguished them from the other category of rights.

[31] It was argued that in contrast the tenure provided in Schedule 2 and section 3 of the Tenure Act apparently are 'different, weaker' rights which are not, as of right, capable of conversion into ownership by operation of law. Their conversion is subject to the restrictions imposed by section 3 of the Act. It was submitted that the permission to occupy held by the Trust was

a mere personal right incapable of recordal on the title deed of the property. It was argued that in these circumstances the legislature cannot be said to be infringing section 9(1) of the Constitution in treating different categories of rights in different ways.

[32] The constitutional validity of the provision must be assessed in light of the objects and purpose of the Tenure Act. In the preamble it is stated that the purpose of the Act is 'to provide for the upgrading and conversion into ownership of certain rights granted in respect of land.' In my view the effect of the exclusionary provision is to deprive some of the holders of a category of land tenure rights the opportunity to convert their tenure rights into ownership. The explanation for the differentiation between the holders of the two categories is not provided in the Tenure Act nor is it discernible. In my view the distinguishing characteristics identified by the Municipality are not a sound basis for the differentiation of the holders of the two categories. It appears to me that there is no rational relationship between the differentiation and the purpose stated in the preamble. The differentiation amounts to unfair discrimination which impacts the Trust unfairly. In the circumstances the differentiation infringes section 9(1) of the Constitution.

[33] The Trust directed a further attack on the exclusionary provision on the basis that the amendment effected by section 25A was clearly designed to extend the right to conversion to holders of rights in land throughout the Republic. It was submitted that the inclusion of the exclusionary provision is entirely arbitrary.

[34] The Minister conceded the point made by the Trust. In the answering affidavit the deponent on behalf of the Minister states that:

“It does not appear...that there is any justifiable basis for the geographical limitation imposed by [s25A of] the Act.”

The deponent further states categorically that the policy position of the Minister is that there is no reason in law or logic for the provisions of the Tenure Act not to be applicable to the entire Republic.

[35] The exclusionary provision creates a distinction apparently based solely on territory and no other basis. Most unfortunately, by legislative fiat the exclusionary provision reintroduces homeland boundaries in the conversion of land tenure rights. In my view, as correctly conceded by the Minister, there appears to be no rational relationship between the differentiation on a geographical basis and the purpose of the statute. The Constitutional Court has stated that a statutory provision is substantively arbitrary if the impugned law either provided insufficient reason for the particular provision in question or is procedurally unfair.[5] The provision has adverse effects on the Trust and similarly placed people in the former homeland areas of the Republic. The differentiation is arbitrary. In such circumstances this should be another basis why the exclusionary provision infringes section 9 of the Constitution.

[36] It was submitted on behalf of the Trust that Item 2(2) of Schedule 6 of the Constitution contemplates only two possibilities. The first being that old order legislation which continued in force when the Constitution took effect does not have a wider application than it had before the Interim Constitution took effect. The second is that such old order legislation is subsequently amended to have such a wider application. It was argued that the aforesaid Item refers to the whole of the old order legislation in question and does not permit its piecemeal amendment to provide for wider application of only portions of it.

[37] The argument was developed further that the inclusion by section 25A of the exclusionary provision has the effect of extending the application of only a portion of the Tenure Act. This, it was argued, is inconsistent with the Constitution and accordingly falls to be declared as invalid.

[38] I agree. Section 9 of the Constitution envisages that national legislation must be of general application throughout the Republic on all persons unless a rational basis is provided for its limited application. Such a rational basis is not provided in neither the Tenure Act nor the Amendment Act.

[39] The Trust asserts that section 25A of the Tenure Act is inconsistent with section 25(1) of the Constitution. Section 25(1) of the Constitution provides:

“No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of

property.”

- [40] The Trust contends that the land tenure rights at issue in this matter are personal rights to the occupation of land. Such rights are considered ‘property’ for the purposes of section 25(1) of the Constitution. The argument was advanced that the courts have recognized ownership of or interest in a real or incorporeal personal rights as being protectable under the property clause of the Constitution.[6] It was further submitted on behalf of the Trust that the provision for the conversion of such rights as of right into ownership of the land itself in the Tenure Act creates the right which in itself is property. It has been held that such rights are universally enforceable and as such constitute statutory rights in land.[7]
- [41] It was asserted on behalf of the Trust that the extension of the application of the Tenure Act by section 1 of the Amendment Act and section 25A in turn extends that right to the holders of land tenure rights mentioned in Schedule 1 of the Tenure Act within the area of the erstwhile Republic of Transkei. It would also extend such rights to the holders of land tenure rights mentioned in Schedule 2 of the Tenure Act within that area but for the inclusion in section 25A of the exclusionary provision.
- [42] Mr Smuts argued that but for the exclusionary provision the Trust would enjoy the right of conversion of those rights to ownership and given the clear objectives of the Tenure Act is entitled to such rights. The relevant statutes in this matter are laws of general application. It was argued that neither of these statutes reveal any constitutional justification for the exclusion of such holders of land tenure rights from the general class of persons afforded the right of conversion and such exclusion is arbitrary and irrational.
- [43] Mr Ronaasen submitted that in case of land owned by the State, the ‘right’ to convert tenure to ownership envisaged in Schedule 2 and section 3 of the Tenure Act is not a right which exists by the mere operation of the law. It was argued that section 25(1) of the Constitution contemplates the protection of existing rights. It is not a mechanism for conferring hitherto non-existent rights. It was argued that the Trust never enjoyed any of the ‘rights’, which may arise from section 3 of the Tenure Act and consequently cannot be deprived of rights which never vested in it. It was asserted that there has been no interference with an existing right but the Trust sought to have rights it never previously owned conferred on it.[8] It was argued that section 25(1) finds no application if there has been no deprivation.[9]
- [44] The property jurisprudence by the Constitutional Court makes it clear that the conception of property for the purposes of section 25(1) of the Constitution must be within the rights and values framework of the Constitution. It appears to me that on an objective assessment a permission to occupy land constitutes property as envisaged in section 25(1) of the Constitution. Section 25A of the Tenure Act extends this right by providing that it may be converted into ownership. In my view section 25A is not creating a new ‘right’ that was non-existent before the promulgation of the Act. The section only extends rights which were in existence into real rights in property.

- [45] The exclusionary provision deprives the Trust of the opportunity to apply for the conversion of the permission to occupy into ownership. In my view the Trust and all similarly placed people had the same right as anyone else in the Republic to apply for the conversion as provided in the Tenure Act. It appears to me on the facts of this matter that the Trust has been deprived of property as envisaged in section 25(1) of the Constitution.
- [46] It has been held that a deprivation of property is arbitrary when the law does not provide sufficient reason for the deprivation or when it is procedurally unfair.[10] The Amendment Act provides no reason whatsoever for the exclusionary provision. In my view the deprivation of property is arbitrary.
- [47] Mr Ronaasen submitted that the Trust has not established that it is a holder of a Land Tenure Right contemplated in section 3 of the Tenure Act and Item 2 of Schedule 2. The submission was based on the definition of 'Black areas' in the Black Areas Land Regulations, 1969 (The Regulations). In Regulation 1 'Black areas' are defined as meaning:
- "...the areas referred to in section 25(1) of the Black Administration Act, read with section 21(1) of the Black Trust Act, but excluding any such area situated in the Black residential area of Sebokeng or in the Transkei as described in the Transkei Constitution Act or which has been declared or defined and set aside in terms of any law as an irrigation scheme or township."*
- [48] It was argued that the definition excluded the Transkei and townships. It was also contended that Sterkspruit was 'at all relevant times a township.'
- [49] Mr Smuts submitted that the permission to occupy was granted to the Trust's predecessors in title during 1940 and was exercised continuously thereafter. The notionally independent Republic of Transkei no longer exists as its founding statutes were repealed by the Interim Constitution. The property is located in the Eastern Cape province as described in Schedule 1(a) to the Constitution.
- [50] I agree that the exclusion from the definition of 'Black areas' of the areas which during its existence fell within the nominal Republic of Transkei was purely an artifice conjured for the sole purpose of recognizing the existence of an apartheid entity as an independent state. It would be contrary to the spirit and

purport of the Constitution for any court to give recognition to an apartheid fiction that no longer exists. The said exclusion is not capable of being given effect to and is meaningless.

- [51] The contention that Sterkspruit was 'at all relevant times' been a township is without merit. The Trust averred in its founding affidavit that Sterkspruit was established as a township only on 6 June 2000. The averment has not been disputed by the respondents. Clearly Sterkspruit was never a township at all relevant times.

- [52] The court is obliged to apply the provisions of section 172 of the Constitution which states:

"172 Powers of Courts in constitutional matters

1. When deciding a constitutional matter within its power, a court
 - (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
 - (b) may make any order that is just and equitable, including-
 - (i) an order limiting the retrospective effect of the declaration of invalidity; and
 - (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.”

[53] I have found that section 25A of the Tenure Act incorporating the exclusionary provisions is inconsistent with the rights in sections 9 and 25 of the Constitution but if that section is read without the exclusionary provisions such inconsistency is removed. The Trust requests the court to make an order that is just and equitable. It was submitted on behalf of the Trust that severance of the numeral ‘3’ will remove such inconsistency.

[54] The approach adopted by the Constitutional Court to the severance of offending provisions is trite. The test formulated has two parts:

“First, is it possible to sever the invalid provisions and second, if so, is what remains giving effect to the purpose of the legislative

scheme?”[11]

[55] Mr Benningfield, who appeared on behalf of the Minister, submitted that the court should keep in mind the principles applicable when considering severance of the provision from a statute. It has been held that the following primary considerations are to be kept in mind: ‘the need to afford appropriate relief to successful litigants on the one hand and the need to respect the separation of powers, in particular the role of the legislature as the institution that is entrusted with the task of enacting legislation on the other.’[12]

[56] The Constitutional Court further stated ‘that a court should be reluctant to read in or severe words from a provision if to do so would require the court to engage in the

details of law making, a constitutional activity that is assigned to the legislatures. I stated that a court should be slow to make choices that are primarily to be made by the legislature.’[13]

[57] The answering affidavit on behalf of the Minister pointed that the department had previously attempted to amend the Tenure Act by specifically enacting the Communal Land Rights Act No 11 of 2004 (CLARA). It was declared invalid in its entirety by the Constitutional Court for lack of compliance with the procedure set out in section 76 of the Constitution.[14]

[58] The Constitutional Court has stated that consideration should not be given to failed or abandoned amendments.[15] In my view CLARA would qualify as a failed amendment and I need not consider its provisions in this matter.

- [59] It has been stated on behalf of the Minister that the department has already commenced with steps to changing or normalizing the situation. A Bill was introduced in Parliament on 7 July 2017. It was stated that section 9 through to section 16 thereof provides for the transfer of ownership of communal land and the procedures for doing so. It was further pointed out that in terms of the schedule to the Bill it seeks to repeal inter alia the whole of the Communal Rights Act 11 of 2004, sections 19 and 20 of the Tenure Act and to substitute section 25A of the Tenure Act. The Bill also intended to repeal the whole of proclamation No 26 of 1926 of the Administrative Area Regulations- Unsurveyed District: Transkeian Territories. It was argued that the Minister had taken steps to address the concerns raised by the applicant. The submission was made that in such circumstances the declaration of invalidity and inconsistency must be suspended for a period of 12 months to allow the Minister to complete the process of enacting the new legislation.
- [60] It was argued on behalf of the Trust that the Minister has not put up any facts on the basis of which it may be contended that good reasons exist for the suspension of an order of invalidity. It was submitted that a declaration of invalidity and a severance of the reference to section 3 can have no possible effect on the process of the enactment of the body of the Bill.
- [61] It appears that at its core the principle of comity recognizes that courts are not elected representatives and it is not for them to legislate. The elected representatives of the people ought to debate issues and thereafter legislate, the only restriction being that the legislation must be consistent with the Constitution. Ordinarily the courts should yield to the legislatures to perform their function of amending statutes.
- [62] Despite the courts' respect for the function of the legislature the suspension of an order of constitutional invalidity is not there simply for the asking. It is necessary that sufficient information must be placed before court to justify any time needed to remedy a defect in legislation.[16] It is incumbent upon the Minister to place before the court the necessary and relevant evidence for the court to determine whether to suspend a declaration of invalidity. It is only after an evaluation of such evidence by the court that a suspension of invalidity may be issued.[17]
- [63] On 18 February 2010 the Minister made an undertaking to the Constitutional Court on affidavit that legislation to repeal CLARA would be passed.[18]
- [64] As already indicated the Bill to introduce that legislation was introduced only on 7 July 2017. The Minister has failed to place pertinent facts before the court to explain the seven year delay in introducing the Bill.
- [65] The Constitutional Court had foreseen that there may be delay occasioned in finalizing the new legislation.[19] I am certain that august Court would not have anticipated that it would have taken 7 years for the Minister to introduce the Bill. The court had specifically requested that the Act dealing with land transformation and security of tenure be given priority as the

issue had even by then become pressing. After referring to section 237 of the Constitution and Item 21(1) of Schedule 6 to the Constitution the court implored the Minister to act with ‘urgency, diligence and without delay.’ Regrettably, it appears the court’s entreaties have fallen on deaf ears. The court had noted that already in 2010 there had been a 13 year delay in finalizing the legislation. Citizens may not be expected to wait for an unduly long time for their rights to be realized. In a culture of justification fostered by the Constitution it is necessary to provide reasons for any delay in the realization of the rights of citizens. In my view no basis has been established for the suspension of a declaration of invalidity beyond the date of the order.

[66] It is necessary to comment on another issue. It is neither proper nor fair to criticize the Minister for the inordinate delay in introducing the new legislation without saying anything about the delay in the delivery of this judgment. After judgment was reserved on 14 December 2017 the Municipality submitted a judgment (*Rahube v Rahube & Others*, 2018 (1) SA 638 (GP)) which it believed was relevant to this matter. Thereafter I granted the Trust an opportunity to submit written comments on the *Rahube* judgment which was done on 9 March 2018 as undertaken. Unfortunately, a series of events precluded me from delivering this judgment earlier. Regardless, the delay is sorely regretted.

[67] I have not been provided with any reason why costs should not be awarded to the successful party. I am satisfied that the matter was of such complexity that it was necessary to employ two counsel.

[68] In the result the following order is issued:

68.1 Section 1 of the Land Affairs General Amendment Act 61 of 1998 and section 25A of the Land Tenure Rights Act 112 of 1991 are inconsistent with the Constitution to the extent that they exclude

section 3 of the Tenure Act from application of the Tenure Act to the whole of the Republic and that they are accordingly invalid to the extent of that inconsistency;

68.2 Section 25A of the Tenure Act be read as excluding the reference to section 3 therein;

68.3 The first respondent and the third respondents are ordered to pay the costs of the applicants, including the costs of two counsel;

68.4 The matter is referred to the Constitutional Court for confirmation in terms of section 172(2) (a) of the Constitution.

T MALUSI

JUDGE OF THE HIGH COURT

Appearances

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Date Heard:

14 December 2017

Date Delivered:

11 October 2018

[1] Natives Land Act 27 of 1913 and the Native Trust and Land Act 18 of 1936.

[2] Western Cape Provincial Government & Others In Re: DVB Behuising (Pty) Ltd v North West Provincial Government & Another

[2000] ZACC 2; 2000 (4) BCLR 347; 2001 (1) SA 500 (CC) at para 40.

[3] All reference to section 8 relate to the equality clause of the Interim Constitution.

[4] Harksen v Lane NO & Others [1997] ZACC 12; 1998 (1) SA 300 (CC) at para 54.

[5] Reflect-All 1025 CC & Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government & Another 2009 (6) SA 391 (CC) at para 39.

[6] Shoprite Checkers (Pty) Ltd v MEC for Economic Development-EC & Others 2015 (6) SA 125 (CC) at para 105, Agri South Africa v Minister for Minerals and Energy 2013 (4) SA 1 (CC), National Credit Regulator v Opperman & Others 2013 (2) SA 1 (CC) at paras 61-64.

[7] Ex Parte: Optimal Property Solutions CC 2003 (2) SA 136 (C) at paras 4-6.

- [8] First National Bank t/a Wesbank v Commissioner, South African Revenue Services & Another [2002] ZACC 5; 2002 (4) SA 768 (CC) at para 57, Reflect All 1025 CC & Others v MEC for Public Transport, Roads & Works Gauteng Provincial Government & Another 2009 (6) SA 391 (CC) at paras 33-36.
- [9] Offit Enterprises (Pty) Ltd & Another v Coega Development Corporation (Pty) Ltd & Others 2011
- (1) SA 293 (CC) at para 37.
- [10] Shoprite Checkers supra note 6 at para 77.
- [11] Coetzee v The Government of the Republic of South Africa
- [1995] ZACC 7; 1995 (4) SA 631 (CC) at para 16, Oriani-Ambrosini v Sisulu, Speaker of the National Assembly 2012 (6) SA 588 (CC) at para 93, South African National Defence Union v Minister of Defence [1999] ZACC 7; 1999
- (4) SA 469 (CC) at para 14.
- [12] Zondi v MEC for Traditional & Land Government Affairs & Others [2004] ZACC 19; 2005
- (4) BCLR 347 (CC), 2005 (3) SA 589 (CC) at para 122.
- [13] Zondi supra at para 123.
- [14] Tongoane & Others v National Minister for Agriculture & Land Affairs & Others 2010 (6) SA 214 (CC), 2010 (8) BCLR 741 (CC).
- [15] Khohliso v S & Another 2015 (2) BCLR 164 (CC), 2015 (1) SACR 319 (CC) at para 40.
- [16] Minister of Justice v Ntuli 1997 (3) SA 772 (CC).
- [17] S v Ntsele 1997 (11) BCLR 1543 (CC).
- [18] Tongoane supra note 14.
- [19] Tongoane supra note 14.

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