

SOUTH AFRICA / JUDGMENT

Herbert NO and Others v Senqu Municipality and Others (2457/2016)

[2020] ZAECHGHC 45 (19 May 2020)

[2020] ZAECHGHC 45**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

Roberson

CASE / FILE NUMBER

2457/2016

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**IN THE HIGH COURT OF
SOUTH AFRICA
(EASTERN CAPE
DIVISION, GRAHAMSTOWN)
REPORTABLE
CASE NO 2457/2016**

Date heard: 05/03/2020

Date delivered: 19/05/2020
In the matter between
GRAHAM ROBERT HERBERT
N O FIRST
APPLICANT
KEVIN LAWRENCE
COTTERELL N O SECOND
APPLICANT
DAWN EARP N
O THIRD
APPLICANT
JAMES THOKOANA
MOTLATSI N O FOURTH
APPLICANT
STEWART STRAUSS
TRUSWELL N O FIFTH
APPLICANT
and
SENQU
MUNICIPALITY FIRST

RESPONDENT
REGISTRAR OF DEEDS,
MTHATHA SECOND
RESPONDENT
MINISTER OF RURAL
DEVELOPMENT
AND
LAND REFORM THIRD
RESPONDENT

JUDGMENT

ROBERSON J:

INTRODUCTION

[1] The Upgrading of Land Tenure Rights Act 112 of 1991 (the Upgrading Act) was enacted:

“To provide for the upgrading and conversion into ownership of certain rights granted in respect of land; for the transfer of tribal land in full ownership to tribes; and for matters connected therewith.”

Section 3 (1) of the Upgrading Act provides:

“3 Conversion of land tenure rights mentioned in Schedule 2

- (1) Subject to subsection (1B), any land tenure right mentioned in Schedule 2 and which was granted in respect of any erf or other piece of surveyed land shall, upon the submission by the owner of such erf or piece of land at the deeds registry of a deed of transfer 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: Provided that-
 - (a) where the State is the owner of an erf or piece of land situated outside a formalised township, the relevant land tenure right need not be converted into ownership, and a deed of transfer shall not be submitted unless-
 - (i) the Minister is satisfied, on the basis of a report by a person assigned or appointed by him or her, that the rights or interests of putative holders are being protected; and
 - (ii) where such land is lawfully occupied or has been allocated for the use of a tribe or community a tribal or community resolution has been obtained;
 - (b) where a tribe is the owner of the land, the decision to convert the relevant land tenure right into ownership shall be taken by way of a tribal resolution.”

[2] Schedule 2 of the Upgrading Act reads:

“RIGHTS TO THE OCCUPATION OF LAND

1. Any permission granted in terms of regulation 5 (1) of the Irrigation Schemes Control Regulations, 1963 (Proclamation R5 of 1963), to occupy any irrigation and residential allotment.
 2. Any permission to occupy any allotment within the meaning of the Black Areas Land Regulations, 1969 (Proclamation R188 of 1969).
 3. Any right of occupation granted to any registered occupier as defined in section 1 of the Rural Areas Act (House of Representatives), 1987 (Act 9 of 1987).
 4. Any right to the occupation of tribal land granted under the indigenous law or customs of the tribe in question.”
- [3] The applicants, in their capacities as trustees of the Teba Property Trust (the Trust), seek an order; declaring the Trust’s permission to occupy Erf 88 Sterkspruit, to be a land tenure right referred to in item 2 of Schedule 2 of the Upgrading Act in respect of Erf 88 Sterkspruit; directing the first respondent (Senqu) to submit to the second respondent (the Registrar) a deed of transfer in the name of the applicants, for conversion of the land tenure right into ownership; alternatively directing Senqu to sign a deed of transfer in the names of the applicants, providing for the conversion of the right into ownership, for submission to the Registrar.

BACKGROUND

- [4] On 6 September 1940 the Native Recruiting Corporation (the NRC) was granted a “Permission to Occupy” Lot no. 1, Village of Sterkspruit, district of Herschel, against payment of £12 per annum, and on condition, inter alia, that the NRC was to use the site solely for the purpose of maintaining thereon an office and compound for use in connection with its recruiting operations in the district. It was not in dispute that business of the NRC was to recruit Africans to work on South African mines. The NRC was incorporated on 27 September 1912 and its shareholders were various mining companies. It appears not to be in dispute that the permission to occupy purported to have been granted in terms of s 18
- (3) of the Native Trust and Land Act 18 of 1936 (the NTLA). The land was subsequently reduced in size and is currently described as Erf 88, Sterkspruit. It is owned by Senqu and is situated in territory which was formerly the Republic of Transkei, one of the so-called independent states, reincorporated into South Africa in 1994.
- [5] The NTLA was enacted:

“To provide for the establishment of a South African Native Trust and to define its purposes; to make further provision as to the acquisition and occupation of land by natives and other persons; to amend Act No. 27 of 1913[1]; and to provide for other incidental matters.”

Section 4 (3) provided that the affairs of the Trust were to be administered by the Governor-General as Trustee with power to delegate to the Minister of Native Affairs.

Section 18 (3) provided:

“With the approval of Parliament signified by resolutions of both Houses the Trustee may for the support, advantage or well-being of natives or purposes connected therewith, grant, sell, exchange, lease or otherwise dispose of land the property of the Trust to persons other than natives.”

Section 18 (4) provided:

“The Trustee may, in accordance with the regulations, authorise the grant to or occupation by any person, board of trustees, educational

authority or religious body for church, school, mission or trading purposes of such areas of land the property of the Trust as he may deem necessary: Provided that no grant of any extent greater than two morgen shall be made without the consent of Parliament signified by resolution of both Houses.”

[6] Regulation 47 (1) (a) of the Black Areas Land Regulations (Proclamation No. R188 of 1969), on which the Trust relied, provided:

“Every permission to occupy granted or deemed to have been granted in terms of any law, prior to the commencement of these regulations, to occupy any specified piece of Trust land[2] in any Black area for arable, residential, church, school or trading purposes, shall, notwithstanding anything contained in such law or written permission, be deemed to have been granted in terms of section 18 of the Development Trust Act[3], read with these regulations”

[7] Since the Upgrading Act was enacted, it has been amended and has also been considered in a number of Constitutional Court decisions. When first enacted it only applied in the old South Africa. Section 1 of the Land Affairs General Amendment Act 61 of 1998 brought about an amendment to the Upgrading Act by the insertion of s 25A in the Upgrading Act, which provided that the Upgrading Act, excluding ss 3, 19 and 20, applied throughout the Republic.

[8] One of the Constitutional Court decisions emanated from the present application and is reported as *Herbert NO and Others v Senqu Municipality and Others* 2019 (6) SA 231 (CC). The application before the Constitutional Court was for the confirmation of a declaration of invalidity by the Grahamstown High Court to the effect that s 1 of the Amendment Act and s 25A of the Upgrading Act were inconsistent with the Constitution and invalid to the extent that they did not extend the applicability of s 3 of the Upgrading Act to the entire Republic of South Africa. This aspect of the application was decided as a separated issue. Following the raising of a question of law by Senqu that s 3 of the Upgrading Act did not apply to Erf 88, the applicants amended their notice of motion and sought an order declaring the provisions of s 25A of the Upgrading Act, to the extent that it excluded s 3 of the Upgrading Act, to be inconsistent with the Constitution. Senqu and the third respondent (the Minister) opposed the granting of such an order.

[9] In dealing with the exclusion of s 3 of the Upgrading Act, Jafta J said at paragraph [10]:

“This means that to date many victims of apartheid who are located in the former homelands cannot convert their occupation and other insecure rights into secure rights.”

Further, at paragraph [28] Jafta J said:

“Evidently the partial extension of the Upgrading Act perpetuated the unequal protection and benefit of the Act on victims of the discriminatory laws of the apartheid era. This unequal treatment applied between people who held land tenure rights in the old South Africa and those who were forced to live in the homelands. In addition, the unequal protection occurred even among those who held tenuous rights in the homelands. Those who held rights convertible in terms of section 2 of the Upgrading Act could convert their rights into ownership as from September 1998. But those who held rights governed by section 3, could not and are still not permitted to convert.”

[10] Jafta J concluded that the impugned provisions limited the rights in s 9 (1) of the Constitution, which provides:

“Everyone is equal before the law and has the right to equal protection and benefit of the law.”

Jafta J further found that the limitation on the right was not justifiable in terms of s 36 of the Constitution.

[11] Following the Constitutional Court judgment, the matter resumed for the hearing of the remaining issues in the application.

THE CURRENT HEARING

[12] The first applicant (Herbert) deposed to the founding affidavit. He explained that the Trust was established to hold and administer the various property rights by which a company, Teba Ltd (Teba) occupies and conducts business on various properties in different centres. Teba currently manages the recruiting of staff on behalf of a number of mining houses which conduct mining operations in South Africa. Teba and the Trust conduct business in the Eastern Cape from the Trust’s office building on Erf 88. The directors of Teba are also the trustees of the Trust.

[13] Herbert set out the means by which the Trust became the holder of the permission to occupy. In 1966 the NRC changed its name to Mine Labour Organisation (NRC) Ltd which on 7 December 1989 ceded its rights in and to the permission to occupy to the Trust. The Director General of the Republic of Transkei consented to the cession.

[14] Herbert recounted the history of Teba, which was incorporated on 14 March 1902 under the name The Witwatersrand Native Labour Association Limited, known as Wenela, for the same purposes as the NRC. In 1966 Wenela changed its name to Mine Labour Organisation (Wenela) Ltd, which in 1977 changed its name to the Employment Bureau of Africa Ltd, which in turn on 20 June 2000 changed its name to Teba Ltd. In 1996 the Mine Labour Organisation (NRC) Ltd was deregistered and its business was acquired by Teba (presumably

then known as the Employment Bureau of Southern Africa).

[15] Herbert also recounted the Trust's unsuccessful attempts to have the permission to occupy converted into ownership prior to the launching of this application. Over a number of years a great deal of correspondence was exchanged between the Trust and Senqu, including between their respective attorneys. There was initially a resolution by Senqu to sell Erf 88 to the Trust, but this sale did not materialise. At a later stage Senqu's municipal manager undertook to put the Trust's claim to Senqu's Council. The Council resolved to transfer the land to the Trust on condition that the land was subdivided and the Trust purchased the subdivided portion on which the existing building stood, and on condition that the Trust should pay the rates on the land for the past 14 years.

[16] The Trust's case is that the permission to occupy is one envisaged in s 3 and item 2 of schedule 2 of the Upgrading Act. In particular, in relying on regulation 47 (1) (a) of the 1969 Proclamation, Herbert stated:

"..... the Permission to Occupy is a land tenure right mentioned in Schedule 2 of the Upgrading of Land Tenure rights Act, 1991, in that it is a permission to occupy an allotment within the meaning of the Black Areas Land Regulations, 1969. In this regard, it constitutes a permission referred to in regulation 47 (1) (a) of the said Regulations granted in terms of a law prior to the commencement of those Regulations, to occupy a specified piece of Trust land for trading purposes."

[17] Senqu challenged the Trust's rights to rely on the permission to occupy on various grounds. It alleged: that the Trust held its right to occupy as an agent of its member mines; that it was not using Erf 88 as contemplated in the permission to occupy; that Teba only occupied a small portion of Erf 88; that the Trust had not demonstrated that its predecessors in title had fulfilled the necessary statutory requirements to acquire rights to Erf 88; and the consent to the cession of the permission to occupy to the Trust was not validly given. I also raised the question of whether or not the NRC traded for profit or required a licence to operate, in view of the definition of "trading allotment" in the 1969 Proclamation, which was defined to mean land held by any person under permission to occupy for the purposes of carrying on any business, trade or calling for which a licence is required or for profit.

[18] When the matter was argued, in addition to the various challenges to the validity of the permission to occupy, it was submitted on behalf of Senqu that the Trust did not fall into the class or group in whose interest the Upgrading Act was enacted, given various Constitutional Court judgments (dealt with further below) to the effect that the purpose of the Upgrading Act was to provide a secure form of land tenure to Africans. After the Trust raised the constitutional challenge to s 25A of the Upgrading Act, Senqu delivered a supplementary answering affidavit in answer to the constitutional challenge in which the deponent stated:

"10. The applicants, conveniently so, in trying to attack the relevant statutory provisions, play down or ignore:

10.1 the historic and legislative background against which the trust acquired the permission to occupy the property;

10.2 the fact that the trust (any reference to the trust includes a reference to its predecessors in title) acquired the permission to occupy the property in order to profit greatly financially from the system of migratory labour, which has variously been described as the cornerstone of apartheid and the greatest “cancer” to afflict South African Society;

10.3 the fact that the trust was the beneficiary of pernicious and racially discriminatory legislation in terms of which it acquired permission to occupy the property to advance its recruitment business for recruiting migratory labour for the mines of South Africa and was a party to perpetrating, for profit, one of the greatest social evils inflicted on the people of South Africa. Significantly the applicants now, opportunistically so, seek to portray the trust as being a victim of this racially discriminatory legislation rather than its beneficiary, which it was.”

It is this issue which I intend to address.

JUDGMENTS

[19] Senqu relied on certain Constitutional Court judgments, including Herbert NO (supra) to the effect that the Upgrading Act was enacted to provide a secure form of land tenure to Africans who under apartheid

legislation had only had tenuous land rights. The specific subject matter of the various judgments may differ, but the references to past discriminatory legislation and its effects are in my view of application in the present matter. I have seen fit to quote fairly extensive extracts from the judgments, in order to give context to specific references to the Upgrading Act and its purpose.

[20] One of these judgments was Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another

[2000] ZACC 2; 2001 (1) SA 500 (CC). This matter concerned the constitutionality of the repeal by the North West Provincial Government of Proclamation 293 of 1962. At paragraph [2] Ncgobo J (as he then was) stated (footnotes omitted):

“[2] The apartheid law with which these proceedings are concerned is Proc 293 of 1962 (the proclamation), which was issued in terms of the Native Administration Act 38 of 1927. It made provision for the establishment of a special kind of township by the Minister of Bantu Administration and Development for African citizens in areas of land held by the 'South African Native Trust', which was established by the Native Trust and Land Act 18 of 1936. That Act was one of two infamous statutes that effectively made it impossible for members of the African community, a racial majority by far in this country, to own land in some 87% of the country. Even a cursory reading of the proclamation conveys the demeaning and racist nature of the system of which it was a part. Provision was made for the 'ethnic character of [the] population of township[s]'. Limited forms of tenure were created by way of 'deeds of grant' and 'certificate[s] of occupation of a letting unit for residential

purposes'. The tenure was a precarious one and could be cancelled by the township 'manager', in the event, amongst others, of the holder of the right 'ceasing to be in the opinion of the manager a fit and proper person to reside in the township'. The proclamation also

made provision for the establishment of special deeds registries and for the registration of deeds of grant. There were detailed

provisions relating to trading and other activities in the townships and to their control. It is unnecessary to provide further detail to demonstrate the distasteful character of the proclamation. There can be no doubt that its terms were in conflict with a number of provisions of the Bill of Rights in the interim Constitution (the Constitution of the Republic of South Africa Act 200 of 1993) and the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution) and on that account unconstitutional. Its terms are a timely reminder of where we have come from and the progress we have made in our transformation to democracy.”

[21] Madala J, in the same matter, also referred to the dispossession of Africans of land. At paragraphs [76] to [78] he said (footnote omitted):

“[76] The 1913 Land Act continued the process of dispossessing black persons of land and put in place a system of land use and occupation

which was calculated to be legally insecure, racially discriminatory and devised to obliterate investment opportunities for black persons, whether in urban or rural areas. Black people were to be accommodated in the urban areas only as temporary sojourners and contract workers who were expected to return to their rural homes on the expiry of their labour contracts or so soon as they were no longer in employment. In terms of this Act, the black majority population of South Africa was allocated 13% of the land while 87% went to the minority white population.

[77] This process was carried further by the Native Trust and Land Act (the 1936 Land Act) in terms of which black people lost even the right to purchase land in the reserves and were obliged to utilise land administered by tribal authorities appointed by the government. Black families who had owned land under freehold title outside the so-called reserves before 1913 were initially exempted from the provisions of the 1913 Land Act: this resulted in a number of so called 'black spot' communities in areas designated for whites. Later they were the subject of further forced removals which took place between the 1950s and the 1980s.

[78] To a large extent, the government expelled most of these farmers to homelands and confined the remainder as tenants of the South African Development Trust, which purchased farms occupied by white people for the consolidation and enlargement of areas occupied by blacks. Because of such dispossession, forced removals which had become the order of the day and the racially designed distribution of land and allied resources, and the weak land rights that remained, the whole issue of land became a source of tremendous conflict.”

[22] At paragraph [8] Ngcobo J said (footnotes omitted):

“In 1991 Parliament passed the Upgrading of Land Tenure Rights Act 112 of 1991 (the Upgrading Act). Its terms were not of application in the TBVC states until 28 September 1998, the date of promulgation of the Land Affairs General Amendment Act 61 of 1998, which made its provisions applicable in the whole country. As the name of the Upgrading Act suggests, its purpose was to provide for the conversion into full ownership of the more tenuous land rights which had been granted during the apartheid era to Africans.”

[23] In the minority judgment, O'Regan J also referred to the purpose of the Upgrading Act, saying at paragraph [103] (footnote omitted):

“..... One of the clear purposes, and indeed one of the most devastating effects of apartheid policy, was to deny African people access to land. Where access to land was afforded, tenure was generally precarious. It is not surprising then that the Constitution

recognises this deep injustice. Section 25 of the Constitution (the property rights clause) provides as follows:

'(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.

(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 tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 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 to equitable redress.'

It is thus clear that the national Legislature is placed under an obligation to provide redress through legislative means for the discrimination which happened in the past. Furthermore, and of particular relevance in this case, it is obliged to seek to transform legally insecure forms of tenure into legally secure tenure. The clear corollary, in our view, is that s 25(6) does not contemplate that insecure forms of land tenure arising from discriminatory legislation in the past may be abolished or reformed by any legislature other than Parliament.”

[24] Further, at paragraph [105], O'Regan J said (footnote omitted):

“The deeds of grant introduced by the proclamation are insecure forms of land tenure. That is not surprising. As part of apartheid policy, a range of insecure forms of land tenure were created for Africans. In 1991, during the period of transition from apartheid to

democracy, Parliament passed the Upgrading of Land Tenure Rights Act (the Upgrading Act). The express purpose of this legislation,

as its name suggests, was to provide for the conversion into full ownership of the tenuous land rights which had been granted during

the apartheid era to Africans.”

And at paragraph [106]:

“In our view, the Upgrading Act is not only a measure which transforms existing insecure title to freehold but is one which permits the continued granting of those forms and their upgrading. It is a measure which, in the language of s 25(5) of the Constitution,

'foster[s] . . . access to land' by South African citizens in disadvantaged communities.”

[25] *Rahube v Rahube and Others* 2019 (2) SA 54 (CC) concerned the constitutional invalidity of s 2 (1) of the Upgrading Act, in that it violated women’s rights in terms of s 9 (1) of the Constitution. At paragraph [38] Goliath AJ referred to the Upgrading Act as follows (footnote omitted):

“This court has held that the purpose of the Upgrading Act was 'to provide for the conversion into full ownership of the more tenuous land rights which had been granted during the apartheid era to Africans'. The Upgrading Act was part of a scheme of

legislation that was enacted to redress the injustices caused by the colonial and apartheid regimes. Land reform was one of the key focus areas of this scheme because the systemic deprivation of the African majority's rights in land and property was a main feature of the apartheid system.”

Further, at paragraph [48] – [51], Goliath AJ went on to say (footnotes omitted):

[48] The Upgrading Act was a legislative measure taken in terms of s 9(2) of the Constitution to advance the rights of persons disadvantaged by unfair discrimination.

[49] Section 25(5) of the Constitution provides that '(t)he 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'. The quest to enable citizens equitably to access land must include attempts to strengthen rights in land that were previously held, such as the informal right that the applicant holds through her lengthy occupation of the property in question. The Upgrading Act, which took effect in Bophuthatswana in 1998, is a piece of legislation which speaks to the fulfilment of the state's s 25(5) obligation.

[50] Section 25(5) creates a justiciable socio-economic right to gain access to land on an equitable basis. The Upgrading Act amounts to a step taken by Parliament in an attempt to foster the realisation of that right.

[51] The mischief that the Act was created to rectify was to provide for recognition and security of rights that had previously been ignored or systemically devalued. A reasonable step to ensure equitable access to land must do something to counteract pre-existing inequitable access.”

[26] In Herbert NO Jafta J also referred to the purpose of the enactment of the Upgrading Act. At paragraph [10] he said:

“[10] The Upgrading Act was enacted to give black people secure rights in land. It permitted them to convert their occupational rights into ownership.”

After referring to the passage in DVB Behuising (supra) in which O'Regan J referred to the purpose of the Upgrading Act, Jafta J, at paragraphs [24] and [25] said:

“[24] It is apparent from this statement that the Upgrading Act targets for conversion into ownership tenuous land rights which were granted to Africans. It is not clear from the papers whether the Trust falls within the class or group of people in the interest of whom the Act was enacted. What is clear though is that the Trust and its predecessors were actively involved in the implementation of shameful policies of the apartheid government by recruiting black workers to provide cheap labour for the mining industry. Those workers travelled long distances from their homes and families and were obliged to work under the most appalling conditions, while living in single-sex hostels, which exposed them to all sorts of illnesses and dangers associated with mining operations and arising from their migrant status.

[25] However, the constitutional and legal question whether the Trust is entitled to claim conversion of rights under the Upgrading

Act is not before this court. Consequently, we need not express any opinion on it. The sole issue placed before this court for

determination is the question whether the relevant provisions are inconsistent with the Constitution.”

[27] A decision of the Constitutional Court to which I was not referred, is *Tongoane v Minister of Agriculture and Land Affairs* 2010

(6) SA 214 (CC). In this matter the Communal Land Rights Act 11 of 2004 was declared constitutionally invalid because the correct procedure had not been followed in its enactment. Although the Upgrading Act was not specifically considered in this judgment, there were nevertheless dicta which in my view are relevant in considering

the purpose of the Upgrading Act and to whom it applies. At paragraphs [1] and [2] Ngcobo CJ stated (footnotes omitted):

“[1] This case raises important constitutional questions concerning one of the most crucial pieces of legislation enacted in our country since the advent of our constitutional democracy: the Communal Land Rights Act, 2004 (CLARA). This legislation is intended to meet one of the long-standing constitutional obligations of Parliament to enact legislation to provide legally secure tenure or comparable redress to people or communities whose tenure of land is legally insecure as a result of the racist policies of apartheid that were imposed under the colour of the law. The people and communities who were primarily victimised by these laws were African people.

[2] Section 25(6) of the Constitution provides:

'(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 tenure which is legally secure or to comparable redress.'

[28] After referring to a number of pieces of racially discriminatory legislation relating to land rights, Ngcobo CJ said at paragraphs

[27] and [28]:

"[27] Relentlessly, African people were dispossessed of their land and given legally insecure tenure over the land they occupied."

[28] One of the goals of our Constitution is to reverse all of this. It requires the restoration of land to people and communities that were dispossessed of land by colonial and apartheid laws after 19 June

1913. It also requires that people and communities whose tenure of land is legally insecure as a result of racially discriminatory colonial and apartheid laws be provided with legally secure tenure or comparable redress. CLARA was enacted with the declared purpose to 'provide for legal security of tenure'."

DISCUSSION

[29] In DVB Behuising, Rahube, and Herbert NO (supra) there are express statements about the purpose of the Upgrading Act, namely that it provided for conversion into ownership

tenuous land rights which were granted to Africans. There are also, in my view, numerous other statements in the judgments,

including Tongoane (supra), which cannot be ignored and which indicate strongly that the Trust may not utilise the mechanism of the Upgrading Act, in order to acquire ownership of Erf 88.

[30] There is repeated mention of the fact that the past discriminatory legislation provided only tenuous land rights to Africans. These were all that were available to them. In contrast neither the NRC nor the Trust were the targets of such discriminatory legislation and consequently systematically dispossessed of land or denied access to land. The NRC was not "forced to live in homelands" It had choices. It was not restricted to the occupation of certain land in the prejudicial sense that Africans were. It had much wider and unimpeded choices of where it could operate but chose to operate in Trust land where it was able to recruit labour for the advantage of its shareholders. The position was expressed in Senqu's heads of argument as follows:

"Accordingly the trust was the beneficiary of previously racially discriminatory legislation, as it was entitled to occupy, at a nominal payment, land that Africans were precluded from owning or occupying and could, by its occupation of the property, exploit the system of migratory labour by conducting a recruitment office on the property."

[31] Then there are the references to redress through legislative means, the redress of injustices, persons disadvantaged by unfair discrimination, the need to counteract pre-existing inequitable access, the reversal of the relentless dispossession of land, and the restoration of land to people and communities who were dispossessed by laws after 19 June 1913.

[32] I do not think that the Trust falls within the category of persons who were disadvantaged by unfair discrimination, or who can claim redress for past injustices, the reversal of dispossession, or the restoration of land. It and its predecessor were not the target of past discriminatory legislation and did not suffer the consequences which need to be redressed and reversed. It does not require a past wrong to be put right.

[33] Finally there is the overarching application of the Constitution. In DVB Behuising and Tongoane mention is made of s 25 (5) or (6) of the Constitution and the obligation of the Legislature to enact legislation which provides

redress for past discrimination. In DVB Behuising O'Regan said that the Constitution recognises the "deep injustice" of the denial to African people of access to land. In Tongoane Ngcobo CJ referred to the constitutional goal to reverse the past wrongs of dispossession and insecure tenure of land. In Rahube Goliath AJ said that the Upgrading Act was a legislative measure taken in terms of s 9 (2) of the Constitution to advance the rights

of persons disadvantaged by unfair discrimination.

[34] In my view the conversion into ownership of the Trust's permission to occupy Erf 88 would run counter to the purpose of the Upgrading Act as described in the authorities to which I have referred and to the constitutional goal to reverse past wrongs and injustices committed in relation to land.

[35] It was submitted on behalf of the Trust and the Minister that the plain meaning of the word "any" in s 3 (1) and Item 2 of Schedule 2 of the Upgrading Act does not permit of an exclusion, and further, that to exclude the Trust's permission to occupy would have consequences for other parties such as churches and schools which were granted permissions to occupy in terms of s 18 (4) of the NTLA. It was also submitted on behalf of the Trust that there was no racial connotation in s 18 (4), nor did the Upgrading Act provide that only Africans had the right to convert tenuous rights into ownership. Herbert NO, so it was submitted, was not authority for the contention that a person who is not African is excluded from converting tenuous rights into ownership.

[36] Firstly, one cannot ignore the Constitutional Court's express statements concerning the purpose of the Upgrading Act. They are unequivocal pronouncements on its purpose, in the context of past injustice and inequality. I should mention that it was submitted that O'Regan J's reference to the "express purpose" of the Upgrading Act was in the minority judgment in DVB Behuising, whereas Ngcobo J had only referred to the "purpose". I think there is little difference between the two statements.

- [37] Secondly, I am respectfully of the view that Herbert NO, although not deciding whether or not the Trust fell into a class or group in whose interest the Upgrading Act was enacted, confined the application of the Upgrading Act to a class or group in whose interest it was enacted. In my respectful view, it opened the way to considering the particular circumstances of the granting of a permission to occupy, in order to decide whether a party did or did not fall into such class or group. In other words, despite the word “any”, a person may not fall into a class or group in whose interest the Upgrading Act was enacted. It is significant in my view that immediately after saying that it was not clear whether or not the Trust fell into such class or group, Jafta J referred to the Trust’s and its predecessors’ involvement in the “shameful policies of the apartheid government” and the iniquities of migrant labour at the time. Further significantly, Jafta J referred to “the constitutional and legal question whether the Trust is entitled to claim conversion of rights under the Upgrading Act”. This question was posed in respect of the Trust itself. Is the Trust constitutionally and legally entitled to claim conversion of rights? In my view the statements in the judgments to which I have referred are overwhelming authority to the effect that the answer to the constitutional and legal question is that the Trust is not entitled to claim conversion of rights under the Upgrading Act. I have pointed out above how the Trust and its predecessor were not disadvantaged by racially discriminatory legislation, and chose to operate in an area which was advantageous to their operations. The descriptions of these operations by Jafta J in Herbert NO at paragraph [24] and contained in Senqu’s heads of argument (see paragraph [30] above) in my view demonstrate powerfully that the Trust does not fall into a class or group of persons who require redress and reversal of wrongs, in the sense expressed in the judgments, and in whose interest the Upgrading Act was enacted.
- [38] I accept that Jafta J did not expressly state that a person who is not African is excluded from the benefit of the Upgrading Act. On that premise, my decision that the Trust is not entitled to claim conversion, does not go so far as to find that anyone who is not African may not claim conversion in terms of s 3 read with item 2 of Schedule 2 of the Upgrading Act. I considered specifically the circumstances of the granting of the permission to occupy to the NRC in the light of the authorities to which I referred and in particular Herbert NO.
- [39] In view of my finding that the Trust does not fall into a class or group of persons in whose interest the Upgrading Act was enacted, it is not necessary to consider the various challenges posed by Senqu to the validity of the permission to occupy, and the question I raised regarding the definition of a trading allotment in the 1969 Proclamation.
- [40] It was submitted on behalf of the Trust and the Minister that the interpretation of s 3 of the Upgrading Act which was argued on behalf of Senqu was not the case they had to meet. The answering affidavit of Senqu raised the various technical arguments against the validity of the permission to occupy. However I do not think that Senqu was prohibited from raising this argument for the purpose of considering and deciding the constitutional and legal question referred to by Jafta J.

- [41] After this application was re-enrolled for hearing following the Constitutional Court decision, Senqu raised a constitutional issue and gave notice in terms of Uniform Rule 16A (1). In the notice it was stated that s 3 of the Upgrading Act is unconstitutional in that it infringes s 9 of the Constitution, amounts to arbitrary deprivation of property as envisaged in s 25 of the Constitution, and fails to provide for adequate review mechanisms for parties to challenge the automatic conversion of land tenure into ownership by interested and affected parties. This constitutional challenge was premised on the Upgrading Act allowing the Trust to claim conversion of the permission to occupy to ownership.
- [42] In my view it is not necessary and would serve no purpose to decide the constitutional challenge. It was raised only in the event of a finding that the Trust had an enforceable right in terms of s 3 read with item 2 of Schedule 2 of the Upgrading Act. I have found otherwise. The challenge is therefore academic.
- [43] Counsel for the Minister, at the commencement of the application, placed on record that the Minister's involvement in the application was only to the extent that the constitutional issue arose, namely in the event that it was found that the applicant had an enforceable right.
- [44] In the result the following order will issue:
- [44.1] The application is dismissed.
- [44.2] The applicants are to pay the first respondent's costs.
- [44.3] No order is made as to the third respondent's costs.

J M ROBERSON

JUDGE OF THE HIGH COURT

Appearances

Applicants: Adv I J Smuts SC, with Adv J G Richards, instructed by Netteltons Attorneys, Makhanda.

First respondent: Adv O H Ronaasen SC, instructed by Whitesides Attorneys, Makhanda.

Third respondent: Adv T J M Paterson SC, instructed by Huxtable Attorneys, Makhanda.

[1] The Natives Land Act, 1913.

[2] Defined in the regulations as all land which vested in or was acquired by the South African Development Trust, formerly the South African Native Trust.

[3] The NTLA was renamed the Development Trust and Land Act.

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