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Dear Sirs

Written submissions on the Draft Constitution Eighteenth Amendment Bill 2019

I Introduction

1. The Ad Hoc Committee to Initiate and introduce legislation Amending Section 25 of the Constitution has invited written comments from the public and Civil Society Organizations on the **Draft Constitution Eighteenth Amendment Bill 2019**.

2. These submissions are structured as follows:

2.1 The LRC and its interest;

2.2 Overview of Section 25 and of expropriation without compensation;

2.3 The significance of expropriation without compensation for labour tenants;

2.4 The significance of expropriation without compensation from a housing perspective;

2.5 Central themes relating to expropriation in relation to communal land:

2.5.1 Recognition of customary law rights;

2.5.2 Mining on communal land; and

2.5.3 Implications of Gender in Land Expropriation without Compensation

3. Recommendations

4. Relevant judgments attached.

II The LRC and its interest

1. The Legal Resources Centre (LRC) is an independent non-profit public interest law clinic which uses the law as an instrument of justice. It works for the development of a fully democratic South African society based on the principle of substantive equality, by providing free legal services for the vulnerable and marginalized, including the poor, homeless, and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social economic or historical circumstances. The LRC, both for itself and in its work, is committed to:

1.1 Ensuring that the principles, rights and responsibilities enshrined in the Constitution are respected, promoted, protected, and fulfilled;

1.2 Building respect for the rule of law and constitutional democracy;

1.3 Enabling the vulnerable and marginalized to assert and develop their rights;

1.4 Promoting gender and racial equality and opposing all forms of unfair discrimination;

1.5 Contributing to the development of a human rights jurisprudence; and

1.6 Contributing to the social and economic transformation of society.

2. The LRC has been in existence since 1979 and operates throughout the country from its regional offices in Johannesburg, Cape Town, Durban and Makhanda.
3. The LRC represented and continues to represent citizens and communities in litigation involving:

3.1. Restitution, including of the land of labour tenants;
3.2. customary law and its status in relation to property rights;
3.3. communal land and new development on communal land including mining;
3.4. housing; and
3.5. Environmental regulation and mining.

4. We appeared on behalf of clients in the Constitutional Court in the matters of *Bhe,*[1] *Richtersveld*[2] and *Shilubana.*[3] Our clients include the communities that successfully challenged the constitutionality of the Communal Land Rights Act of 2004.[4]

5. We also appeared on behalf the applicant in perhaps the most important case to date on expropriation and compensation, namely *Msiza and Others v Director-General for the Department of Rural Development and Others.*[5]

6. The LRC represented three fishers from Hobeni in the Eastern Cape in successfully setting aside their conviction for fishing without authorisation from the Minister in terms of the Marine Living Resources Act, based on the

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[1] *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).
[2] *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5)SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003).
[3] *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008).
[4] *Tongoane and Others v The Minister of Agriculture and Land Affairs and Others* CCT 100-09. The LegalResources Centre, with Webber Wentzel attorneys, represented four communities Kalkfontein, Makuleke, Makgobistad and Dixie in a challenge on the constitutionality of the Communal Land Rights Act of 2004. The Act was declared unconstitutional by the Constitutional Court in May 2010. Prior to the institution of legal proceedings on the CLRA, the LRC and its clients made extensive written and oral representations to the department and to parliament on the problematic and unconstitutional aspects, both procedural and substantive, of the CLRA Bill.
[5] *Msiza and Others v Director-General for the Department of Rural Development and Land Reform and Others* (LCC133/2012) [2016] ZALCC 12; 2016 (5) SA 513 (LCC) (5July 2016)

fact that they were exercising their customary rights to fishing. The SCA found in favour of the fishers and established key principles of recognition of customary property rights.[6]

7. The LRC also participated in different capacities in the hearings and research conducted by the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change under chairpersonship of Mr Kgalema Motlanthe. The LRC also participated in the Presidential Advisory Panel on Land Reform. The LRC strongly recommends that conclusions reached in that extensive investigation into land legislation and implementation post-1994 be incorporated into the work of this committee.

8. Most recently, the LRC represented 22 000 labour tenants in the Constitutional Court, challenging the failure of the Department of Rural Development and Land Reform to process their applications of acquisition of land under Land Reform (Labour Tenants) Act 3 of 1996. As a result of the Departments failure, a Special Master was appointed by the Land Claims Court. [7]

III Overview of Section 25 of the Constitution

9. Section 25 has multiple sections which must be read together and be seen as mutually supportive. Sections 25(1) – (3) provide for the protection of existing property rights. They also entrench negative property rights – the rights not to be arbitrarily deprived of property, and the right for property not to be expropriated without just and equitable compensation, determined by agreement or approved by a court.[8] Section 25(4) provides the bridge to the

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[6] *Gongqose and Others v Minister of Agriculture, Forestry and Fisheries and Others; Gongqose and Others v State and Others* (1340/16 & 287/17) [2018] ZASCZ 87.
[7] Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another (CCT 232/18) [2019] ZACC 30; 2019 (11) BCLR 1358 (CC) ; 2019 (6) SA 597 (CC) (20 August 2019)
[8] See T Ngcukaitobi & M Bishop, "*The Constitutionality of expropriation Without Compensation," pg 3,* https://webcache.googleusercontent.com/search?q=cache:ehJ8HXU0PREJ:https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/law/documents/constitutional-court-

subsections which follow it. It expressly recognizes that "*the public interest includes the nation's commitment to land reform.*" Juxtaposed with section 25(1) – (3) are subsections (5) - (9) of section 25 which are the positive elements of the rights and together constitute the land reform provisions. The inclusion of subsections (4) – (9) were designed to ensure that the apartheid era spatial distribution of land occupation and ownership was not frozen upon coming into force of the Constitution.

10. Section 25(8) also requires that the other subsections of section 25 do not impede land reform.[9] According to Bishop and Ngcukaitobi, Section 25(8) has two clear purposes the first being interpretation and the second is limitation:[10]

> " **interpretation** : It must influence the interpretation of ss 25(1) to (3).It means that deprivations that are necessary for land reform are less likely to be arbitrary. It means that limitations on the role of courts in s 25(2)(b) in the land reform context should be more tolerable. And it should influence the outcome of the s 25(3) analysis, particularly by emphasising the purpose of the expropriation when land reform is at stake."
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> **"Limitation**: If a law is found to limit s 25(2)(b) or s 25(3), s 25(8) "*should weigh heavily in on the side of the poor and landless in any proportionality review under s 36."* Put differently, if the criterion in s 25(8) is met, it is a strong indication that the law is "*reasonable and justifiable in an open and democratic society".*

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review-program/Ngcukaitobi%2520Bishop%2520Article%2520(FINAL).docx+&cd=1&hl=en&ct=clnk&gl=za last accessed 26 January 2020

[9] 25(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

[10] See T Ngcukaitobi & M Bishop at pg 4

11. In *First National Bank of SA Limited t/a Westbank v Commissioner for the South African revenue services and Another* the Constitutional Court stated with regard to section 25:[11]

> "The purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions."

IV What is expropriation of land?

12. Expropriation is not defined in the Constitution but was subsequently defined by the Constitutional Court in *Harksen v Lane NO* as "*the compulsory acquisition of rights in property by a public authority.*"[12] Within this definition, the Court stipulated that the term compulsory means compelled by law. The Court again defined expropriation in *Phoebus Apollo Aviation CC v Minister of Safety and Security* as "the compulsory taking over of property by the state to obtain a public benefit at private expense." [13]

13. Section 25(2) of the Constitution sets out three criteria that must be met for an expropriation: namely that it must be (1) carried out in terms of a law of general application;[14] (2) that it must be in the public interest or for a public purpose ;[15] and (3) that just and equitable compensation be provided. [16]

14. Therefore, one of the main concerns during the drafting of the Constitution was that expropriation should be possible for land reform purposes in the

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[11] First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another [2002] ZACC 5; 2002 (4) SA 768 (CC) at para 50.
[12] Harksen v Lane NO 1998 (1) SA 300 (CC) at [32]
[13] Phoebus Apollo Aviation CC v Minister of Safety and Security 2003 (2) SA 34 (CC) at [4]
[14] This requirement is found both in section 25(1) and 25(2) of the Constitution
[15] Section 25(2)(a).
[16] Section 25(2)(b) and 25(3).

new constitutional era.[17] The potential problem was that public purpose would be interpreted too narrowly and would therefore not permit for expropriation for the benefit of private beneficiaries. In response to this concern, public interest was added to the final Constitution as a requirement,[18] and more importantly section 25(4) was added to ensure that land reform purposes would be included.

15. Section 25(4)(a) of the Constitution states that "the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources." As such the Constitution explicitly confirms that expropriations for the benefit of private individuals are permissible for the purposes of land reform. In addition, sections 25(5) to (9) provide the further basis for land reform in South Africa.

16. In the *Agri SA* Case [19] the Court stated the following with regard to expropriation:

> "The approach to be adopted in interpreting section 25, with particular reference to expropriation, is to have regard to the special role that this section has to play in facilitating the fulfilment of our country's nation-building and reconciliation responsibilities, by recognising the need to open up economic opportunities to all South Africans. This section thus sits at the heart of an inevitable tension between the interest of the wealthy and the previously disadvantaged. And that tension is likely to occupy South Africans for many years to come, in the process of undertaking the difficult task of seeking to achieve the equal distribution of land and wealth to all."

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[17] *See* LM du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* (1994)183 (discussing the reasoning of the Technical Committee); T Roux "Property" in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed (2006) 46-33; see also M Chaskalson "Stumbling Towards s 28: Negotiations over the Protection of Property Rights in the Interim Constitution" (1995) 11 *SAJHR* 222-237; see also M Chaskalson & C Lewis "Property" in Chaskalson et al (eds) *Constitutional Law of South Africa* (1996) 31-21.

[18] See I Currie & J de Waal The Bill of Rights Handbook 5th ed (2005) 555; see also M Chaskalson "*Stumbling Towards s 28: Negotiations over the Protection of Property Rights in the Interim Constitution*" (1995) 11 SAJHR 222-237; see also M Chaskalson & C Lewis "*Property*" in M Chaskalson et al (eds) Constitutional Law of South Africa (1996) 31-21

[19] *Agri South Africa v Minister for Minerals and Energy* [2013] ZACC 9 (18 April 2013) 61

17. As highlighted above, expropriation has always been a source for contention in South Africa. However, a balance must be achieved to ensure an equitable redress for the landless. The property clause in the Constitution does aim to achieve this goal.

Is expropriation of land without compensation possible within the current constitutional framework?

18. Section 25(3) of the Constitution provides for the determination of compensation when property is expropriated. It reads as follows:

> *"(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -*
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> *(a) the current use of the property;*
>
> *(b) the history of the acquisition and use of the property;*
>
> *(c) the market value of the property;*
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> *(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*
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> *(e) the purpose of the expropriation."*

19. Our courts have repeatedly stressed that section 25(3) of the Constitution marks a break from the traditional approach to compensation under the Expropriation Act 63 of 1975 and its predecessors. It is not concerned only with the loss suffered by the person whose land is expropriated. As was explained in *Du Toit*:

> "*Viewed in the context of our social and political history, questions of expropriation and compensation are matters of acute socio-economic concern and could not have been left to be determined solely by market forces." Instead, the*

compensation awarded to landowners "must reflect an equitable balance between the interests of the public and of those affected by the expropriation."[20]

20. Taking into account the test of just and equitable and the five factors listed in section 25 (3) of the Constitution, in some instances expropriation of land with zero compensation is possible within the current constitutional framework.

V SUBMISSIONS ON THE PROPOSED AMENDMENTS TO SECTION 25 OF THE CONSTITUTION

The quest for land reform must remain an executive function

21. The three wings of government are equally instrumental in delivering a system of democratic governance. They are all collectively inclusive yet all perform independent functions. With the proposed amending provisions, this provision is proposed:

"3(A) National legislation must, subject to subsections (2) and (3), set out specific circumstances where a court may determine that the amount of compensation is nil."

22. The provision appears amiss as it does not deal with the issue of what land can legally be expropriated on the basis of nil compensation as a means of land reform. We submit that the determination of compensable and non-compensable expropriation falls within the ambit of the President and the national executive as prescribed in the Constitution.[21] Such determination can then be reduced to legislation which will then guide the courts. We make this submission on the basis that a clear assessment, guided by a collection of data, submissions, historical dispositions, and other credible sources that can inform the legislation that determines nil compensation that

[20] Agri South Africa v Minister for Minerals and Energy [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) at para 60
[21] Section 85

will be followed by the courts. Relegating an executive role to the judiciary will be a herculean task for the courts, in exercising a duty that does not form a judicial function. The courts provide meaning and justice to the law as determined by Parliament and ensure that legislation complies with the Bill of Rights.

23. Drawing lessons from other jurisdictions is important in determining the course South Africa should take in this task. We submit that approaching land reform in a formally legal and structured way can avoid devastating experiences like those of Mexico and Russia where land reform was a result of revolutionary action[22]. With legislation that guides courts the desired equal and fair distribution can be achieved.

CATEGORIES OF LAND AND PUBLIC INTEREST EXAMPLES WHERE EXPROPRIATION WITHOUT COMPENSATION MAY BE APPROPRIATE

Labour tenants

24. The initiative is extremely important to farm dwellers (labour tenants[23] and occupiers[24]), to landowners and to the country as a whole. Land reform, including tenure security and restitution, is of fundamental importance in addressing persistent patterns of inequality. It has significant implications for

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[22] Cousins, B "*Global and historical lessons on how land reform have unfolded'* https://theconversation.com/global-and-historical-lessons-on-how-land-reforms-have-unfolded-127627 accessed February 20, 2020

[23] Section 1 of Land Reform (Labour Tenants) Act No. 3 of 1996 provides that:
"**labour tenant**" means a person – (a) who is residing or has the right to reside on a farm; (b) who has or has had the right to use cropping or grazing land of the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and (c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm"

[24] Section 1 of the Extension of Security of Tenure Act No. 62 of 1997 provides that:
"**occupier**" means a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or anther right in law to do so……."

rural economies and the agricultural sector, both subsistence and commercial.

25. The Land Reform (Labour Tenants) Act No. 3 of 1996 ("**LTA**") was enacted to give effect to the right in section 25(6) of the Constitution which guarantees those with insecure tenure the right "*to tenure which is legally secure or to comparable redress"*. The LTA targets labour tenants, some of the most vulnerable people in South Africa. It protects them from unlawful evictions, and allowed them to apply to the Director-General of Rural Development and Land Reform for rights over the land that they occupy, including ownership.

26. Thousands of labour tenants took up that invitation and made applications for rights in their land before the cut-off date of 31 March 2001. They applied with the hope that their applications would be processed speedily and that they would be given secure tenure on the land which they and their families had lived on for generations.

27. They would be sorely disappointed. The Director-General and the Department of Rural Development and Land Reform ("the Department") have failed to perform the simple clerical tasks necessary to process labour tenants applications. As a result, more than sixteen years after the deadline for lodging applications lapsed, thousands of labour tenants are still waiting for the determination of their claims. The majority of those applications are stuck in a bureaucratic limbo where the Department is unable or unwilling to take them forward. While their applications remain unprocessed, labour tenants remain more vulnerable to eviction, are restricted in how they can use the land, and cannot plan for the future.

28. In 2019 the Constitutional Court in the *Mwelase* case[25] found that at every turn the Department had failed the labour tenants by not processing their claims. The Court therefore rightly decided to uphold the decision to appoint

[25] Supra at footnote 7

a Special Master, for the purpose of overseeing the labour tenant claims realized.

29. As stated in paragraph 2 above, the initiative by Parliament and the Committee is extremely important to farm dwellers. Farm dwellers were promised "tenure which is legally secure or comparable redress."[26]

The history of the acquisition and use of the property[27]

30. It is important to state that in terms of sections 3(1) and 16(1) of the LTA, labour tenants are entitled to acquire the land that they were occupying and using on the 2 June 1995. Most labour tenants who have made applications for acquisition of land are still occupying and using the land that they were using on 2 June 1995 and before. This means that most of the owners of land have never used the land occupied and used by labour tenants.

31. Furthermore, most of the land owners have acquired land through donations and inheritance. A small number of them have paid nominal purchase prices.

The current use of the property[28]

32. Almost all land occupied and used by labour tenants is used by land owners for agricultural purposes. Some are using land for stock farming. Some are using land for growing crops. Some are using land for game farming. As such, the land occupied and used by labour tenants should be valued as agricultural land.

The market value of the property[29]

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[26] Section 26 (6) of the Constitution states that:

> "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."

[27] Section 25(3)(b) of the Constitution.

[28] Section 25(3)(a) of the Constitution

33. The simple question is whether the land occupied and used by labour tenants should be valued as agricultural land, or as land with the potential for other development. A related question is how the existence of the labour tenant claim should factor into the determination of market value.

34. There is always a possibility that property will be used for a purpose other than its current use. There will always be buyers who may be willing to pay more than other buyers because of the potential value they see in a property if it is used differently. The question to answer is when those possible future uses convert into a different determination of market value.

35. The approach was set out in *Port Edward Town Board v Kay*:

> *"Where there are several possibilities, all reasonable, for which the property is suited, the party relying on the potential is entitled to select from amongst them the one which is most advantageous to him as being the 'highest and best use' to which the property can be put, provided of course that such use would have occurred to both the notional parties and would have been accommodated by them in their negotiations about the price. But such potentiality must not be inflated: it remains a mere potentiality, not a reality … , and as such it is at best a bargaining chip in the notional negotiations."*[30]

36. In a number of cases, including *Msiza and Others v Director-General for the Department of Rural Development and Others*,[31] our courts have rejected the potential use of the property as a basis for determining compensation upon expropriation.

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[29] Section 25(3)(c) of the Constitution.

[30] 1996 (3) SA 664 (A) at 675E-F.

[31] Msiza and Others v Director-General for the Department of Rural Development and Land Reform and Others (LCC133/2012) [2016] ZALCC 12; 2016 (5) SA 513 (LCC) (5 July 2016)

The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property[32]

37. This factor is not applicable for the acquisition of land occupied and used by labour tenants[33]

The Purpose of the expropriation[34]

38. In terms of section 25 (2) of the Constitution expropriation of land "*for a public purpose or in the public interest*" is allowed.

39. Section 25(4)(a) of the Constitution states that "*the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources."*

VII Farm occupiers

40. The Extension of Security of Tenure Act No. 62 of 1997 ("ESTA") was enacted to give effect to the right in section 25(6) of the Constitution which guarantees those with insecure tenure the right "to tenure which is legally secure or to comparable redress". ESTA targets occupiers, some of the most vulnerable people in South Africa. It protects them from unlawful evictions, and promotes the achievement of a long-term security of tenure.

41. Like labour tenants, occupiers are currently occupying and using land on farms. This means that the owners of land currently occupied and used by occupiers are not using such land.

42. Section 26 of ESTA allows the expropriation of land for developmental purposes. It reads as follows:

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[32] Section 25(3)(d) of the Constitution
[33] Msiza and Others v Director-General for the Department of Rural Development and land Reform and Others (LCC133/2012)[2016]ZALCC 12; 2016 (5) SA 513 (LCC) (5 July 2016)
[34] Section 25(3)(e) of the Constitution

"(1) Without derogating from the powers that a Minister may exercise under the Expropriation Act, 1975 (Act No.63 of 1975), the Minister may for the purposes of any development in terms of this Act, exercise equivalent powers to the powers that such other Minister may exercise under the Expropriation Act, 1975.

(2) Notwithstanding the provisions of the Expropriation Act, 1975, the owner of the land in question shall be given a hearing before any land is expropriated for a development in terms of this Act.

(3) In the event of expropriation, compensation shall be paid as prescribed by the Constitution, with due regard to the provisions of section 12(3), (4) and

(5) of the Expropriation Act, 1975.

(4) Any right in land which derives from the provisions of this Act will be capable of expropriation in accordance with the provisions of any applicable legislation."

43. Section 4 (1) (a) of ESTA allows the Minister of the Department of Rural Development and Land Reform "*to facilitate the planning and implementation of on-site and off-site developments"*. Section 1 of ESTA defines off-site and on- site developments as follows:

> **"off-site development"** *means a development which provides the occupants thereof with an independent tenure right on land owned by someone other than the owner of the land on which they resided immediately prior to such development;*
>
> **"on-site development**" *means a development which provides the occupants thereof with an independent tenure right on land on which they reside or previously resided".*

44. We submit that taking into account the five factors listed in section 25(3) of the constitution, when the land occupied and used by occupiers is expropriated for developmental purposes, in some instances, zero compensation will be justified.

VIII Housing

45. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE) and the Extension of Security of Tenure Act 62 of 1997 (ESTA) are pieces of legislation created to ensure the progressive realization of the right to housing. Both these Acts as well as important Constitutional Court decisions have contributed towards the expansion of the meaning of section 26(1) of the Constitution. This has further allowed for increase of obligations of the State to ensure the realization of the right to housing and ensure that poor/indigent people are not left homeless upon legal eviction proceedings from privately or state owned properties/buildings.

46. Under the current housing legislation and jurisprudence, the State (in its three tier structure) bear the duty to ensure that emergency temporary accommodation is available for people who would be left homeless upon an eviction. This obligation is often difficult to fulfil by the State due to inter alia, limited resources, lack of budget, lack of proper planning and lack of suitable alternative accommodation. In the circumstances, expropriation of land without compensation appears to be the solution to the challenges often experienced by the State.

47. The option to expropriate in the “public interest” has been shockingly under-utilised by the State. It has seldom been put as an option on the table and where it is an option it is often the very last resort. It is difficult to understand the reasoning behind the State’s unwillingness to expropriate land for the public interest. One of the explanations by the State could be the amount of compensation to be paid. This explanation though would be distorted view because the amount of compensation required to be paid by the State could be significantly reduced, and in some instances amount to zero if the determining factors listed in section 25 (3) are equally considered and applied.

48. We refer to a recent case litigated by the LRC where the City of Johannesburg was ordered by the High Court to ensure the provision of

alternative accommodation for a poor community within a certain period of time, after an eviction order was granted against the community. The City missed the deadline imposed by the court but requested several postponements in the matter to buy time for it to secure an alternative relocation site. The City later entered into negotiations with the land owner to purchase the property from it in order to develop it on behalf of the occupiers. Negotiations failed in view of the proposed offer to purchase by the land owner which requested an exorbitant amount. As a last resort, expropriation of the land was put on the table. This appeared to be the solution at the end, after a protracted matter of over 25 court postponement which spanned over a period of just over 3 years (after the court order). The compensation offered was still at a very high price but it is what the City settled for.

49. The mistake made by the City in this instance was that market value of the property was the first factor considered and the rest of the factors were almost ignored. The property in question was used for residential purposes only. The land was undeveloped agricultural land surrounded by an industrial area. It had been acquired by the owner at an auction, over a period of more than a decade, at a price which was just over 50% less than amount paid as compensation. The purpose of acquiring the property would be to provide housing to poor people who could have been homeless. The property could be developed by the State and used to house other beneficiaries in the same position as that community.

50. The above example not only shows an unaccounted reluctance by the state to expropriate land but also the distorted interpretation of section 25 (3). It is possible under the current framework to expropriate land such as the one described above at a significantly reduced rate. This option ought to have been the first option on the table as it is currently provided for in our constitution. The appropriate mechanism for the state to expropriate without compensation would include, but not limited to:

50.1. Establishing legislation which is in line with the entire section 25 (3) and section 25 (4) clause. This may entail improving the current expropriation Bill;

50.2. Consider expropriating without compensation as the default position, but for a consideration of the listed factors. So starting point at zero compensation;

50.3. National land audit and or database of all privately and state owned land coupled with a profile of the land: its use, extent etc.

50.4. Establishing a formulae in line with section 25 (3) and 25 (4) which would be packaged in the legislation, to be used as a guide.

50.5. Dispute resolution procedure for interested parties where an expropriation does not comply with section 25 (3) and/or the legislation.

51. The benefits of expropriation without compensation in the realisation of the right to housing are bountiful. We refer to a large city like Johannesburg (in particular the inner city) where millions flock into the city in search of better opportunities and employment. There are a number of abandoned building which could be acquired by local government and used as alternative accommodation, low cost housing or low-cost rental for thousands of people staying in the inner city. These abandoned buildings are usually hijacked, where owners have moved abroad or want nothing to do with the buildings for failure to pay for the rates, taxes and municipal services. A land/property audit would also be necessary in the circumstances in order to identify ownership and thereafter commence the expropriation proceedings.

52. The process after expropriation would depend on whether individuals qualify for ownership of the property. The criterion can be included in the legislation proposed above and should take into account a variety of factors:

52.1. Previously disadvantaged;

52.2. History of ownership;

52.3. Financial circumstances (for affordability of municipal services, taxes, rates and the likes);

52.4. South African citizenship and lawful South African residents;

52.5. If you have previously benefited from a state housing program e.g: RDP house

53. Strict measures would have to be put in place in order to prevent corruption whether by government officials or by members of the public. This would include: improved electronic systems to be constantly monitored by an expert like an auditing company for example. An accelerated application process (after acquisition of the land); increased capacity within the state (human resources) and skills development programs to ensure competent officials.

IX COMMUNAL LAND

54. In terms of S25(6) of the Constitution, parliament must enact legislation that would provide security to *"a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices*". Customary communal tenure is a prime example of such insecure tenure.

55. The insecurity of such tenure (pre-constitutionally) was at least twofold and entirely based on racial discrimination: on the one hand, the status of customary law as law and therefore as the source of ownership and other land rights was wholly undermined, while on the other, the prohibition on black common law ownership meant that communal land rights holders could never find security within a property regime that recognized common law private property only – and protected it at all cost.

56. The first attempt at securing tenure rights on communal land, the Communal Land Rights Act of 2004, was successfully challenged by four communities, represented by the LRC, on both procedural and substantive grounds. These communities said, inter alia, that allowing traditional leaders and traditional councils to take decisions over land in fact held in terms of customary law by households and individuals, would make such tenure more insecure, rather than more secure.

57. In fact, the LRC submits that one of the glaring blind spots of the debate about expropriation without compensation is the reality that individuals, households and communities on communal land are regularly deprived of their land and land rights without just and equitable compensation, when decision about the alienation of that land is made on their behalf and without their consent.[35]

58. Equally important to accelerating expropriation without compensation, we submit, is an urgent strengthening of the existing tenure protections for people living on communal land contained in the Interim Protection of Informal Land Rights Act of 1996.

59. We proceed to discuss three key areas of concern relating to communal land.

Communal land and Mining

60. 2013 marked the centenary of the 1913 Native Land Act which effectively ended black ownership of land in South Africa. Nineteen years after the Final Constitution was adopted which mandated and obligated the democratic State to turn the skewed patterns of resource ownership and access in South Africa around, disturbingly little has changed.

61. In 2013 the minister of mineral resources identified the 1913 Act as the source of scourge of the migrant labour system in her mining indaba speech.31 She said:

This year also marks a hundred years since the enactment of the Native Land Act, which created a system of land tenure that deprived the majority of South Africans of the right to own land, and eventually compelled Africans who had lost their land

[35] See for example https://www.dailymaverick.co.za/article/2018-06-11-dispossession-without-compensation-the-legacy-for-poor-rural-communities/.

to join the mining industry as migrant labourers… It is the remnants of this historical legacy of the migrant labour system, poor housing and living conditions, high levels of illiteracy, and low skills level that inevitably contributed to Marikana.

62. But the 1913 Land Act and the preceding colonial laws such as the Glen Grey Act of the 1890s reflect much more. The ruling party recognises the significance of mining interests and the 1913 land act shaping the history and future of our economy:

The ANC was formed at a time when South Africa was changing very fast. Diamonds had been discovered in 1867 and gold in 1886. Mine bosses wanted large numbers of people to work for them in the mines. Laws and taxes were designed to force people to leave their land. The most severe law was the 1913 land Act, which prevented Africans from buying, renting or using land, except in the reserves. Many communities or families immediately lost their land because of the Land Act. For millions of other black people it became very difficult to live off the land. The Land Act caused overcrowding, land hunger, poverty and starvation.[36]

63. Inequity in the mining industry has its roots in the dispossession of the African population of their land. Community protest as exemplified by the Marikana uprisings of 2012 has its roots in 200 years of discriminatory state law regimes.

64. From the early days the statute laws dealing with land also dealt with mineral rights. For example, in 1813 the Governor of the Cape Colony, Sir Cradock, issued a proclamation that converted the loan places certificates of white settlers into quitrent title deeds. The quitrent title contained a prescribed clause dealing with minerals: “All gold, silver and precious stones shall belong to the queen or king of England”. By contrast, the customary ownership rights of black communities were ignored. Communities were conquered in border wars, land and property such as cattle confiscated, and citizens were subjugated to become workers or servants under Master and

[36] http://www.anc.org.za/show.php?id=206

Servant laws. The tenure systems of colonial powers legalised squatting by white settlers and conquerors and ignored property rights of black occupiers of land.

65. Settler land owners owned all the minerals on their land, except for gold, silver and diamonds if these minerals had been reserved for the government. Land owners could mine their minerals although over the years the right to mine both reserved and unreserved minerals became more and more regulated by the state. Despite regulation, owners retained benefits and privileged treatment. For example, in 1883 after the discovery of diamonds all mining for diamonds was made subject to a permit to be issued by the magistrate. Initially permits for diamond mining could be issued without consent of the landowner. But three years later in 1887 the law was changed back and the consent of the landowner was needed before diamond mining was permitted on the owner's land.

66. Similarly the Gold Laws applicable in the South African Republic and the Transvaal Colony, preserved certain owner's privileges and concessions to allow digging for gold on land. The 1927 Precious Stones Act reserved for the owner prescribed shareholding in any kimberlite mine.

67. The history of mining law in South Africa shows that the government claimed rights to regulate strategic mining but that the private land owners retained a privileged bargaining position to negotiate benefits such as rental, royalties and shareholding. Land owners could use their land and mineral ownership rights to negotiate benefits.

68. By contrast, the history of land and mining law relating to rights of black communities on communal land, shows that their rights were consistently ignored or deliberately disregarded. The Native Land Act of 1913 outlawed ownership rights of black people in the largest parts of the country. In the rest of the country Native reserves were established where the ownership of land vested in the Governor General of the Union of South Africa. Where

communities and consortiums of independent African farmers purchased formerly white owned farms, such land was registered in the names of white missionaries, and later the minister of native affairs to hold the land in trust for the community often represented by an unrelated government imposed chief.

69. Black communities could not own land or register their tenure rights on their ancestral land or land that they had bought. They could therefore not use their land and mineral ownership rights to negotiate benefits from mines on their land.

70. To date the regimes created in 1813 and reinforced in 1913, have not been transformed or addressed and rural communities on communal land have not been afforded their basic negotiation rights.

The MPRDA and mining law discriminates against black people

71. Our history shows that black original land ownership was consistently ignored and, since 1913, outlawed. Today the post constitution Mineral and Petroleum Resources Development Act of 2002 promises redistribution but discriminates against black community land owners who get no benefit from mining on their land.

72. The MPRDA entrenches the historical discrimination against indigenous or customary forms of ownership (which discrimination was found to be unlawful by the Constitutional Court in *Richtersveld*) in the following way: only those with recognised ownership in the pre-MPRDA era had old order rights which could be converted. In practice, that meant (white) landowners with common law title only. While the constitutional provisions for restitution and security of tenure aimed to ensure the systematic overturning of such a racially discriminatory property regime, it came too late in most cases for communities to allow them equal opportunity to convert their rights in terms

of the MPRDA. Security of tenure is still not ensured in terms of s 25(6) while most restitution communities continue to await transfer of their land.

73. Examples of past statutory discrimination against black communities and promotion of white interests include the following:

73.1. Black people were not allowed to participate in the industry in that they were prohibited from applying for prospecting and mining permits;

73.2. White land owners and tenants i.e. those who had taken or acquired the occupational ownership rights of the surface, were given legislative backing to participate in mining and shares in the proceeds of mines , whilst black people could not become owners of the land they occupy and did not get benefits from mineral exploitation on their land.

73.3. The Development Trust and Land Act of 1936 contained a blanket provision reserving all mineral rights on trust land and black owned land for the Trust and all proceeds went to the trust fund as if it was the private holder of mineral rights;

73.4. Minimal benefits were obtainable under the now repealed Development Trust and Land Act of 1936 and the land control laws of former homelands.34 Old order landowners and surface owners received mining benefits by virtue of their land ownership and by operation of law. In Namaqualand in the 1980s, the Trans Hex mining company negotiated a lucrative mining lease with the state on a communal reserve and on 5 May 1994 converted the standard 5% state royalty to a regional community royalty, called the Diamond Fund Trust, which until recently received 90% of the state royalty.

74. The MPRDA accordingly discriminates against communities on communal land, and is inconsistent with the Constitution and the African Charter 35 to the extent that the property rights of African communities under customary law have not been recognised.

75. The North Gauteng High Court delivered judgement in the case of the Amadiba and Xolobeni people who have approached the court for an

order declaring that their customary property rights to the land upon which they have lived for centuries gives them the legal right to withhold consent to a foreign mining company from entering their land.

The constitutional basis for special treatment of, and investigation into community rights if communal land is considered for expropriation

76. We explained that mining statute law did not and does not afford communities on communal land equal treatment compared to white land owners. Land reform is progressing at a snail's pace and tenure reform on communal land is being neglected. Absent the formal recognition of customary land rights of communities, expropriation law should give careful consideration to such rights

77. It would be appropriate under this heading to consider the constitutional framework that requires a shift in the legal regime and recognition of ownership and customary rights which invoke a) the consent principle under customary law, which requires community permission for any mining and development on communal land and the possibility of expropriation of such land, and b) high standards of redress and reparation for historic taking of customary land and mineral rights.

78. The expropriation bill in its current form as sent back to parliament by President Zuma fails to address adequately the complex reality of the South African rural landscape. It is common cause that the South African rural landscape is one still plagued not only by the gross inequality in land and service allocation of the apartheid era, but also with the reality of different operating notions of ownership and land rights. It is the latter state of affairs that makes it difficult for rural communities to assert their voices in the development discussion in South Africa. For this and other reasons, we argue that both mining statute law and the bill should provide for effective

mechanisms to facilitate the participation of communities *in their own development and on their own terms.*

79. While our Constitution already recognises customary law as an independent source of law, the rights arising from such law – to land and resources – remain largely unrecognised. Any legislation that deals with rural development and land use change must prioritise rural communities who were and continue to be the most marginalised and vulnerable. The legal basis for this submission is found in section 9 of the Constitution, and in the legislation that gave effect to this section. The Preamble to the Promotion of Equality and the Prevention of Discrimination Act 4 of 2000 reads:

"Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy.
The basis for progressively redressing these conditions lies in the Constitution which, amongst others, upholds the values of human dignity, equality, freedom and social justice in a united, non-racial and non-sexist society where all may flourish;
Section 9 of the Constitution provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality;
This implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources, deprived of their human dignity and who continue to endure the consequences."

80. Despite what national legislation may permit, trust can only be built where there is a right of consent involved. The South African Human Rights Commission states, "The study found that through the process of consultation between stakeholders and communities, there was a complete *disintegration of trust between all stakeholders*. Communities felt helpless since, in their view, the granting of mining rights to the mining company was

inevitable and the community ultimately had no power to control the process."[37]

81. The failure as yet of the legislature to give effect to section 25(6) of the Constitution of ensuring security of tenure for people on communal land is but one reason for the continued marginalisation of rural communities.

82. In the Amadiba and Xolobeni[38] case, the conflict between the IPILRA and MPRDA with regard to the level of engagement that must be achieved prior to granting a mineral right: consent as opposed to consultation. The court in this instance took into account the importance of the social and historical background of the legislation. The court in this case has correctly declared that the MPRDA must be read in conjunction with IPLRA to protect the rights of customary communities who hold communal land rights, which were not historically protected by the law. Furthermore the community may not be deprived of their land without consent and they have the right to decide what happens on their land. Where the land is held on a communal basis the community must be placed in a position to consider the proposed deprivation and be allowed to take a communal decision in terms of their custom.

THE RECOGNITION AND PROMOTION OF CUSTOMARY FORMS OF TENURE AND DECISION MAKING PROCESSES

83. The renowned scholar of customary law and related systems of tenure, the late Prof Okoth-Ogendo of Kenya, once recounted how, as the colonial era drew to a close in the 1950's and 60's, British legal scholars organised a series of conferences to discuss the 'future' of customary law in Africa and the need to 'construct a framework for the development of legal systems in the emerging states'. These initiatives assumed that the 'indigenous' legal

[37] South African Human Rights Commission report: 2008 Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo ERM available at, http://www.reports-and-materials.org/SAHRC-report-on-Anglo-Platinum-Nov-2008.pdf

[38] Baleni and others v Minister of Mineral Resources and others [2018] JOL 40654 (GP)

systems of African countries and peoples of which they were well aware, were inadequate and inferior compared to the English common law.

84. These scholars must have felt vindicated when, upon independence most African countries adopted the colonial legal framework wholesale – especially, as Okoth-Ogendo points out, in view of the development framework's "general ambivalence as regards the applicability of indigenous law". Indigenous law and customary legal systems were regarded as inferior, were never extended to areas covered by colonial laws and, when applied, it was done only to the extent that it was not repugnant to Western justice and morality or inconsistent with any written law. It is trite that the post-colonial era sadly continued the relegation of customary law to a separate and unequal system of law that rarely found its way into the formal, 'Western' courts.

85. The post constitutional South African courts have now dealt with customary forms of tenure. The case of the Richtersveld community reached the Constitutional Court in 2003. In recognising the aboriginal title of the Richtersveld community, the Court held that:

> *"the real character of the title that the Richtersveld Community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. It follows therefore that prior to annexation the Richtersveld Community had a right of ownership in the subject land under indigenous law."*

86. This judgement confirmed the constitutional recognition and protection of customary law as found in sections 39(3) and 211 of the Constitution.

87. We submit that any legislative instrument that purports to address rural development and land questions, including proposed expropriation legislation, in South Africa should have as a central concern the recognition of customary law as a source of law equal to statutory and common law as a source of tenure rights and resource rights in South Africa. What is needed is a shift in the legal regime and recognition of ownership and customary rights which would invoke a) the consent principle under customary law, which requires community permission for any mining on communal land, and b) high standards of redress and reparation for unlawful taking of customary land and mineral rights. We have argued above that such an approach would be in conformance with the Constitution.

Considering the indigenous people's right to land

88. Section 25(7) of the Constitution has made it significantly difficult for members of the indigenous community, who were the first victims of land dispossession, to assert their right to property under the Constitution at the very least. The dispossession dates centuries back and thus the provision that canvasses land dispossession after the enactment of the Native Land Act of 1913 expressly excludes them. We respectfully submit that this be given extensive consideration and the during the process of amendment, extensive consideration be given formally recognizing the rights of indigenous people, as the national legislative framework gives no formal recognition to socio economic rights for indigenous people. The courts have made great strides in giving some form of recognition to the rights of indigenous people. Looking at the *Richtersveld* judgment that has been mentioned above, the community of Nama indigenous people successfully asserted their customary land rights over the land in question, where such land had been occupied by Alexkor for mining purposes. It must be noted however that the dispossession of the land occurred after 1913, which fits the scope of section 25(7). We submit that is incumbent on Parliament to make clear legal provision for land dispossession that occurred prior to 1913.

X Implications of Gender in Land Expropriation without Compensation

89. Black South African women, especially rural Black South African women, are especially vulnerable to poverty and disempowerment. As part of the colonial and imperial project that developed into apartheid, women's ties to land and their roles as landowners were diminished and erased. Colonial law makers excluded women from their understanding of customary law and understanding of land tenure when developing laws such as the *Black Administration Act 38 of* 1927 and the *Native Land Act 27 of 1913*.[39] Customary laws and understandings of gender and land were distorted by this process that emphasized only patriarchal elements of indigenous South African customs and community structures.[40] Gradually legislation like the Natal Code of Zulu Law Proc R151 of 1987 codified and fossilized "*misconstructions of African life…without acknowledging the strong rights of wives to security of tenure and use of land."* [41]

90. It is recognized that patriarchal elements were present in customary social structures, but the colonial project almost entirely erased women from the understanding of land ownership.[42]

91. The result of the above process is that Black women, especially rural women, are among the most vulnerable and impoverished in South Africa. Since 1994, only 5% of land is owned by Black South Africans, and most of

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[39] Clark, Michael and Luwaya, Nolundi, Land and Accountability Research Centre (LARC). 'Communal Land Tenure 1994-2007: A Commissioned Report' June, 2017, a commissioned report for the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an Initiative of the Parliament of South Africa [Clark].

[40] Clark, Michael and Luwaya, Nolundi, Land and Accountability Research Centre (LARC). 'Communal Land Tenure 1994-2007: A Commissioned Report' June, 2017, a commissioned report for the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, an Initiative of the Parliament of South Africa [Clark].

[41] Nhlapo "African customary law in the interim Constitution" in Liebenberg (ed) The Constitution of South Africa from a Gender Perspective (Community Law Centre: University of the Western Cape, Cape Town 1995) at 162.

[42] *Gumede (born Shange) v President of the Republic of South Africa and Others* (CCT 50/08) [2008] ZACC 23; 2009 (3) BCLR 243 (CC) ; 2009 (3) SA 152 (CC) (8 December 2008)

that is held by men.[43] Access to land represents access to financial security via means of production, access to food security and access to shelter. [44]

92. Previous land reform paid little to no attention to women and the vulnerabilities women face as women seeking financial and social security in their own right. So far, women remain absent from the discussion about expropriation without compensation, despite the fact that "women are an integral part of agricultural production and food security in [South Africa]."[45] Women make up 43% of the agricultural labour force including farms, cellars, slaughterhouses, factories and markets. 69% of small-scale farmers are women, and female-headed households are prevalent in the countryside due to the migration of men into urban centres for work. However, women's security of tenure and land rights remain exceptionally weak and most of the labour described above happens on small plots of land.[46]

93. It is imperative that expropriation without compensation focuses on the empowerment of women in order to truly address patterns of inequality in South Africa. Disempowering women was a key element to the colonial project and therefore countering this process must be part of any processes, social structures, policies and laws seeking to undo the harm caused by apartheid.

94. The new proposed amendments explicitly provide for expropriation of land without compensation as a legitimate mechanism for land reform. They are also a way of addressing the past injustices of arbitrary dispossession of land. They will serve to ensure equitable access to land for all South

[43] Land Audit Report, 2017
[44] Rural Women's Movement (2019) "Land redistribution-women must grab the moment." Foundation for Human Rights, available at <https://fhr.org.za/index.php/latest_news/land-redistribution-women-must-grab-moment/>
[45] Rural Women's Movement (2019) "Land redistribution-women must grab the moment." Foundation for Human Rights, available at <https://fhr.org.za/index.php/latest_news/land-redistribution-women-must-grab-moment/>
[46] Rural Women's Movement (2019) "Land redistribution-women must grab the moment." Foundation for Human Rights, available at <https://fhr.org.za/index.php/latest_news/land-redistribution-women-must-grab-moment/>

Africans regardless of race, class or gender. In light of this and in recognizing the empowering section 25(6), read with section 9 aim as redress for past racial discrimination, we submit the implementation of these provisions must zone in on race, class and gender as a means to achieve equitable redress in land reform for vulnerable groups like women, children, people with disabilities and members of the LGBTI community who continue to suffer prejudice. The commodity of land remains a key component of empowerment.

95. To aid this consideration, it is worthy to note that the Durban High Court in *Agnes Sithole and Another v Gideon Sithole and another*,[47] recently handed down a judgement which deemed parts of the Matrimonial Property Act 88 of 1984 were unconstitutional and invalid as they maintained a position of the now repealed Black Administration Act 38 of 1927. Essentially, the former provisions deemed all marriages by black couples that were entered into prior to 1988 were out of community of property as envisaged in the Act. Considering most black family structures where the husbands are the breadwinners, this caused serious prejudice to black women as they had no matrimonial property rights at the time of death or divorce. The marriages are now deemed to be in community of property which offers greater protection and equality to married women.

96. In his judgement , Madodo DJP note that:

"The discrimination the impugned provisions perpetuate is so egregious that it should not be permitted to remain on our statute books by limiting the retrospective operation of the order or by suspending the order of invalidity to allow Parliament to rectify the error. The effect of the order is that all civil marriages are in community of property. The recognition of the equal worth and dignity of all black couples of a civil marriage is well overdue." [48]

[47] Agnes Sithole and Another v Gideon Sithole and Another
[48] Daily Maverick , https://www.dailymaverick.co.za/article/2020-01-28-key-judgment-favours-women-married-under-sexist-apartheid-law/

97. This judgement recognizes the discrimination that women have been subjected to in terms of acquiring property and land rights and granted them access to independently owing property and certified their property rights. Constitutional recognition of women's property rights will ensure that women are not subjected to prejudicial treatment and thus we submit that these in the implementation of section 25, priority must be afforded to certain vulnerable groups who continue to be marginalized and prejudiced. should provide such provision, extensively.

XI CONCLUSION

98. Expropriation occurs by coercion authorized by law and without the consent of the affected property holder. Property may therefore be expropriated irrespective of the wishes of the property holder. Surprisingly, the state has rarely used this power over the last two decades of democracy to achieve land reform. One of the reasons for this hesitation may be the fact that the Expropriation Act 63 of 1975, which comes from the pre-constitutional era and requires payment of market- value compensation, still governs this state power in other circumstances. Another reason may be the uncertainty regarding whether awarding compensation that is (significantly) below the market value of expropriated property amounts to "*just and equitable compensation*", as required by section 25(2) - (3) of the Constitution.

99. The issue of whether awarding compensation that is (significantly) below market value of the expropriated property amounts to "just and equitable compensation" has confronted the courts in the case of: M*siza and Others v Director-General for the Department of Rural Development and Land Reform and Others* 2016 (5) SA 513 (LCC) and *Uys N.O and Another v Msiza and Others* 2018 (3) SA 440 (SCA) (29 September 2017). It is now settled that compensation that is below market value of the expropriated property may be "just and equitable" in some circumstances.

100. In our submission Parliament and the National Executive failed in their duties to take effective and reasonable steps to facilitate land reform as required by section 25(5) of the Constitution for a number of reasons, inter alia, including:

100.1. First, Parliament or executive functionary allocated powers under the Expropriation Act No. 62 of 1975 has never utilised the Expropriation Act No. 63 of 1975. Furthermore, there have never adequately utilised other legislations that allow expropriation of land such as LTA and ESTA.

100.2. Second, Parliament has produced the Expropriation Bill. On the 14 February 2017, the Bill was referred back to Parliament by the former President and he stated the following:

> *"Parliament failed to facilitate adequate public participation during the processing of the bill as required by the Constitution of the Republic of South Africa"*

100.3. The referral was limited to the procedural irregularity and unconstitutionality of the bill due to non-compliance with the public participation requirements under sections 72 and 118 of the Constitution;

100.4. As a peculiar aside and without more, the President noted that he was of the view that the bill may impact on "the land under traditional leaders;".

100.5. The bill was referred to the Portfolio Committee on Public Works for consideration and report in terms of Joint Rule 203.

101. Despite the fact that expropriation of land for land reform purposes is crucial, Parliament has not fixed the procedural irregularity pointed out by the former President.

102. In conclusion, it is our view that there is no need to amend section 25 of the Constitution but since Parliament has decided to amend section 25, the following must be considered:

102.1. Parliament must ensure that the amendment will make a difference in the lives of vulnerable people.

102.2. There is legislation that allows the expropriation of land with zero compensation which has never been utilised by the state.

103. Perhaps more importantly, expropriation – and deprivation – of communal land continues unabated.

104. The LRC thus makes the following recommendations:

104.1. Provision of land to rural women, people with disabilities, children, indigenous people be given special priority

104.2. Expropriation without compensation is possible within the parameters of the Constitution. It can and should be used in the instances that we cite above: to return the land of labour tenants, to fulfil obligations towards farm workers; to make better located land available for low cost housing by identifying abandoned or unused land or land held for purely speculative purposes and land that is underutilized and owned by public entities.

104.3. There are 3 theoretical routes identified by Bishop and Ngcukaitobi which may be used to justify expropriation without compensation only within the narrowly defined categories listed above in 104.2 which can justify expropriation without compensation:

104.3.1. The legislation could be constructed so that the loss of property is a deprivation, not an expropriation. This can be done by transferring the land directly from existing landowners to new landowners. The law will then have to be justified in terms of s 25(1).

104.3.2. the state could argue that, in a very limited set of circumstances, expropriation without compensation s “just and equitable” under s 25(3).

104.3.3. the state could accept that expropriation without compensation would limit either s 25(1) or s 25(3), but seek to justify the limitation in terms of s 25(8).

104.4. Any attempts to make expropriation ‘faster’ through less regulation or even the ousting of judicial review could potentially pose significant danger for people living on communal land who are already deprived of

their land rights without just and equitable compensation through, for example, the awarding of mining rights.

104.5. The Expropriation Bill should be amended to ensure that the expropriating authority, when dealing with communal land, will have information on:

104.5.1. The impact on the community or part thereof;

104.5.2. The value not only of improvements, but also of individual and communal rights and interests;

104.5.3. Impacts on the community's institutions and social networks which is so often crucial for the survival of rural communities, and

104.5.4. The availability and or provision of alternative land and accommodation to be provided by the expropriating authority or the mining company or developer.

105. The State should urgently rethink its State Land Lease and Disposal Policy if it is to be implemented on expropriated land made available for land reform. The policy is proving a great hindrance rather than an enabling document for land reform beneficiaries who have been able to get access to state land.

106. Finally, the LRC attaches hereto judgments critical to the discussions of this committee. We respectfully request an opportunity to make oral submissions to the committee at the appropriate time.

Yours sincerely

LEGAL RESOURCES CENTRE

Per: Lelethu and Thabiso

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1222/2016

In the matter between:

JOHANNES UYS N.O **FIRST APPELLANT**

DIRK CORNELIUS UYS N.O **SECOND APPELLANT**

and

MSINDO PHILLEMON MSIZA **FIRST RESPONDENT**

DIRECTOR GENERAL FOR THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM **SECOND RESPONDENT**

MINISTER FOR THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM **THIRD RESPONDENT**

Neutral citation: *Uys & another v Msiza & others* (1222/2016) [2017] ZASCA 130 (29 September 2017)

Coram: Navsa ADP, Cachalia and Seriti JJA and Tsoka and Lamont AJJA

Heard: 1 September 2017

Delivered: 29 September 2017

Summary: Land – Land Reform – calculation of just and equitable compensation to owner for land awarded to labour tenant – proper evaluation of factors including market value – owner aware of labour tenant's claim when land purchased for development – claim a pre-existing impediment affecting development potential -Pointe Gourde principle not of application.

ORDER

On appeal from: the Land Claims Court of South Africa, Johannesburg (Ngcukaitobi AJ and Canca AJ sitting as court of first instance), judgment reported sub nom as *Msiza v Director General for the Department of Rural Development and Land Reform & others* 2016 (5) SA 513 (LCC) (5 July 2016):

1 The appeal is upheld with costs.
2 The third respondent is to pay the first respondent's costs and 70% of the appellant's costs, such costs are to include the costs of two counsel.
3 The order of the Land Claims Court is amended as follows:
The figures 'R1 500 000 (one million five hundred thousand rand)' are deleted and substituted with the figures 'R1 800 000 (one million eight hundred thousand rand)' where they appear in paragraphs one and two.
Paragraph 5 is deleted and substituted with '5. The second respondent is to pay the costs of the applicant and the Dee Cee Trust, including the costs of two counsel'.

JUDGMENT

Lamont AJA (Navsa ADP, Cachalia and Seriti JJA and Tsoka AJA concurring):

[1] This is an appeal from the Land Claims Court (the LCC) (Ngcukaitobi AJ and Canca AJ) against the amount of compensation it determined was due to the owner of a portion of a property expropriated pursuant to successful claim by labour tenant under s 23 (1) of Land Reform (Labour Tenants) Act 3 of 1996. The owner of the property is the Dee Cee Trust (the Trust) and the labour tenant, who was awarded the property, is Mr Msindo Phillemon Msiza (Mr Msiza). The Trust's complaint is that the LCC

determined the compensation on the basis that the property was zoned for agricultural use instead of having regard to its developmental potential. And it then compounded the error by arbitrarily reducing the market value of the property because it was awarded to a labour tenant. The judgment of the LCC is reported as *Msiza v Director General for the Department of Rural Development and Land Reform and Others*.[1] This court granted the Trust leave to appeal against the decision. Agri SA sought and was granted leave to make submissions to this court as amicus curiae regarding the proper consideration of market value in the assessment of just and equitable compensation as contemplated in s 25 of the Constitution.

[2] The first and second appellants are the trustees of the Trust which owns the property that is the subject of this dispute. It measures approximately 352 hectares in extent and is known as Remainder of Portion 4 (a portion of Portion 2) of the farm Rondebosch 403 JS. It is situated in the district of Middelburg, Mpumalanga Province (Rondebosch). The extent of the land awarded to Mr Msiza by the LCC was a portion of Rondebosch, 45.8522 hectares in extent (the land).

[3] The Msiza family has continuously occupied the land since at least 1936. Mr Msiza's grandfather was recognised as a tenant who had the right to grow crops, graze cattle and reside on the land in consideration for labour. The arrangement was set out in a contract concluded under s 4(1) of The Native Service Contract Act 24 of 1932. The family exercised those rights on the land.

[4] On 5 November 1996 Mr Msiza's father lodged a claim for an area of land situated on Rondebosch to be awarded to him as a labour tenant in terms of Chapter 3 of the Act. On 21 November 1996 receipt of the claim was acknowledged by the second respondent, the Director General of the Department of Rural Development and Land Reform (the Director General). On 2 December 1996 the Director General notified Mr Jooste, who owned

[1] *Msiza v Director General, Department of Rural Development and Land Reform and Others* 2016 (5) SA 513 (LCC) (5 July 2016).

Rondebosch at the time, of the claim. Notice of the claim was published in the Government Gazette on 3 January 1997.

[5] The trust became the owner of Rondebosch on 9 May 2000 pursuant to an agreement for the purchase thereof concluded on 17 December 1999. The purchase price was R400 000. It is common cause that the Trust was aware of the claim and the presence of the Msizas when it acquired the property.

[6] Subsequent to the award of the land to Mr Msiza by the LCC on 16 November 2004, the parties attempted to reach agreement over the amount of compensation to be paid to the Trust. Offers of R408 000 and later R550 000 were made by the Minister to the Trust which it found unacceptable. The negotiations also involved an offer that the Msizas accept other land in lieu of the land awarded. That suggestion too was rejected. Unable to resolve their differences the matter stalled. On 21 August 2012, Mr Msiza launched an application in the LCC for a determination in terms of s 23(2) of the Act. The LCC determined the amount payable by the Director General and the Minister as R1,5 million. That order is the subject of this appeal.

[7] An owner's right to compensation for the loss of rights in land is dealt with in s 23(1) of the Act in the following terms:

'The owner of affected land or any other person whose rights are affected shall be entitled to just and equitable compensation as prescribed by the Constitution for the acquisition by the applicant of land or a right in land.'

[8] When a court considers the nature of the order it makes, it must have regard to s 22(5) of the Act,[2] which echoes the relevant provisions of the Constitution.

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[2] 'In determining the nature of the order which is to be made the Court shall have regard to-

(a) the desirability of assisting labour tenants to establish themselves on farms on a viable and sustainable basis;

(b) the achievement of the goals of this Act;

(c) the requirements of equity and justice;

(d) the willingness of the owner of affected land and the applicant to make a contribution, which is reasonable and within their respective capacities, to the settlement of the application in question; and

(e) the report and any determination made by an arbitrator appointed in terms of section

[9] The provisions of the Constitution that deal with just and equitable compensation for the expropriation of property are s 25(2) and (3) which provide that land may:

'(2) …be expropriated only in terms of law of general application-

(a) for a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct State investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.'

[10] These provisions were considered in *Du Toit v Minister of Transport*:[3] The court held at para 28 that:

'[s]ection 25(2) of the Constitution requires property to be expropriated only in terms of a law of general application and subject to compensation. The amount of compensation must then be agreed upon between the affected parties. Alternatively, it may be decided or approved by a court of law. However, the amount of compensation agreed or decided upon must adhere to the standards of justice and equity. It must also reflect an equitable balance between the interests of the public and of those affected by the expropriation. These standards, provided for in s 25(3) of the Constitution, are peremptory and every amount of compensation agreed to or decided upon by a court of law must comply with them. To determine that the amount is just and equitable, s 25(3) provides an open-ended list of relevant circumstances to be taken into account, including the market value of the property. In contrast, the Act does not specifically require that the amount of compensation meet the peremptory standards of the Constitution. Section 12(1) of the Act confines the compensation amount to either actual financial loss, when what is expropriated is a right, or to the

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19 (1) (a).'

[3] *Du Toit V Minister of Transport* 2006 (1) SA 297 (CC).

aggregate of market value and financial loss when the subject of the expropriation is tangible property. Section 25 of the Constitution, on the other hand, does not draw that distinction. There are clearly differences between the Act and the Constitution which may affect the fairness of the amount of compensation.'

[11] *Du Toit* dealt with valuation in the context of expropriation of land under the Expropriation Act 63 of 1975 (the Expropriation Act). The approach and the principles that were dealt with in *Du Toit* apply, as s 23(1) of the Act set out in paragraph 7 above invokes s 25(2) and (3) of the Constitution. *Du Toit*'s case at para 26 (footnotes omitted) sets out in relation to the Expropriation Act that:
'It is therefore now the Constitution, and not the Act, which provides the principles and values and sets the standards to be applied whenever property, which in turn is now also constitutionally protected, is expropriated. Every act of expropriation, including the compensation payable following expropriation, must comply with the Constitution, including its spirit, purport and objects generally and s 25 in particular.'

[12] Section 25(3) sets out a number of factors to be considered. Because it is usually the one factor capable of objective determination, market value is the convenient starting point for the assessment of what constitutes just and equitable compensation in any case, and then the other factors are considered to arrive at a final determination.[4] This approach, known as the two-stage approach is set out in *Du Toit* at para 37(footnotes omitted) as follows:
'Section 25(3) indeed does not give market value a central role. Viewed in the context of our social and political history, questions of expropriation and compensation are matters of acute socio-economic concern and could not have been left to be determined solely by market forces. The approach of beginning with the consideration of market value (or actual financial loss for that matter) and thereafter deciding whether the amounts are just and equitable is not novel. It was adopted by Gildenhuys J in *Ex parte Former Highland Residents: In re Ash and Others v Department of Land Affairs*. The Court in that matter did not deal with the interpretation and application of s 12(1) of the Act but rather with s 2 of the Restitution of Land Rights Act in the context of monetary compensation for dispossession of land. Nevertheless, the Judge pointed out that the market value of the expropriated property could become the starting point in the application of s 25(3) of the Constitution since it is one of the few factors in the section which is readily quantifiable. Thereafter, an

[4] *Msiza* para 38.

amount may be added or subtracted as the relevant circumstances in s 25(3) may require. Actual loss may play a similar role depending on the circumstances of the case. For this reason, the approach adopted here which applies the Act as a starting point and proceeds to apply s 25(3) of the Constitution may not be suitable in all cases. It is, however, the most practicable one in the circumstances of this case where there is no challenge to the constitutionality of the Act.'

[13] This approach, the court emphasised, must be applied with care to ensure that all the factors set out in s 25(3) are given equal weight. The factors set out in s 25(3) makes justice and equity paramount in the calculation of compensation;[5] market value on its own is but a component of the set.

[14] In the present matter the primary issue between the parties regarding the market value was whether the property had residential development potential. It was agreed between the parties, on the basis of expert evidence, that if the property had residential development potential, its market value was R4,36 million. On the other hand, if it was considered in its present state, namely as agricultural land then the market value was R1,8 million. The disparate valuations must of course be considered in relation to the history and circumstances of the present case and against constitutional and relevant statutory provisions.

[15] The report of the expert called on behalf of the State is significant. In reaching his valuation of R1,8 million he considered the physical features attaching to the land as also its present and historical use by the Msiza family. He stated as follows 'taking cognisance of the historic and current use, the characteristics of the subject property, the lawful use, and the judgment on the subject property in terms of Chapter lll of the Land Reform (Labour Tenants) Act, we considered agricultural use is the highest and best use for the subject property and will be valued accordingly.' Simply put, the valuation of R1.8 million took account of the Msiza claim in the valuation of the property.

[5] See *Du Toit* para 84.

[16] Having regard to the aforesaid and applying the principles set out in the cases referred to above, the conclusion of that expert in relation to the compensation to be paid cannot be faulted. But, contends the appellant, the application of the *Pointe Gourde* principle requires the impediment to residential development constituted by the Msiza land claim to be ignored in determining the value. The true market value of the land would then be R4,36 million reflecting its developmental potential.

[17] The *Pointe Gourde* principle usually applies in expropriation matters. It found its way onto the statute books in section 12(5)*(f)* of the Expropriation Act in the following terms:

'In determining the amount of compensation to be paid in terms of this Act, the following rules shall apply, namely -…..

(f) any enhancement or depreciation, before or after the date of notice, in the value of the property in question, which may be due to the purpose for which or in connection with which the property is being expropriated or is to be used, or which is a consequence of any work or act which the State may carry out or perform or already has carried out or performed or intends to carry out or perform in connection with such purpose, shall not be taken into account.'

[18] The section has its origin in the *Pointe Gourde*[6] judgment of the Privy Council, where Lord MacDermott said that it 'is well settled that compensation for the compulsory acquisition of land cannot include an increase in value which is entirely due to the scheme underlying the acquisition'. The purpose of the principle is set out in *Helderberg*,[7] referring to Australian authority[8] as follows:

'(T)o ensure that a resuming [expropriating] authority does not employ planning restrictions to destroy the development potential of the land and then assess compensation for its resumption [expropriation] on the basis that the destroyed potential had never existed. . . . The principle applies in cases where there is a direct relationship between the planning restriction and the scheme of which resumption is a

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[6] *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565 (P.C).

[7] *City of Cape Town v Helderberg Park Development (Pty) Ltd* (429/05) [2006] ZASCA 91; [2007] 1 All SA 517 (SCA); 2007 (1) SA 1 (SCA) para 28.

[8] *Queensland v Murphy* (1990) 95 ALR 493 (HC) at 496.

feature and extends to cases where there is merely an indirect relationship, provided that the planning restriction can properly be regarded as a step in the process of resumption. . . .'

[19] In the present matter, the Constitution and the Act set the legal and policy parameters for the restoration of land rights to labour tenants. As mentioned at the outset the relevant steps sanctioned by the legislation to enforce Mr Msiza's rights were in place and known before the Trust purchased the land. In other words there was a known impediment to the property's development potential when the property was purchased which had a direct bearing on the price that a willing buyer in the Trust's position would have been prepared to pay for the property.

[20] The application of the *Pointe Gourde* principle, where the purchaser of land has knowledge of the facts which constitute the impediment to development at the time of the purchase, was considered in *Port Edward v Kay.*[9] In that matter, which dealt with an expropriation, the existence of an impediment to development of the land was known. The impediment was constituted by a policy known as the 'green wedge scheme' which prevented the type of development for which the land was otherwise suitable. For that reason the permissions required to develop the land would probably not have been obtained. The development potential was accordingly remote. It was held in *Kay*'s case that if the purchaser had knowledge of the impediment at the time of the sale to him, that knowledge would have been reflected in the price paid at the time of purchase. Hence the 'purchaser … had the benefit of that depreciation; to disregard the depreciation in his capacity as seller would be to benefit him in a manner clearly not intended by the section.'[10] The section referred to is s 12(5)*(f)* of the Expropriation Act more fully set out above. *Kay* is accordingly authority that the *Pointe Gourde* principle does not apply where the owner, who bought knowing of the impediment, is subsequently expropriated.

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[9] *Port Edward Town Board v Kay* 1996 (3) SA 664 (A) 678 B-C; *Kerksay Investments (Pty) Ltd v Randburg Town Council* 1997 (1) SA 511 (t) 524 F-H.

[10] *Kay* supra 681

[21] The *Pointe Gourde* principle therefore does not apply to the present case as the Trust bought the land knowing of the Msiza claim and the presence of the Msiza family on the land. On this basis the market value of the land is therefore R1,8 million, and not R4,36 million, which would have been the market value of the land with its developmental potential.

[22] The LCC was hesitant to apply the two-stage approach[11] but did so and accepted the market value of R1,8 million. It then proceeded to consider compensation which would be just and equitable. It determined that an amount of R300 000 should be deducted from the market value.

[23] The reasons for making the deduction[12] were listed as being: that there was a 'disproportionate chasm' between the amount paid by the trust and the market value it sought to claim; that the trust made no significant investment in the land; that the use of the land had not changed since it was acquired; that when the land was acquired there was a land claim and the Msiza family were residing on the land; that the land had been awarded to the Msiza family in 2004 and had not been transferred; that as the object of the compensation is land reform the fiscus should not be saddled with extravagant claims for financial compensation when the object of expropriating the land is to address the pressing public concern for such reform; that the Msiza family had lived and worked on the farm since 1936 as Labour tenants and should receive compensation. The LCC also found that there has been no direct State investment or beneficial capital improvement of the land.

[24] In my view, there was no 'disproportionate chasm' between the price paid by the Trust when it bought the land and the market value at the time of the determination. Over the period of Trust ownership the value of land increased. This does not result in a disproportionate chasm but rather in a reflection of the escalation of the value of land.

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[11] *Msiza* para 38.
[12] *Msiza* para 80.

[25] The failure of the Trust to make any significant investments in the land since acquisition; the unchanged use of the land; the Trust's knowledge of the impediment to development; the success of the determination, the fact that the Msiza family have been labour tenants and have worked the land since 1936 have all been taken into account in considering market value. The LCC accepted that the expert had considered these factors as against market value.[13]

[26] There was therefore no justification for stigmatising the Trust's claim as 'extravagant'. Nor was there any evidence that the fiscus is unable to pay R1,8 million for the land. In fact it accepted that the valuation was appropriate. There is similarly no evidence that the State is unable to meet claims of this nature. On the contrary it is the amount the State was willing to pay.

[27] There were thus no facts justifying the deduction of the amount of R300 000. The LCC arbitrarily decided on this amount with no rational foundation. The computation was accordingly unfounded and cannot stand.

[28] A just and equitable determination for the land is R1,8 million.

[29] The LCC made no order as to costs which is the usual order made in the LCC where no exceptional circumstances exist. This approach to costs has been recognised in this court.[14] In my view exceptional circumstances do exist in the present matter. Mr Msiza was obliged to bring the application as the matter was not moving forward. The negotiations between the Trust and the Minister had stalled. Shortly prior to the commencement of the proceedings, the Minister accepted that R1,8 million was an appropriate determination, yet did not tender that amount. The Trust was therefore compelled to go to trial to get any determination in its favour at all. The extreme dilatory conduct of the Minister coupled with his failure to make an appropriate tender constitute exceptional circumstances and justify an award of costs against him in favour of the Trust as well as in favour of Mr Msiza. Each achieved substantial

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[13] *Msiza* para 76.
[14] *Abrams v Allie N O & others* 2004 (9) BCLR 914 (SCA) para 29.

success. The position on appeal is different. The Trust was unsuccessful in its main attack. It succeeded on the issue of the deduction and should be awarded costs on that basis. Counsel were agreed that an appropriate order was that the Minister pay 70% of the Trust's costs and all of the first respondent's costs.

[30] It remains to thank the amicus curiae for the assistance which it gave this court.

[31] In the result the following order is made:

1 The appeal is upheld with costs.

2 The third respondent is to pay the first respondent's costs and 70% of the appellant's costs, such costs are to include the costs of two counsel.

3 The order of the Land Claims Court is amended as follows:

The figures 'R1 500 000 (one million five hundred thousand rand)' are deleted and substituted with the figures 'R1 800 000 (one million eight hundred thousand rand)' where they appear in paragraphs one and two.

Paragraph 5 is deleted and substituted with '5. The second respondent is to pay the costs of the applicant and the Dee Cee Trust, including the costs of two counsel'.

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C G Lamont

Acting Judge of Appeal

APPEARANCES:

For the Appellants:	G J Scheepers Instructed by: Karien Schutte Attorneys, Middelburg Schoeman Maree Inc., Bloemfontein
For the 1st Respondent:	A A Gabriel SC (with M Bishop) Instructed by: Legal Recources Centre, Johannesburg Matsepes Inc., Bloemfontein
For the 2nd and 3rd Respondents:	N H Maenetje SC (with P Nonyane) Instructed by: The State Attorney, Pretoria The State Attorney, Bloemfontein
For the Amicus Curiae:	G M Goedhart Instructed by: Macroberts Attorneys, Pretoria Claude Reid Attorneys, Bloemfontein

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 232/18

In the matter between:

BHEKINDLELA MWELASE	First Applicant
JABU AGNESS MWELASE N.O.	Second Applicant
MNDENI SIKHAKHANE	Third Applicant
BAZIBILE GRETTA MNGOMA N.O.	Fourth Applicant
ASSOCIATION FOR RURAL ADVANCEMENT	Fifth Applicant

and

DIRECTOR-GENERAL FOR THE DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM	First Respondent
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Second Respondent

Neutral citation:	*Mwelase and Others v Director-General for the Department of Rural Development and Land Reform and Another* [2019] ZACC 30
Coram:	Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J
Judgments:	Cameron J (majority): [1] to [80] Jafta J (partial dissent): [81] to [113]

Heard on: 23 May 2019

Decided on: 20 August 2019

Summary: Land Reform (Labour Tenants) Act 3 of 1996 — appointment of a special master by Land Claims Court — separation of powers — not overreach of judicial power — contempt of court by Minister — not proven on facts

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ORDER

On appeal from the order of the Supreme Court Appeal (hearing an appeal from the Land Claims Court):

1. Leave to appeal is granted.
2. The appeal in the main application succeeds and the order the Supreme Court of Appeal granted is set aside.
3. In its place there is substituted:
   "The appeal is dismissed with costs".
4. The respondents are to pay the costs in this Court, including costs of two counsel.
5. The order granted by the Supreme Court of Appeal on the contempt application is set aside.
6. In its place there is substituted:
   "The appeal is dismissed with no order as to costs".
7. The appeal in this Court against the dismissal of the contempt application is dismissed with no order as to costs.

JUDGMENT

CAMERON J (Froneman J, Khampepe J, Madlanga J, Mhlantla J, Nicholls AJ and Theron J concurring):

Introduction

[1] Earlier this year, in a case about Parliament's constitutional duties, this Court stressed that land and dignity were fundamental to realising other constitutional rights. Land reform could be "a catalyst for structural change in our society", the judgment noted.[1] But delays in processing land claims have debilitated land reform. Expeditious land restitution could, the Court said, "contribute to a wider, more striking consciousness that centres on the constitutional values of equality and dignity, and gives rise to ideals of social justice, identity, the stimulation of economic activity, the promotion of gender equality and a contribution towards the development of rural livelihoods".[2]

[2] Each of these urgent words are apposite to this case – not, this time, for lawmakers, but for our country's administrators – the bureaucrats and officials who are responsible for putting into effect the land reform programme. At issue are not only the lives and wellbeing of those claiming the betterment of their lives as labour tenants. At issue is the entire project of land reform and restitution that our country promised to fulfil when first the interim Constitution came into effect, in 1994, and after it the Constitution, in 1997.

[1] *Speaker of the National Assembly v Land Access Movement of South Africa* [2019] ZACC 10; 2019 JDR 0548 (CC); 2019 (5) BCLR 619 (CC) at para 65, per Mhlantla J on behalf of the Court.

[2] Id at para 66.

[3] The main question for decision is whether an order the Land Claims Court granted constitutes "a textbook case of judicial overreach".[3] It arises because the Land Claims Court appointed a special master of labour tenants (special master) to help the Department of Rural Development and Land Reform, first respondent, (Department) process labour tenants' land claims.[4] The Department and the Minister of Rural Development and Land Reform, second respondent, (Minister) objected.[5] The Supreme Court of Appeal upheld their objections. By a majority, it overturned the Land Claims Court's order.[6] It considered the Land Claims Court had overreached its judicial role under the Constitution.[7] The applicants, who are, or represent, labour tenants, ask this Court to reinstate the Land Claims Court order. At issue is the extent of the Land Claims Court's power to fashion and implement remedies to secure practical justice for claimants who, 25 years into our democracy, still have no secure tenure – even though a statute promised them this more than 20 years ago.

[4] A connected but secondary issue is whether the Minister committed contempt of court in relation to an order the Land Claims Court granted during the litigation.

Background – the promise and the snag

[5] Labour tenancy has deep roots in our land's pernicious racial past. A labour tenant provides labour on a farm in exchange for the right to live there and work a portion of the farm for his or her own benefit.[8] It is a precarious state, subject

[3] See below at n 77.

[4] *Mwelase v Director-General for the Department of Rural Development and Land Reform* 2017 (4) SA 422 (LCC) (per Ncube AJ) (Land Claims Court judgment).

[5] While the applicants were seeking only a supervisory order (before they added a special master to the order they sought), then-Director-General of the Department, Mr Shabane, in his affidavit dated 24 March 2014, considered the relief sought "an extreme violation of the basic principles of separation of powers".

[6] *Director-General for the Department of Rural Development and Land Reform v Mwelase; Mwelase v Director-General for the Department of Rural Development and Land Reform* [2018] ZASCA 105; 2019 (2) SA 81 (SCA) (Schippers JA; Leach JA, Seriti JA and Willis JA concurring; Mocumie JA dissenting) (Supreme Court of Appeal judgment). Willis JA proffered additional reasons for concurring with the majority judgment.

[7] Id at para 51.

[8] Under early employment law, in the master and servant relation, labour tenants were classified as "servants". In *Mvubu v Herbst* 1924 TPD 741 (*Herbst*) at 749, the Court held that although the contract is sui generis

to the will of the land-owner. Historically it has been the more tenuous in South Africa because patterns of racial subordination and exclusion meant that labour tenants were overwhelmingly black, and the landowners on whose favour they depended were overwhelmingly white.[9]

[6] The statute at issue here, the Land Reform (Labour Tenants) Act[10] (Labour Tenants Act) was intended to change this. It came into effect on 22 March 1996. It was momentous legislation for a country newly freed from formal apartheid. Adopted while the interim Constitution was in force,[11] it was part of an interlocking set of four statutes. All were designed to fulfil the overall constitutional promise of restitution[12] to those deprived of rights in land by racial subordination.[13] The flagship

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(unique), "the relationship of a master and servant is incidentally established" – a protective decision, that enabled the black appellant to claim three months' as opposed to eight days' notice to vacate (Krause J and Gey van Pittius AJ).

[9] The historical gist of the relationship of labour tenancy and its racial colouring is encapsulated in the statement by the Court in *Herbst* at 752 that "[t]he native is to render services of a personal nature and is therefore bound to follow the instructions of the farmer as his master".

[10] Act 3 of 1996.

[11] Act 200 of 1993. Chapter 8 of the interim Constitution provided for the Public Protector, Human Rights Commission, Commission on Gender Issues and Restitution of Land Rights. Section 121 of that Chapter, titled "Claims", in part provided:

> "(1) An Act of Parliament shall provide for matters relating to the restitution of land rights, as envisaged in this section and in sections 122 and 123.
>
> (2) A person or a community shall be entitled to claim restitution of a right in land from the state if—
>
> (a) such person or community was dispossessed of such right at any time after a date to be fixed by the Act referred to in subsection (1); and
>
> (b) such dispossession was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), had that section been in operation at the time of such dispossession.
>
> (3) The date fixed by virtue of subsection (2)(a) shall not be a date earlier than 19 June 1913."

[12] Embodied in section 121(2) of the interim Constitution.

[13] Section 25 of the Bill of Rights, titled "Property", is the constitutional successor to section 121 of the interim Constitution. Subsections (5)-(9) provide:

> "(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.

was the Restitution of Land Rights Act of 1994[14] (Restitution Act). Later came the Extension of Security of Tenure Act of 1997[15] (ESTA) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998.[16]

[7] The Labour Tenants Act was the second of the four enactments. It promised security of tenure to labour tenants as defined.[17] This was in fulfilment of the specific constitutional undertaking, later spelled out expressly in the Bill of Rights,[18] that those with legally insecure land tenure resulting from past racism were entitled to statutorily conferred security of tenure or to comparable redress.[19]

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(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.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6)."

[14] Act 22 of 1994.

[15] Act 62 of 1997.

[16] Act 19 of 1998.

[17] Section 1 of the Labour Tenants Act defines "labour tenant" as a person—

"(a) who is residing or has the right to reside on a farm;

(b) who has or has had the right to use cropping or grazing land on the farm, referred to in (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and

(c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm.

includes a person who has been appointed a successor to a labour tenant in accordance with the provisions of section 3(4) and (5), but excluding a farm worker."

The definition has three limiting features, including a trans-generational requirement. The effect, as pointed out by the Department of Land Affairs *White Paper on South African Land Policy* (April 1997) at 71 is that the statute—

"excludes other categories of rural land dwellers, such as farm workers, tenants on farms or persons who would have qualified as labour tenants were it not for the fact that they unilaterally ended their labour contract with the farm owner".

[18] The Constitution, came into effect on 4 February 1997, the year after the Labour Tenants Act was enacted.

[19] Section 25(6) of the Constitution.

[8] The statute's main objective was to fortify the status of labour tenants, which was precarious.[20] This it did by conferring as a right what had previously been a tenuous permission. And it did so by stating in vividly simple terms that "a person who was a labour tenant[21] on 2 June 1995 shall have the right with his or her family members to occupy and use that part of the farm".[22] In tandem, the statute curbed

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[20] The Preamble enunciates the statute's purpose as being "to assist labour tenants to obtain security of tenure and ownership of land".

[21] In contradistinction to farmworkers. The Labour Tenants Act provides that "farmworker" means—

> "a person who is employed on a farm in terms of a contract of employment which provides that—
>
> (a) in return for the labour which he or she provides to the owner or lessee of the farm, he or she shall be paid predominantly in cash or in some other form of remuneration, and not predominantly in the right to occupy and use land; and
>
> (b) he or she is obliged to perform his or her services personally".

Labour in the labour tenancy relation may be provided by someone other than the labour tenant, for instance, a family member.

[22] Section 3 of the Labour Tenants Act. The date 2 June 1995 is mentioned also in section 12(1)(a) and (b). Section 3 is titled "Right to occupy and use land" and reads in full:

> "(1) Notwithstanding the provisions of any other law, but subject to the provisions of subsection (2), a person who was a labour tenant on 2 June 1995 shall have the right with his or her family members to occupy and use that part of the farm in question—
>
> (a) which he or she or his or her associate was using and occupying on that date; and
>
> (b) the occupation and use of which is restored to him or her in terms of this Act or any other law.
>
> (2) The right of a labour tenant to occupy and to use a part of a farm as contemplated in subsection (l) together with his or her family members may only be terminated in accordance with the provisions of this Act, and shall terminate—
>
> (a) subject to the provisions of subsections (3) to (7), by the waiver of his or her rights;
>
> (b) subject to the provisions of subsections (4) and (5), on his or her death;
>
> (c) subject to the provisions of section 10, on his or her eviction; and
>
> (d) on acquisition by the labour tenant of ownership or other rights to land or compensation in terms of Chapter III.
>
> (3) A labour tenant shall be deemed to have waived his or her rights if he or she with the intention to terminate the labour tenant agreement—
>
> (a) leaves the farm voluntarily; or
>
> (b) appoints a person as his or her successor.
>
> (4) If a labour tenant dies, becomes mentally ill or is unable to manage his or her affairs due to another disability or leaves the farm voluntarily without appointing a successor, his or her family may appoint a person as his or her successor and shall, within 90 days after being called upon in writing to do so by the owner, inform the owner of the person so appointed.

landowners' longstanding power to evict labour tenants without reason or notice, while affording labour tenants both substantive and procedural anti-eviction protections.[23]

[9] There was yet more gold lying at the heart of the Labour Tenants Act. This was Chapter 3.[24] While Chapter 2 promised greater security of tenure, it was Chapter 3 that gave an even more dramatic right. This was the right to acquire ownership of the very land that labour tenants had used and occupied.

[10] But there was a snag. It is the snag with which this case is concerned. The right to acquire land could be realised only through the detailed mechanisms set out in the Chapter – and these depended, critically, on efficient departmental action and processes.[25] The statute enabled a labour tenant to apply for specified property rights.[26] An application process then ensued, in which both labour tenants and the Department had to take practical steps to realise the promise of ownership.[27]

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(5) A person who is not a family member of a labour tenant, may only be appointed as the successor to such labour tenant if he or she is acceptable to the owner, who may not unreasonably refuse such appointment.

(6) A labour tenant may, subject to subsection (7), waive his or her rights or a part of his or her rights if such waiver is contained in a written agreement signed by both the owner and the labour tenant.

(7) The terms of an agreement whereunder a labour tenant waives his or her rights or part of his or her rights in terms of subsection (6) shall not come into operation unless—

(a) the Director-General has certified that he or she is satisfied that the labour tenant had full knowledge of the nature and extent of his or her rights as well as the consequences of the waiver of such rights; or

(b) such terms are incorporated in an order of the Court or of an arbitrator appointed in terms of section 19."

[23] Sections 5-15 of the Labour Tenants Act.

[24] Sections 16-28 of the Labour Tenants Act.

[25] The founding affidavit in the Land Claims Court of the Association For Rural Advancement's director, Mr Michael Cowling, lists six phases in a labour tenant's application for a right in land: Application; Processing; Response; Agreement; Referral; Adjudication.

[26] Section 16(1)(a)-(d) ("may apply").

[27] The Association For Rural Advancement's founding affidavit in the Land Claims Court explained that purpose of the central role of the Department's Director-General in the referral process was, first, to help labour tenants, many of whom might not be able to manage an application themselves; second, place a mediating entity between the claimant and the landowner; and, third, to ensure record-keeping and sound administration by the

[11] The critical first step was that labour tenants had to lodge an application[28] before 31 March 2001 with what was then the Department of Land Affairs (later renamed as the Department of Rural Development and Land Reform) for an order conferring on them ownership of the portion of land that they were occupying and using for cropping and grazing. The statute requires the Department to expedite the process after a labour tenant has lodged a claim. The Department must notify the landowner that the application has been lodged.[29] Then it must publish notice of the application in the *Government Gazette*.[30] If the claim is opposed and the parties cannot settle,[31] even after mediation has been tried,[32] the Department must refer the claim to the Land Claims Court.[33] If the Department fails to do this, there is an irreversible hold-up: the claim becomes inextricably snagged.[34] As the Land Claims Court observed, unless the Department acts to refer the claim, "the noble goals" of the Constitution and of the statute "will not come to pass".[35] (The statute also imposes pivotal responsibilities on the Minister; which are not in issue here).[36]

[12] All this entailed a colossal statutory promise, of life-changing importance to especially vulnerable people. In expectant response, thousands upon thousands of

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Department. All of this, the Association For Rural Advancement's affidavit with more than a little wistful poignancy, observes required the Department to act "with at least a modicum of efficiency".

[28] Section 17(1) of the Labour Tenants Act.

[29] Section 17(2)(a).

[30] Section 17(2)(c).

[31] Section 18.

[32] Section 18(3).

[33] Section 17(6) provides that "the Director-General shall, at the request of either party, refer the application to the Court". A near-mirror provision in case of settlement attempts is section 18(7): "the Director-General shall, at the request of any party, refer the application to the Court".

[34] The Land Claims Court has held, in a decision that has never been challenged, that the Court's power under section 22 to award land or a right in land is not engaged *unless* the Director-General refers the labour tenant's claim to the Land Claims Court: *Mhlongo v Sesley Farm Trust* [2008] ZALCC 2 (Ncube AJ).

[35] Land Claims Court judgment above n 4 at para 4.

[36] Section 26(1) of the Labour Tenants Act obliges the Minister ("the Minister shall") to grant advances and subsidies from money appropriated by Parliament for labour tenants to acquire land or rights in land and to develop land occupied or to be occupied by labour tenants. Section 26(2) provides that labour tenants may use these advances or subsidies to acquire land or rights in land. Section 27(1) provides that labour tenants may apply for these to the Minister.

labour tenants timeously lodged claims with the Department.[37] But then . . . nothing seemed to happen. Or almost nothing: what the fifth applicant, the Association For Rural Advancement (AFRA), called "administrative lethargy" ensued. And prevailed. The applicants presented indisputable evidence that the majority of labour tenant applications have simply not been processed.

[13] The applicants form part of this group. They, or those they represent, all occupy land on the Hilton College Estate in KwaZulu-Natal. They represented by the Hiltonian Society, the third respondent in the Land Claims Court. Their claims are representative of many thousands more. The first applicant, Mr Bhekindlela Mwelase, a labour tenant residing on Hilton, was born in 1931. He was 82 when these proceedings were launched in 2013. The applicants' written argument informed us that he died, six months before the hearing, on 7 November 2018. The second applicant is Ms Jabu Agness Mwelase N.O., cited as representative of the estate of the late Mr Xhegwana Mwelase (the first deceased), who died on 21 September 2005. The third applicant is Mr Mndeni Sikhakhane, while the fourth applicant is Ms Bazibile Gretta Mngoma N.O., cited as representative of the estate of the late Mr Ndoda Mngoma (the second deceased), who died on 27 August 2007.[38]

[14] AFRA is a non-governmental organisation founded in 1979. For the past four decades it has promoted land rights and agrarian reform with the object of redressing past injustices and improving quality of life and livelihoods of rural impoverished people. The work AFRA has done, primarily in KwaZulu-Natal, but also elsewhere, has been signal in sustaining the hopes and claims of many thousands of labour tenants and other land claimants.

[37] By 31 March 2001, 19 416 applications had been lodged under section 16.

[38] In Mr Shabane's affidavit dated 15 August 2016, he stated, "for the record", that very few actual labour tenant relationships continue to exist, because farmers had brought them to an end. He stated that "[w]hat is left is the land use component only and the protection afforded by the Act", of which the four individual applicants "are typical examples".

[15] In June 2000, before the cut-off date, the individual applicants lodged claims under the statute[39] to acquire the land they occupy. The Hiltonian Society opposes their claim, but, 19 years later, that is still not the point. The point is that the claims were not referred to the Land Claims Court. Despite repeated written requests, the Department failed to refer the applications. Until the applicants instituted these proceedings, the Department even failed to explain why it had failed in this. The death of two of the applicants, after timeously lodging their claims, expecting and hoping for what the statute promised them, paints a poignant picture of the story before us.[40]

Land Claims Court proceedings

[16] In July 2013, the applicants turned to the Land Claims Court for help. The four individual claimants presented the impenetrable frustrations of their own claims as emblematic of the way the Department's inefficiency and ineptitude had thwarted the dreams of many thousands. They explained how they repeatedly asked the Department to refer their claims to the Land Claims Court. They recounted how it repeatedly failed. The Department was eventually constrained to do so after this litigation was initiated. The further processing of their claims, and the Hiltonian Society's defence to them, is now knitted into the larger relief the applicants seek.[41]

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[39] In terms of section 16 of the Labour Tenants Act.

[40] The applicants' founding papers in the Land Claims Court sparely state that "[i]t is a tragedy that [their two co-applicants] did not live to see their section 16 applications decided".

[41] In more detail, the referral and processing of the individual applicants' applications is intertwined with the larger relief AFRA and the individual applicants also seek in this way: close to 20 000 applications were submitted in terms of section 16 of the Labour Tenants Act within the window period between 1996 to 2001. The four individual applicants lodged their claims in respect of Hilton in 2001. On 12 April 2001, the Hiltonian Society responded to the section 17(2) notice by disputing that the applicants qualify as labour tenants. In 2008, negotiations between the individual applicants and the Hiltonian Society broke down without settlement. In 2012, with AFRA's help, the first to fourth applicants sent letters to the Director-General, first requesting a referral of their claims to the Land Claims Court and later alerting him that they would resort to litigation. No response was received. On 9 July 2013, Part A of the relief requested in the notice of motion before the Land Claims Court sought the referral of the individual applicants' claims to the Land Claims Court. On 22 October 2013: the Hiltonian Society filed its answering affidavit, not opposing referral of the individual applicants' claims, but disputing that they were labour tenants. Apart from neglecting the labour tenant applications, the Department, for a period, also completely ceased processing applications. The latest figures from the Department's own August 2016 report indicate that – based on the Department's own estimate – there are 10 914 claims that remain unsettled and therefore require referral to the Land Claims Court. Some claims appear to have been processed, like that of Mr Zabalaza Mshengu. It appears the individual applicants' claims have now been referred to the Land Claims Court, but the litigation continues. The Hiltonian Society contends

[17] More generally, all five applicants sought a detailed order granting structural relief. This was designed to ensure that the Department, at last, implemented the statute. The order required the Department to supply details of all applications filed that had not been settled or referred to the Land Claims Court.

[18] In response, the Department admitted that labour tenant applications had not been proactively managed for a number of years. The Department's report of August 2016 later indicated the scale of the problem – nearly 11 000 labour tenant applications remained unsettled.[42] In terms of sheer bureaucratic overload, this was a staggering figure.[43]

[19] The Department had nevertheless initially contended that it was not required to process all labour tenant claims (the then-Director-General initially asserted that "it would be wasteful to pursue labour tenant claims proactively at this stage"). This was because labour tenants would ostensibly be better off if their claims did not proceed through the Labour Tenants Act. For instance, the Department said the labour tenants would be better off lodging restitution claims or being helped under other land reform programmes.[44] Yet even on the Department's own version, this left over 10 000 labour tenants in limbo.

[20] The Department in effect conceded its statutory duties under the statute – but suggested that it knew better than the Legislature. Its depositions before the Land

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in the Land Claims Court that the individual applicants' rights are not transmissible to their heirs. It appears that the Land Claims Court heard argument on this in mid-May, the week before the hearing in this Court.

[42] Land Claims Court judgment above n 4 at para 9 mentions 10 914 unsettled claims.

[43] Mr Shabane's affidavit recorded, with mild understatement, that labour tenant claims "proved to be far more complex than anticipated".

[44] Land Claims Court judgment above n 4 at para 10. In fact, Mr Shabane made the larger and empirically unviable claim that labour tenants "generally prefer to be accommodated in other land reform projects". He added that restitution "more often provides a better and more sustainable end-result for labour tenants", and that the Department had "realised that labour tenant claims are best diverted to other forms of land reform, or would have to wait until restitution claims are finalised". Mr Shabane recorded that "over 9 000 labour tenants have received land in terms of other programmes" representing, he said, "almost fifty percent of labour tenants [who] applied for land".

Claims Court indicate it considered it was better placed to know what labour tenants needed, and to decide what they would get. And this was not to fulfil the statute's promises – but something else, which the Department would determine.

[21] When the matter came before the Land Claims Court on 19 September 2014, statistics on outstanding labour tenant claims had not been provided. The parties then agreed to an order that required the Department to update the Land Claims Court on progress in collating data, settling claims and referring unsettled claims by 31 March 2015.[45] Despite this order, the Department repeatedly failed to provide these details. In April 2015, the Department estimated that it would need two more years *just to capture the details* of thousands of applications still outstanding.[46] This suggested that the Department was itself unable to determine how big a problem confronted it. Even after the Department's records were revealed as non-existent or shambolic, it continued to proffer repeated undertakings to comply with the Land Claims Court orders – but continued repeatedly to breach them.

[22] The Department's persisting failure to provide hard information, with its admission that processing labour tenant claims had been neglected, and, in effect, that they remained in a chaotic state, prompted the applicants to change tack. They asked the Land Claims Court to intervene more radically.[47] They sought an order appointing a special master to intervene directly in the Department's bureaucratic processes, so as to help it to do the job the statute entrusted to it. The applicants contended that court supervision alone had failed. Instead, a special master would assist everyone – the Land Claims Court, the Department, and the applicants – to work together to ensure the implementation of the statute.

[23] Despite the applicants' harder-line approach, they concluded yet another agreement with the Department. In the shadow of the order they now sought, for a

[45] The applicants called this the Collation Order. Land Claims Court judgment above n 4 at para 11.

[46] The applicants' papers in this Court note that even now this collation process remains unfinalised.

[47] Land Claims Court judgment above n 4 at para 6.

special master, they did a deal that fell short of it. On 9 June 2015, the Department acceded to a series of detailed orders that required it to file regular reports with the Land Claims Court. These were supposed to update the Court on the Department's progress in collating data, settling claims and referring unsettled claims to the Land Claims Court.[48] Regular reports, including an implementation plan the Department would itself formulate and lay before the Court, would enable the Land Claims Court to evaluate the Department's targets, assess progress, and tweak the plan as necessary.

[24] The Land Claims Court arduously supervised the process. But things did not go well. Direct court supervision, too, failed. The Department failed to file reports on time. It failed to comply with its own Implementation Plan. And, when the applicants made worried inquiries about the deficient reports the Department filed, it did not respond. In addition, aspects of the plan were not complied with. Interim reports also failed to adequately comply with the Land Claims Court's order.[49]

[25] The applicants now renewed their prayer for a special master – but, yet again, they agreed to a deal with the Department. The resultant agreement, which the Land Claims Court endorsed in May 2016, aimed to nurture good faith negotiation between the parties toward a Memorandum of Understanding. The parties would establish a national forum of non-governmental organisations to work with the Department to implement the statute.

[26] Unfortunately, far from fostering co-operation, this agreement fell apart – the very breakdown that culminated in the Land Claims Court and Supreme Court of Appeal judgments at issue now. This includes the applicants' contempt proceedings against the Minister. For, in a judgment delivered on

[48] The applicants called this the Supervision Order. Id at para 14.

[49] Id at para 15.

8 December 2016, the Land Claims Court endorsed the applicants' plea. It granted an order appointing a special master.[50]

[50] The Land Claims Court's order provided as follows:

> "1. The First Respondent's failure to process or refer to the Court applications brought under section 16 of the Land Reform Labour Tenants Act, No 3 of 1996 ('the Act'), is declared to be inconsistent with sections 10, 25(6), 33, 195 and 237 of the Constitution of the Republic of South Africa, 1996.
>
> 2. A special master of labour tenants ('the special master') shall be appointed as set forth hereunder.
>
> 3. By not later than 30 January 2017, any party may deliver a nomination of a person to be appointed as the special master. The nomination must be in writing, accompanied by:
>
> 3.1. A short curriculum vitae of the nominated person;
>
> 3.2. Suggested terms of appointment and a remuneration structure acceptable to the nominee; and
>
> 3.3. The nominated person's acceptance of the terms of appointment and the remuneration structure.
>
> 4. By not later than 28 February 2017, the First and Second Respondents/the Department may comment on all nominations submitted by the parties.
>
> 5. The Court will reconvene on Friday, 3 March 2017 at 10h00 at the Land Claims Court, Randburg, at which hearing the Court shall:
>
> 5.1. Consider the candidates nominated for the position of special master;
>
> 5.2. Appoint a special master, if there is a suitable candidate;
>
> 5.3. Establish his or her terms of appointment and remuneration; and
>
> 5.4. Give such further directions as it may deem appropriate.
>
> 6. The special master, once appointed, is hereby ordered to prepare, in collaboration with the First Respondent and / or his delegees, and to deliver by not later than 31 March 2017, a plan, ('the Implementation Plan'), for the performance of the duties of the First Respondent and the Department with supervision by the special master, in relation to pending labour tenant claims under sections 16, 17 and 18 of the Act. The Implementation Plan must set forth:
>
> 6.1. The total number of claims lodged to date, and the number which have not yet been processed and finalised;
>
> 6.2. An assessment of the skill pool and other infrastructure required for processing labour tenant claims, and to what extent such skill pool and infrastructure is available within the Department of Rural Development and Land Reform ('the Department');
>
> 6.3. Targets, on a year to year basis, for the resolution of pending labour tenant claims, either by agreement or by referring the claim to the Court;
>
> 6.4. A determination of the budget necessary during each financial year for carrying out the Implementation Plan, including both the Department's operating costs for processing claims and the amounts required to fund awards made pursuant to applications in terms of section 16 of the Act;
>
> 6.5. Plans for co-ordination with the Court to ensure the rapid adjudication or arbitration of unresolved claims referred to the Court in terms of section 18(7) read with sections 19 to 25 of the Act; and
>
> 6.6. Any other matters which the special master may consider relevant.

[27] The Land Claims Court reasoned that the special master squared with the provisions of the Restitution Act[51] that empower the Land Claims Court[52] to conduct proceedings on an informal or inquisitorial basis. Nearly 11 000 applications remained to be settled. If each took only one day to process, the load would take about 24 years for the Department to surmount, including work on weekends – and, without weekend work, 40 years.[53] A special master, the Land Claims Court concluded, could assist the Department to develop a comprehensive strategy for the efficient processing and referral of claims, to deal with lost applications, to prevent

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7. The First and Second Respondents shall co-operate, and cause the Department to co-operate with the special master in the preparation and execution of the Implementation Plan and shall ensure:

    7.1. that the special master is provided with all documents (including archival documents) and records requested by him or her;

    7.2. that all officials of the Department are reasonably available to meet with the special master and provide him or her with such information as he may reasonably require; and

    7.3. that all reasonable requests by the special master are timeously responded to.

8. By 15 April 2017 the First and Second Respondents / the Department shall file a report indicating which portions of the plan (if any) are objected to together with the grounds for objection and proposals for alternative provisions.

9. The Court shall reconvene on Wednesday, 19 April 2017 at 10h00 at the Land Claims Court, Randburg, at which hearing the Court shall:

    9.1. Consider the Implementation Plan delivered by the special master together with the report filed by the First and Second Respondents / the Department;

    9.2. Approve the Implementation Plan, with or without amendments or otherwise deal with the Plan as it may deem fit; and

    9.3. Make such further orders as may be advisable, including orders relating to the fulfilment of the Implementation Plan and the processing of pending labour tenant claims.

10. Any party may, on notice to the other parties and to the special master (when appointed), apply to the Court for a clarification or amendment of this order.

11. The First and Second Respondents, jointly and severally, the one paying the others to be absolved, must pay the Applicants' costs in these proceedings incurred up to the date of this Order, taxed as between party and party, and including the costs consequent upon the employment of two counsel.

12. There is no order as to costs in respect of the Third Respondent."

[51] Section 32(3)(b) of the Restitution Act.

[52] Applicable to the performance of the Land Claims Court's functions under section 30(1) of the Labour Tenants Act.

[53] Land Claims Court judgment above n 4 at para 27.

potential overburdening of the Land Claims Court and to significantly ameliorate the disadvantage of having too few judges at the Court.

[28] The Land Claims Court in essence concluded that the Department had failed to understand its own role in processing labour tenant applications.[54] Many thousands of vulnerable labour tenant applicants were entitled to effective relief – which the Department had failed to provide and would face grave difficulties in providing. If a special master working with the Department could achieve what the Department on its own had not, the appointment was "more than justified".[55]

[29] However, in the separate contempt proceeding the Land Claims Court concluded that the Minister was not in contempt of court in not obeying the orders it had issued because he interpreted the order in a particular way and acted in accordance with that interpretation. It dismissed their application, without ordering the applicants to pay costs.[56]

Supreme Court of Appeal

[30] The Department and the Minister appealed against the order appointing a special master, while the applicants appealed the failure of their contempt application against the Minister.[57] The majority of the Court overturned the appointment of the special master.[58] It endorsed the Land Claims Court order that the Department's failure to process or refer labour tenant applications to the Land Claims Court was "inconsistent with sections 10, 25(6), 33, 195 and 237 of the Constitution".[59] It also embraced the ruling that the Department be required to deliver to the Land Claims

[54] The Department's approach to look instead to securing additional resources, and rebuffing the help a special master would offer, "completely underplays the pro-active and strategic role [the Department] must play in efficiently processing" claims id at para 27

[55] Id at para 36.

[56] *Mwelase v Director-General for the Department of Rural Development and Land Reform* 2016 JDR 2130 (Land Claims Court contempt judgment) at para 22.

[57] Supreme Court of Appeal judgment above n 6 at para 1.

[58] Id at paras 54 and 69.

[59] Id at para 29.

Court an implementation plan envisioning a senior manager or managers responsible for the national implementation of the Labour Tenants Act. To these the Supreme Court of Appeal appended very much the remaining provisions of the Land Claims Court's larger order, which included skill pool and resource assessments, targets and budget determinations, with opportunity for comments and later consideration and approval by the Land Claims Court.[60]

[31] But the order the Supreme Court of Appeal granted excised the heart of the Land Claims Court's relief. This was the special master. The Court considered the concept an inapposite and untimely foreign import.[61] It endorsed the warning Kriegler J voiced in this Court against "blithe adoption of alien concepts or inapposite precedents".[62] This, it said, "applies equally to foreign institutions such as the special master".[63]

[32] The Court noted that, the parties had earlier agreed to the appointment of a senior manager to administer national implementation of the statute (as well as ESTA claims). This would be an official from the Department. The order embodying this left the Department responsible for policy formulation, the development of a national programme for implementation, and the monitoring and evaluation of the progress of the claims. In other words, the Court inferred, the applicants accepted the Department as competent to manage the task. This made the appointment of a special master "inexplicable and unjustified".[64]

[33] While the Court acknowledged the Land Claims Court's special statutory power to conduct proceedings on an informal or inquisitorial basis,[65] this ostensibly

[60] Id at paras 67 and 69.

[61] Id at paras 39-42.

[62] The Supreme Court of Appeal id at para 42 endorsed the warning sounded out by this Court in *Bernstein v Bester N.N. O.* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 133.

[63] Supreme Court of Appeal judgment above n 6 at para 42.

[64] Id at para 43.

[65] Section 32(3)(b) of the Restitution Act read with section 30(1) of the Labour Tenants Act.

offered no warrant for appointing an outsider who would effectively "usurp" the functions of the Department.[66] Instead, the Land Claims Court should have used its inquisitorial powers to find out why a senior manager of the Department could not successfully manage the Labour Tenants Act process, when the parties themselves had agreed that this was feasible, and resources had been set aside for this.[67]

[34] The Land Claims Court also did not find out how the settlement of claims could be accelerated or improved.[68] The majority doubted that a special master could "significantly ameliorate" the burdens that monitoring departmental performance imposed on the Land Claims Court.[69] And judicial staff shortages in the Land Claims Court could never justify the appointment.[70]

[35] While it was true that the Constitutional Court[71] and the Supreme Court of Appeal itself had encouraged courts to forge new remedies to provide effective relief,[72] "appropriate relief" under the Bill of Rights[73] could not

[66] Supreme Court of Appeal judgment above n 6 at para 44. The Supreme Court of Appeal at para 53 similarly concluded that this Court in *Black Sash Trust v Minister of Social Development* [2017] ZACC 8; 2017 (3) SA 335 (CC); 2017 (5) BCLR 543 (CC) (*Black Sash I*) did not empower the independent monitors to "usurp" a government department's statutory functions.

[67] Supreme Court of Appeal judgment above n 6 at para 45.

[68] Id.

[69] Id at para 46.

[70] Id.

[71] See *Fose v Minister of Safety and Security* [1997] ZACC 6; 1997 (3) SA 786 (CC); 1997 (7) BCLR 851 (CC) at para 69, where this Court, having scrupulously considered the distinctive features of the interim Constitution went on expressly to echo calls from the Supreme Courts of India and Canada for our courts to "forge new tools" and "shape innovative remedies, if needs be" to ensure that when the legal process establishes an infringement of rights, it be effectively vindicated.

[72] *Meadow Glen Home Owners Association v City of Tshwane Metropolitan Municipality* [2014] ZASCA 209; 2015 (2) SA 413 (SCA) at para 35. There the Court, in concord with *Fose*, invitingly reflected on the problems of remedy that a special master might suitably address:

> "Both this Court and the Constitutional Court have stressed the need for courts to be creative in framing remedies to address and resolve complex social problems, especially those that arise in the area of socio-economic rights. It is necessary to add that when doing so in this type of situation courts must also consider how they are to deal with failures to implement orders; the inevitable struggle to find adequate resources; inadequate or incompetent staffing and other administrative issues; problems of implementation not foreseen by the parties' lawyers in formulating the order; and the myriad other issues that may arise with orders the operation and implementation of which will occur over a substantial period of time in a fluid situation. Contempt of court is a blunt instrument to deal with these issues and courts should look to orders that secure on-going oversight of the implementation of the order. There is

license appointing one in effect to implement legislation. This was a function entrusted to the Department.[74] Of decisive concern was that the order in effect enabled the special master to take over the functions and responsibilities of the Department in labour tenant claims. This rendered the departmental executive secondary.[75] Worse, a special master would become entangled in budget and operational issues.[76] The Court censured the Land Claims Court's order as a "gross intrusion by a court into the domain of the Executive" and thus "a textbook case of judicial overreach".[77]

[36] The dissent held that the Land Claims Court had exercised the true discretion the statute bestowed upon it, as a specialist court, to employ extraordinary measures where necessary to carry out its responsibility. The effect of the majority's order was that the same Department that had failed labour tenants for over 20 years would continue.[78] That the applicants accepted the appointment of a senior manager during the interim arrangements did not mean the Court should interfere with the Land Claims Court's discretionary order. The special master appointment did not

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> considerable experience in the United States of America with orders of this nature arising from the decision in *Brown v Board of Education* and the federal court supervised process of desegregating schools in that country. The Constitutional Court referred to it with approval in the *Treatment Action Campaign II* case. Our courts may need to consider such institutions as the special master used in those cases to supervise the implementation of court orders."

[73] Section 38 of the Constitution provides that:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
>
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest; and
>
> (e) an association acting in the interest of its members."

[74] Supreme Court of Appeal judgment above n 6 at para 47.

[75] Id at para 48.

[76] Id at para 50.

[77] Id at para 51, invoking the phrase Mogoeng CJ used in his dissenting judgment in *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47; 2018 (2) SA 571 (CC); 2018 (3) BCLR 259 (CC) at para 223.

[78] Supreme Court of Appeal judgment above n 6 at para 72.

amount to judicial overreach. While the separation of powers is important to democracy, it provides no basis to avoid the obligation to provide appropriate relief that is just and equitable.[79]

Was the reversal of the Land Claims Court order justified?

[37] The Department's objection to the Land Claims Court order derived fundamentally from separation of powers concerns: the special master would be an "outsider" whose work involved "a take-over" of the functions of the Department. This is the objection the Supreme Court of Appeal upheld, and it formed the kernel of its reasoning in overturning the Land Claims Court order.

[38] While the applicants sought to downplay the significance of appointing a special master, it must be accepted that no court order has done anything quite like this before.[80] In *Black Sash I*,[81] which the applicants invoked, this Court set up a high-level specialist committee to oversee departmental performance in association

[79] Id at para 89.

[80] A situation of comparable ambit was at issue in *Linkside v Minister of Basic Education* 2015 JDR 0032 (ECG). At issue was the violation of children's rights to basic education through failure over a long period of years by a provincial department of basic education to appoint educators to vacant posts at their public schools. The High Court granted an extensive order. It provided that R81 445 339.99, which named schools had paid to educators, against posts on the provincial educator establishment that the Department had failed to fill, be repaid to the schools under direction and management of a firm of registered chartered accountants as claims administrators. Specified educators whose appointment the order embraced were declared qualified. Detailed steps were set out for the provincial department to fill the posts. The order – as with the Land Claims Court's here – was the culmination of long years of litigation challenging sustained departmental failure to comply with constitutional duties. This impelled the applicants, and the Court, to escalate the remedies granted, as structural orders became more and more detailed and prescriptive, culminating in recourse to unprecedented remedial mechanisms in an effort to compel departmental compliance. See Taylor "Forcing the Court's Remedial Hand: Non-Compliance as a Catalyst for Remedial Innovation" (2019) 9 *Constitutional Court Review* (forthcoming). A further instance is *Madzodzo v Minister of Basic Education* 2014 (3) SA 441 (ECM), concerning failure to provide adequate age and grade appropriate furniture enabling each child to have his or her own reading and writing space.

[81] *Black Sash I* above n 66 at para 76. The order empowered a committee of suitably qualified independent legal practitioners and technical experts to evaluate the performance by the Minister of Social Development and the South African Social Security Agency of the terms of its order, and required the committee to report to the Court the results of their evaluations and any recommendations they consider necessary.

with National Treasury. The panel did not itself have plan-drawing[82] or budget-projection powers.[83] Those are exactly the powers the special master is given here.

[39] But then the *Black Sash I* facts did not cry out for a special master. The crisis there arose because the responsible Minister failed or refused to take adequate steps to ensure continuation of nationally critical social grants payments, through either a properly run procurement process,[84] or insourcing them via the South African Social Security Agency (SASSA). The Minister was later personally mulcted in litigation costs because of her misconduct in failing to disclose to the Court her missteps triggering the crisis that necessitated the order.[85] Though outrageous and disturbing, the distinctive facts in *Black Sash I* did not quite match the sustained, large-scale systemic dysfunctionality and obduracy that is evidenced here. The *Black Sash I* circumstances were unique, and the order this Court granted was appropriate to them. That must be so here, too.

[40] This is because here, over nearly two decades, and indisputably since 2006,[86] the Department has manifested and sustained what has seemed to be obstinate misapprehension of its statutory duties. It has shown unresponsiveness plus a refusal to account to those dependent on its cooperation for the realisation of their land claims and associated constitutional rights. And, despite repeated promises, plans and undertakings, it has displayed a patent incapacity or inability to get the job done.

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[82] Clause 6 of the Land Claims Court's order requires the special master "to prepare, in collaboration with the [Director-General] and/or his delegees . . . a plan ('the Implementation Plan') for the performance of the duties of the [Director-General] and the Department with supervision by the special master".

[83] Clause 6.4 of the Land Claims Court order required the Implementation Plan to set out a "determination of the budget necessary during each financial year" for carrying the Implementation Plan out, including departmental operational costs and amounts to fund awards to claimants.

[84] To replace the improperly awarded contract this Court set aside in *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 42; 2014 (1) SA 604 (CC); 2014 (1) BCLR 1 (CC) and *Black Sash I* above n 66 at para 73.

[85] *Black Sash Trust (Freedom under Law Intervening) v Minister of Social Development* [2018] ZACC 36; 2018 (12) BCLR 1472 (CC) (*Black Sash III*) at para 12. The Court found the inference that the Minister's non-disclosures were evidenced bad faith irresistible, and that, at best for her, her conduct was "reckless and grossly negligent".

[86] As noted in the Supreme Court of Appeal judgment above n 6 at para 7, "[m]embership of those families had to be verified and to that end the Department's officials conducted thousands of farm visits until 2006".

[41] In this, the Department has jeopardised not only the rights of land claimants, but the constitutional security and future of all. South Africans have been waiting for more than 25 years for equitable land reform. More accurately, they have been waiting for centuries before. The Department's failure to practically manage and expedite land reform measures in accordance with constitutional and statutory promises has profoundly exacerbated the intensity and bitterness of our national debate about land reform. It is not the Constitution, nor the courts, nor the laws of the country that are at fault in this. It is the institutional incapacity of the Department to do what the statute and the Constitution require of it that lies at the heart of this colossal crisis.[87]

[42] The performance of the Department in response to the increasingly focused pressures the applicants applied, has been an object, and abject, case in point. Each time, the Department has temporised. It has done this, each time, with promises of better performance. This time it would get things right. But it never did. It has been a classic case of more-same, more-same. The very course of this litigation, right up to the proceedings in this Court, has shown the Department's inability, in colloquial but apposite terms, to get its act together. While the good faith and good intentions of its promises and undertakings may be accepted, they have repeatedly failed to translate into effective, rights-affirming practical action.

[87] See High Level Panel chaired by Kgalema Motlanthe on the Assessment of Key Legislation and Acceleration of Fundamental Change, *Report of the High Level Panel On The Assessment of Key Legislation and The Acceleration of Fundamental Change* (November 2017). The Panel set out with stark simplicity the deficits in land reform. Despite the cut-off date for land claims being 1998, to date, there are more than 7 000 unsettled claims and over 19 000 yet to be finalised 'old order' claims. The Panel exposes the extremely slow rate of restitution claims, concluding that it will take up to 35 years to finalise all old order claims, 143 years to settle new order claims and, if land claims are reopened, up to 709 years to complete Land Restitution. Institutional capacity is evidenced in lack of skills and capacity, overlapping and conflicting claims, and inconsistent monetary awards. A possible explanation for these shortcomings is the lack of sufficient resources. However, the budget for land restitution has been consistently underspent; this evidences how severe problems lie in implementation and the capacity of the system itself.

In former Deputy Chief Justice Dikgang Moseneke's Speech "Reflections on South African Constitutional Democracy – Transition and Transformation" (keynote address at the Mistra-Tmali-UNISA Conference 20 Years of South African Democracy, University of South Africa, 12 November 2014), while reflecting on constitutional functioning, Moseneke highlighted "bureaucratic inadequacies" in attaining either urban or rural land equity, warning that "[m]illions will continue to live in desperately undignified conditions unless we confront land inequality".

[43] In this Court, barely three weeks before the hearing, and nearly eight months after the applicants lodged their application, the Department belatedly applied to adduce further evidence.[88] The evidence was this: it had appointed a special senior official, Mr Thamsanqa Mdontswa, to manage the labour tenant project, created 32 three-year contract department positions in KwaZulu-Natal and Mpumalanga, reprioritised R911 million for the labour tenure programme, revised the project plan for processing applications and was undertaking regular visits to district offices. In addition, it suggested arbitrators to assist the Land Claims Court's adjudication task.

[44] The applicants justly objected to this evidence. They pointed out that the Department's affidavit was unsettlingly similar to an affidavit it tendered just over a year before in the Supreme Court of Appeal – including heralding the appointment of Mr Mdontswa, and repeated much of its content. In any event, the additional evidence simply did not meet what the rule requires: the new evidence must be common cause, incontrovertible or of an official, statistical or scientific nature. Besides, the applicants said, the evidence, in reiterating previous unfulfilled assurances and promises, tended if anything to support the Land Claims Court order.

[45] All these objections proved to be dismally warranted. On the back foot, the Department conceded at the hearing that its supposedly new evidence did not match up to the rule's requirements. Instead it now sought the admission only of evidence the applicants accepted as common cause. That evidence, so far as it goes, far from

[88] Rule 31 of the Rules of the Constitutional Court regulates "Documents lodged to canvass factual material":

> "(1) Any party to any proceedings before the Court and an amicus curiae properly admitted by the Court in any proceedings shall be entitled, in documents lodged with the Registrar in terms of these rules, to canvass factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record: Provided that such facts—
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> (a) are common cause or otherwise incontrovertible; or
>
> (b) are of an official, scientific, technical or statistical nature capable of easy verification.
>
> (2) All other parties shall be entitled, within the time allowed by these rules for responding to such document, to admit, deny, controvert or elaborate upon such facts to the extent necessary and appropriate for a proper decision by the Court."

showing the Department has "turned the corner and is doing what it should be doing", as counsel bravely contended, tends to show the opposite. It evokes an image of the Department as engaged in a hopeless Sisyphean struggle, condemned eternally to roll a gigantic boulder arduously up a hill, only, as the top nears, for it to roll down to the bottom, time and again, the labour doomed to be repeated forever.

[46] All this shows is that the mythical spell must be broken. And the impasse must be resolved. And it can be done, with cooperation, goodwill, humility and respect – and without necessarily adversarial combat. The courts and government are not at odds about fulfilling the aspirations of the Constitution. Nor does the separation of powers imply a rigid or static conception of strictly demarcated functional roles. The different branches of constitutional power share a commitment to the Constitution's vision of justice, dignity and equality. That is our common goal. The three branches of government are engaged in a shared enterprise of fulfilling practical constitutional promises to the country's most vulnerable.

[47] These joint efforts will not always be frictionless. On the contrary, it has been astutely noted that an understanding of the separation of powers as "a relationship of mutual accountability, responsiveness and openness between the three branches",[89] may give rise to unavoidable – even productive – tension:

> "Dialogic engagement in this context will frequently be characterised by disharmony and mutual resistance to an over-assertion of power by one branch. What is important, however, is that the branches of government remain engaged with each other in a manner which is open and respectful of the institutional strengths and weaknesses of each other. Through this process the limits of each branch's institutional power will be continually defined and redefined as they respond to the multifarious challenges of South Africa's evolving constitutional democracy."[90]

[89] Liebenberg *Socio-Economic Rights: Adjudication Under a Transformative Constitution* (Juta, Cape Town 2010) at 67. See further Langa "Transformative Constitutionalism" (2006) 17 *Stellenbosch Law Review* 351.

[90] Liebenberg above n 89 at 70.

[48] In cases that cry out for effective relief, tagging a function as administrative or executive, in contradistinction to judicial, though always important, need not always be decisive. For it is crises in governmental delivery, and not any judicial wish to exercise power, that has required the courts to explore the limits of separation of powers jurisprudence. When egregious infringements have occurred, the courts have had little choice in their duty to provide effective relief. That was so in *Black Sash I*,[91] and it is the case here. In both, the most vulnerable and most marginalised have suffered from the insufficiency of governmental delivery.

[49] The vulnerability of those who suffer most from these failures underscores how important it is for courts to craft effective, just and equitable remedies, as the Constitution requires them to do. In cases of extreme rights infringement, the ultimate boundary lies at court control of the remedial process. If this requires the temporary, supervised oversight of administration where the bureaucracy has been shown to be unable to perform, then there is little choice: it must be done. Here, the fact that the Department's tardiness and inefficiency in making land reform and restitution real has triggered a constitutional near-emergency, as explained earlier.[92] This fact underscores the need for practically effective judicial intervention.

[50] Through all times and issues, this Court has emphasised the importance of respect for the separated distribution of powers between Legislature, Executive and Judiciary.[93] And it has not only enjoined restraint in the exercise of judicial power,[94]

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[91] *Black Sash I* above n 66.

[92] See [41] above.

[93] *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) at paras 63-5; *South African Association of Personal Injury Lawyers v Heath* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) at para 46; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at para 66; and *De Lange v Smuts N.O.* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 60.

[94] *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* [2000] ZACC 8; 2000 (3) SA 936 (CC); 2000 (8) BCLR 837 (CC) at para 64. See Lenta "Judicial Restraint and Overreach" (2004) 20 *SAJHR* 544 at 564, who references *Christian Education v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757 (CC); 2000 (1) BCLR 1051 (CC) as an instance where this Court deferred to the Legislature's interpretation of children's rights in prohibiting corporal punishment at schools.

it has displayed it – so much so that its critics have on occasion reproved it for over-cautious timidity.[95]

[51] And the courts have never sought to supplant government in its task of implementing legislative and other programmes. They simply could not and cannot. They step in only when persuaded by argument and evidence that they have to correct erroneous interpretations of the law, or intervene to protect rights infringed by insufficient and unreasonable conduct in social and economic programmes. In this, the courts undertake no self-appointed role,[96] but seek only to carry out their constitutionally mandated function with appropriate restraint.[97] In *Treatment Action Campaign*, this Court noted that, where the state has failed to give effect to its constitutional duties, the Constitution obliges the Court to say so: "In so far as that constitutes an intrusion into the domain of the [E]xecutive, that is an intrusion mandated by the Constitution itself."[98] And in *Mohamed*, this Court noted that to "stigmatise" a court order "as a breach of the separation of state power as between the

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[95] See Dugard and Langford "Art or Science? Synthesising Lessons from Public Interest Litigation and the Dangers of Legal Determination" (2011) 27 *SAJHR* 39; Ray "Evictions, Aspirations and Avoidance" (2015) 5 *Constitutional Court Review* 173 and Department of Justice and Constitutional Development *Constitutional Justice Project: Assessment of the Impact of Decisions of the Constitutional Court and Supreme Court of Appeal on the Transformation of Society* (November 2015).

[96] See generally Lenta above n 94 at 544-576 and Sewpersadh and Mubangizi "Judicial Review of Administrative and Executive Decisions: Overreach, Activism or Pragmatism?" (2017) 21 *Law, Democracy and Development* 201.

[97] In discharging this constitutionally mandated function, there is not only a risk of judicial overreach but also a risk that courts will be overly deferent to the government. This tension is articulated in Taylor *Optimisation Through Innovation: Judicial Exercise of Discretionary Remedial Power to Enforce the State's Positive Human Rights Duties* (DPhil Thesis, University of Oxford, 2019) at 106:

> "The other risk [besides judicial overreach] inherent in the exercise of discretionary remedial power is that the court may be insufficiently responsive to the imperative of its constitutional mandate, with the result that rights are under-realised. The risk of judicial overreach is frequently cited as a concern about discretionary remedial power, but there is just as much risk that the court will be overly deferent and constrained in its exercise of discretionary remedial power. This may entail a complete failure to provide just and equitable relief, or providing relief that only gives effect to a very 'thin' conception of the right breached."

This Court has recognised many, many times that its mandate to ensure all branches of government act in a constitutionally compliant manner does undermine the separation of powers but is in fact an essential feature of the separated structuring of constitutional power. See, for example, *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) (*Doctors for Life*) at paras 37-8 and *Minister of Health v Treatment Action Campaign II* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) (*Treatment Action Campaign*) at para 99.

[98] *Treatment Action Campaign* above n 97 at para 99.

Executive and the Judiciary is to negate a foundational value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law".[99] In the same vein, the Court warned in *Doctors for Life*, that the bogeyman of separation of powers concerns should not cause courts to shirk from this constitutional responsibility:

> "[W]hile the doctrine of separation of power is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty."[100]

[52] The concept of overreach[101] first manifested in this Court's jurisprudence when a litigant confronted it with a plea that it should intervene early in Parliament's legislative process so as to preclude governing party overreach.[102] Next, the Court noted that an overly narrow interpretation of a statute would have an adverse impact on the Legislature's design.[103] The most celebrated instance is no doubt the suggestion in a dissenting judgment by Mogoeng CJ that the majority judgment

[99] *Mohamed v President of the Republic of South Africa* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at para 71.

[100] *Doctors for Life* above n 97 at para 200. This is echoed by O'Regan J in her dissent on remedy in *Minister of Home Affairs v Fourie* [2005] ZACC 19; 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) at para 170.

[101] "Overreach", in the sense apposite here, means to reach too far, to try to do what is not possible (*Oxford Concise Dictionary*); to defeat (oneself) by seeking to do or gain too much; the act or an instance of defeating one's own purpose by going too far (Garner *Black's Law Dictionary* 9 ed (West, St Paul 2009) at 1213); to fail by trying to achieve, spend, or do more than you can manage; to do more than your authority allows (*Cambridge English Dictionary*, available at https://dictionary.cambridge.org/dictionary/english/overreach).

[102] *Glenister v President of the Republic of South Africa* [2008] ZACC 19; 2009 (1) SA 287 (CC); 2009 (2) BCLR (136) (CC) at para 21 (an opposition party contended that the Court should "act as a counterweight if the ruling party overreaches itself and, it contends, if the Court does not act, it is unlikely anyone else will"). This was followed by passing allusion to the debate in *Law Society of South Africa v Minister for Transport* [2010] ZACC 25; 2011 (1) SA 400 (CC); 2011 (2) BCLR 150 (CC) at para 27. There is reference to legislative overreach in the judgment of O'Regan J in *S v Coetzee* [1997] ZACC 2; 1997 (3) SA 527 (CC); 1997 (4) BCLR 437 (CC) at para 184 and Petse AJ in *S v Mlungwana* [2018] ZACC 45; 2019 (1) SACR 429 (CC); 2019 (1) BCLR 88 (CC) at para 85 similarly noted: "This breadth and, by all accounts, legislative overreach, point to how section 12(1)(a) results in criminalisation without regard to the effect of the protest on public order. This exacerbates the severity of the limitation."

[103] *The Citizen 1978 (Pty) Ltd v McBride* [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) at para 63 (the literal interpretation "overreaches the delicate 'interplay of benefit and disadvantage' that underlies the provisions").

embodied "a textbook case of judicial overreach",[104] where the question in issue was not a governmental programme or departmental functionality, but the interpretation of the Constitution's provision for Presidential impeachment.[105] More narrowly, this Court characterised over-extensive striking down of an entire statute, when only one word had been shown to be constitutionally invalid, as judicial overreach.[106]

[53] These instances show the wide diversity of circumstances in which the exercise of judicial power may be scrutinised for excess. They also show that this Court, and other courts, are acutely aware of the perils of trying to do too much. They intervene only when the evidence and arguments compel them to conclude that the Executive or the Legislature has done wrong, or has not done enough. And when the courts intervene, they do so with necessary trepidation.

[54] And so here. In argument, the Department did not contend that a court-appointed special master could never be justified. It conceded it might be warranted: that would depend on the extent of the rights violations and of the bureaucratic dysfunction in not remedying them. The Department contended only that the level of violation and dysfunction here were not extreme enough.

[55] The concession was sound, since it locates the debate about the special master not in "overreach", but in a careful consideration of where judicial power stops, and, with it, the practical question as to when a court intervention on this scale is justified.

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[104] *Economic Freedom Fighters* above n 77 at para 223, to which the majority judgments of Jafta J and Froneman J respond at paras 218-220 and 279 respectively.

[105] Section 89 of the Constitution.

[106] *South African Veterinary Association v Speaker of the National Assembly* [2018] ZACC 49; 2019 (3) SA 62 (CC); 2019 (2) BCLR 271 (CC) at para 52 ("a declaration invalidating the whole Act, or any portion of it besides the insertion of the word 'veterinarian', would amount to judicial overreach because the remainder has not been shown . . . to have been enacted unconstitutionally"). In *Potgieter v Olivier* 2016 (1) SA 272 (GP) at para 33, the High Court declined to substitute judicial overreach for what it conceived as regulatory overreach, which the Supreme Court of Appeal cited approvingly in *Du Bruyn N.O. v Karsten* [2018] ZASCA 143; 2019 (1) SA 403 (SCA) at para 27, while the dissentients in *Centre for Child Law v Media 24 Limited* [2018] ZASCA 140; 2018 (2) SACR 696 (SCA) at para 102 considered that the fact that the responsible Ministers had not opposed an invalidity challenge to a statute might mean "that the court may be less circumspect about the possibility of judicial overreach than might otherwise be the case, pending Parliament's consideration of the matter".

And in assessing this, it is a mistake to class a special master as an exotic or outlandish importation. The Land Claims Court referred only briefly to foreign practice.[107] Its main warrant for the appointment was its own home-baked statutory powers.[108] It was the Supreme Court of Appeal that summarily equated the special master with the institution of a special master in United States federal law,[109] and then went on to reprove its importation as alien.[110]

[56] Yet we can gain much from considering how what works elsewhere might also work here.[111] In the United States, the use of special masters has developed flexibly.[112] It occurs in all areas of law.[113] It is more familiar in courts with heavier caseloads and complex law suits that test judicial capacity and expertise.[114] Special masters may help the court with complex electronic discovery, or undertake

[107] Land Claims Court judgment above n 4 at para 22.

[108] Id at para 21.

[109] The Supreme Court of Appeal judgment above n 6 at para 38 stated that "[f]irst and foremost, the appointment of a special master – a private attorney, law professor or retired judge, appointed with or without the parties' consent to assist in the adjudicative process – is a court adjunct in the United States".

[110] Id at para 42 the Supreme Court of Appeal stated:

> "It needs merely to be stated that the institution of the special master under US law is governed by federal rules, with its own distinctive features. There are no such rules, neither an equivalent of a special master in our law."

Immediately thereafter, the Supreme Court of Appeal cited the warning by Kriegler J against "blithe adoption of alien concepts" as discussed in [31] above.

[111] On 23 May 2019, the Court, as it has on previous occasions, sent a request to the World Conference on Constitutional Justice (Venice Commission) to determine whether other jurisdictions' courts appoint or approve the appointment of special masters or court adjuncts. Responses were received from only seven jurisdictions (Spain, Mexico, Poland, Slovakia, the Czech Republic, the Republic of Kosovo and the Republic of Croatia). They indicated that those jurisdictions are either not empowered to appoint special masters or court adjuncts or that court-appointed special masters or court adjuncts do not exist or that there is no specific provision for them.

[112] On the role and use of special masters in the United States generally, see Willging et al *Special Masters' Incidence and Activity: Report to the Judicial Conference's Advisory Committee on Civil Rules and Its Subcommittee on Special Masters* (Federal Judicial Center, 2000).

[113] Rule 53 of the Federal Rules of Civil Procedure regulates referral to a special master by district courts, but state courts' rules also provide for them, with especial pertinence to securing what we know as socio-economic rights. See Jokela and Herr "Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool" (2005) 31 *William Mitchell Law Review* 1299. On the flourishing of socio-economic rights adjudication under state constitutions in the United States, see Hershkoff and Loffredo "State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis" (2011) 115 *Penn State Law Review* 932 at 981-2; Feldman "Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government" (1993) 24 *Rutgers Law Journal* 1057; and Neubourne "State Constitutions and the Evolution of Positive Rights" (1989) 20 *Rutgers Law Journal* 893.

[114] DeGraw "Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits of Special Masters" (1991) 66 *NYU Law Review* 800.

fact-finding investigations,[115] or facilitate settlement attempts, or formulate remedies and monitor compliance.[116] But the critical point is that under Rule 53 of the Federal Rules of Civil Procedure the court keeps its power freely to endorse or reject or change, in part or wholly, the special master's recommendations, or remit with directives. It is the court that retains responsibility and control over the eventual order.

[57] Comparative analyses and best practices are certainly helpful in understanding the role of the special master. And they mitigate the notion that it is alien. But as the dissent in the Supreme Court of Appeal noted, how foreign jurisdictions have affirmed the powers of special masters does not bind us in crafting good remedies here. This is especially so in the nationally imperative question of land reform and restitution.[117]

[58] Special masters, often with expertise in specialist areas of government, may assist with either devising a remedial plan or implementing it.[118] In implementing a remedy,[119] the main task of a special master is to oversee and monitor – rather than usurping performance of executive functions, which is closer to the functions of other court-appointed officers (administrators or receivers, whose respective tasks may be to supplement or replace management of a government institution).[120]

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[115] As this Court mandated by order in *Black Sash Trust v Minister of Social Development* [2017] ZACC 20; 2017 (9) BCLR 1089 (CC) (*Black Sash II*), in appointing former Judge President Ngoepe to conduct a specified fact-finding inquiry. See the history and findings set out in *Black Sash III* above n 85.

[116] DeGraw above n 114 at 801.

[117] As the Supreme Court of Appeal dissent noted above n 6 at para 79:

> "[T]he social circumstances, historical reality of labour tenants, scope of powers of the Land Claims Court, specificity of our judicial methods to interpret transforming legislations and our courts' ever available oversight powers would shape the institution of a special master in a way that makes it compatible, specific and appropriate [to our] context. Thus, this court need not even engage in the debate on the appointment of the special master in South Africa in general. Nor is a comparison with other jurisdictions necessary."

[118] Buckholz et al "Special Project: The Remedial Process in Institutional Reform Litigation" (1978) 90 *Columbia Law Review* at 805.

[119] The dissent in the Supreme Court of Appeal judgment above n 6 at para 93 distinguished between the special master's involvement in the "preparatory phase" and the "execution phase" of the Implementation Plan.

[120] Buckholz et al above n 118 at 831–7. In *Brown v Plata* 563 US 493 (2011) health care provision in Californian prisons was at issue. The United States Supreme Court eventually held that a court-ordered inmate limit to reduce the prisoner population was needed to remedy violation of prisoners' Eighth Amendment constitutional rights inflicted by overcrowding. The preceding litigation in the Northern District Court of

[59] The Supreme Court of Appeal's concern that the special master might, on this palette, be designed to "effectively usurp the functions of the Director-General and officials of the Department"[121] would have been better directed had the Land Claims Court appointed a receiver – a much more intrusive official.[122] But it did not. Far from the Land Claims Court abdicating its own powers, or usurping those of the Department, it set the scope of the special master's mandate itself and retained control over its role in formulating the remedy.[123]

[60] Specifically, the Land Claims Court retained control over every stage of formulating the specific features of the remedy. These included setting the scope of the special master's mandate, directing the process it should follow, and ultimately deciding the final form of the plan to fulfil the promises of the Labour Tenants Act.[124]

[61] The Land Claims Court made clear that the special master remains an agent of the Court,[125] and acts in extension of the Court's own supervisory jurisdiction. And

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California, particularly in *Plata v Schwarzenegger* No C01-1351 TEH 2005 WL 2932243 (ND Cal May 10 2005) and *Plata v Schwarzenegger* No C01-1351 TEH 2005 WL 2932253 (ND Cal Oct 3 2005), illustrates the power of judicially-supervised intervention. When, three years after a court-approved settlement, overcrowding had not adequately improved, the Court placed the state's medical health care delivery system for prisons in receivership. As here, an extended remedial process and repeated good faith attempts to settle culminated in a refusal by the Court to countenance partial compliance when bolder intervention was indispensable.

[121] Supreme Court of Appeal judgment above n 6 at para 44.

[122] Buckholz et al above n 118 at 836. Compare with the Supreme Court of Appeal's characterisation id at para 48.

[123] Clause 8 of the Land Claims Court order directed the Department to file a report "indicating which portions of the plan (if any)" they are objected to, together with proposals for alternatives. Clause 9 envisaged a hearing at which it, the Court, would consider the plan and approve it, with or without amendments, and make further orders.

[124] The Land Claims Court judgment above n 4 at para 23 stated that the characteristics of the special master include "independence, diligence, managerial experience, an ability to mediate disputes, to work with both parties, and experience in land related matters."

[125] The Land Claims Court judgment above n 4 at para 19 noted the following four salient features:

> "1. A special master is an independent person who is appointed by, and reports to, the Court.
>
> 2. His or her duty is to assist the Court. In the present case it would be to assist the Court in the processing and adjudication of labour tenant claims in the manner as determined by the Court.
>
> 3. The special master is not an advocate for the claimants or for the government but an agent of the Court and as such, he or she is given limited decision making powers.

the Court alas made plain that the work to be done would alleviate its own capacity constraints in overseeing the output of the Department.[126] The apprehension that the special master would be a complete outsider, reigning at will over the Department with unfettered executive power loses sight of a key fact. This is that the independence of the special master is not merely the detached neutrality of a third-party expert unaffiliated with the parties. It is rather an extension of judicial independence, because it derives from appointment as an agent of the court, continuingly subject to court control and authority.

[62] While the powers afforded a special master certainly seem intrusive, this is only because it is the Court itself that is exercising the constitutionally entrusted powers to afford effective relief. It is not the Court authorising an outside, unchecked body to intrude into the executive domain. It is the Court stepping in to ensure that nationally critical land reform and restitution processes make headway, 20 years after they should. In this way, the special master's independence is a product of the independence of the Court, to which he or she remains subordinate.

[63] Once it is clear that the special master remains an agent of the Court within our constitutional structure, functioning under court supervision, the questions become more practical. They are: (a) did the Land Claims Court, specifically, have statutory

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> Were a special master required to assist the Court in implementing a court order, as is sought in this application, his or her powers would always be subject to oversight by the Court.
>
> 4. A special master provides additional resources to the Court. He/she will bring skills that are chosen specifically for the case at hand, and can devote enough time to the litigation to become fully acquainted with the parties and extensive information involved. A special master can also engage more informally with the parties than a Judge can."

[126] The Land Claims Court judgment above n 4 stated at para 28:

> "An important factor to bear in mind is that it is unfortunately the case, and one beyond the control of this Court, that currently there is only one permanent Judge and an additional 4 or 5 Acting Judges at the Land Claims Court each term. This means that often no single Judge will hear an entire matter until its completion as occurred in this particular case. Each new Judge appointed to an on-going case is required to familiarise himself or herself with the history and detailed issues of the dispute between the parties. Were a special master to be appointed, as envisaged, these disadvantages would be significantly ameliorated for the benefit of all concerned."

power to order the special master's appointment and (b) how extreme were the rights violations and departmental dysfunction that the evidence revealed?

[64] The Land Claims Court located its power to appoint a special master in the wide statutory competences entrusted to the Court, which permit it to "conduct any part of any proceedings on an informal or inquisitorial basis".[127] The Department is correct to point out that this specific power governs the Land Claims Court's conduct of its own proceedings.[128] But that is a pinched perspective. The Act expressly constitutes the Land Claims Court as a court of law,[129] with all the powers the High Court has "in relation to matters falling within its jurisdiction as are possessed by a provincial division of the [High Court]"[130] in regard to affected land. Recently, the Land Claims Court held that its powers are reinforced by section 38 of the Constitution, which grants it the power to issue "appropriate" relief, including a declaratory order, where a right in the Bill of Rights is infringed. Section 172(1)(a) of the Constitution provides that a court "must" declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency.[131]

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[127] Section 32(3)(b) of the Restitution Act, read with section 30(1) of the Labour Tenants Act.

[128] Section 32 of the Restitution Act is headed "Rules governing procedure".

[129] Section 29 of the Labour Tenants Act provides that the Land Claims Court—

> "shall have jurisdiction in terms of this Act throughout the Republic and shall have all the ancillary powers necessary or reasonably incidental to the performance of its functions in terms of this Act, including the power to grant interlocutory orders and interdicts, and shall have all such powers in relation to matters falling within its jurisdiction as are possessed by a provincial division of the Supreme Court having jurisdiction in civil proceedings at the place where the affected land is situated, including the powers of such a division in relation to any contempt of the Court."

[130] Id.

[131] In *District Six Committee v Minister of Rural Development & Land Reform* [2019] ZALCC 13 at paras 4-6 Ngcukaitobi AJ held—

> "The power of this court to issue declaratory orders flows from section 22(1)(cA) of the Restitution of Land Rights Act 22 of 1994. The section empowers this Court to issue a declaratory order on my question of law which relates to section 25(7) of the Constitution or the Restitution Act. In terms of section 22(1)(cD) this Court has the power to decide any constitutional matter falling within its jurisdiction.
>
> These powers are reinforced by section 38 of the Constitution, which grants this Court the power to issue an "appropriate" relief, including a declaratory order where a right in the Bill of Rights is infringed. Section 172(1)(a) of the Constitution states that this Court "must" declare any law or conduct as invalid if it finds that such law or conduct is inconsistent with the Constitution.

[65] This Court has held that the Labour Court, although not expressly so invested, enjoys jurisdiction to strike down a statute on the ground of constitutional invalidity.[132] By parallel reasoning, it follows that the Constitution affords the Land Claims Court extensive powers, when deciding a constitutional matter within its power, to "make any order that is just and equitable".[133] Any order that is just and equitable! That is no invitation to judicial hubris. It is an injunction to do practical justice, as best and humbly, as the circumstances demand. And it is wrong to understate the breadth of these remedial powers, as Madlanga J eloquently reminds us in *Mhlope*:

> "The outer limits of a remedy are bounded only by considerations of justice and equity. That indeed is very wide. It may come in different shapes and forms dictated by the many and varied manifestations in respect of which the remedy may be called for. The odd instance may require a singularly creative remedy. In that case, the court should be wary not to self-censor. Instead, it should do justice and afford an equitable remedy to those before it as it is empowered to do."[134]

> This Court has the same powers as the High Court in respect of matters falling within its jurisdiction. The approach of this Court to contempt of court is accordingly similar to that followed by the High Court. The same applies in relation to personal cost orders."

[132] The blunt authority for this conclusion is *Public Servants Association on behalf of Ubogu v Department of Health, Gauteng; Head of the Department of Health, Gauteng v Public Servants Association on behalf of Ubogu* [2017] ZACC 45; 2018 (2) SA 365 (CC); 2018 (2) BCLR 184 (CC) (*Public Servants Association*). At issue was whether the Labour Court has power to strike down legislation on the ground of constitutional invalidity, even though its statute nowhere lists that competence amongst its powers. This Court concluded Yes. The compressed ratio appears at para 33:

> "It follows that, being a court of similar status with the High Court, the Labour Court has the power to make an order concerning the constitutional validity of an Act of Parliament."

[133] Section 172(1) provides:

> "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."

[134] *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC) at para 83.

[66] Likewise, the Constitution affords the Land Claims Court inherent power to protect and regulate its own process, and to develop the common law.[135] These provisions empower it to remedy wrongs, including through materially innovative remedial measures. That is the power the Land Claims Court exercised here.

The Land Claims Court's exercise of its discretionary powers

[67] In voiding the appointment of the special master, the majority of the Supreme Court of Appeal gave no express consideration to the fact that the Land Claims Court was exercising not a weak power, but a powerful discretion.[136] This is what this Court has recognised as "a discretion in the true sense".[137] What is more, the discretion here was being exercised by a specialist court in relation to its assessment of its own capacity and expertise to ensure an effective remedy within a field the statute specially entrusts to it.

[68] A "true discretion" or "discretion in the strong sense" is a power entrusted to a court to consider a wide range of available options, each of which is equally permissible. The court then has a choice as to which option it selects. And its pick can be said to be wrong only if it has failed to exercise that power judicially or has been influenced by wrong principles or a misdirection on the facts, or reached a

[135] Section 173 of the Constitution provides:

> "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[136] This Court in *Florence v Government of the Republic of South Africa* [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) at para 115 explained that—

> "legislation may allow a court a weak or fettered discretion which must be exercised in a restricted or preset manner only. In that event, if a court were to veer beyond its limited range of permissible choices, again an appeal court would be at liberty to intervene."

[137] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of SA Ltd* [2015] ZACC 22; 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (*Trencon*) at para 85. See also *Florence* above n 136 at paras 110-7; *Farjas (Pty) Ltd v Minister of Agriculture and Land Affairs* [2012] ZASCA 173; 2013 (3) SA 263 (SCA) at para 7; *Mphela v Haakdoornbult Boerdery CC* [2008] ZACC 5; 2008 (4) SA 488 (CC); 2008 (7) BCLR 675 (CC) at para 26; and *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* [2007] ZACC 12; 2007 (6) SA 199 (CC); 2007 (10) BCLR 1027 (CC) at para 84.

decision that could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.[138]

[69] In my view, the Land Claims Court directed itself properly and scrupulously to the facts before it. These showed failing institutional functionality of an extensive and sustained degree. That cried out for remedy. In understanding the Land Claims Court's exercise of its discretionary powers, it is important that it identified the fundamental issues as institutional, not personal.[139] The fate of the applicants' contempt application made the same point, in a different way – this was not about personal obduracy, but about impairment in departmental function. The Land Claims Court's order was directed at remedying institutional dysfunction and other blockages that imperil rights at a systemic level.[140]

[70] A remedy of the kind the Land Claims Court granted was designed to fix persistent institutional failings that repeatedly resulted in non-compliance with court orders. It was directed to systemic functioning – rather than to any individuals' attitudes or defaults. This diminishes any personal sting the remedy may seem to imply. Instead, it recognises our joint responsibility, as a country, for sustaining and growing and strengthening our institutions. And it acknowledges our judicial complicity in institutional and systemic dysfunction that impedes our attainment of shared constitutional goals and aspirations.

[71] For all these reasons the order the Land Claims Court granted must be restored.

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[138] See *Trencon* above n 137 at para 88.

[139] See Roach and Budlender "Mandatory Relief and Supervisory Jurisdiction: When is it Appropriate, Just and Equitable" (2005) 122 *SALJ* 325 at 345-351 and compare Taylor above n 80 at 4-5:

> "Instead of framing non-compliance in psychological terms – inattentiveness, incompetence and intransigence – the cases featured in this article [which includes the present matter] expose the institutional dynamic that often underlies non-compliance with constitutional obligations. In these cases, the retention of supervisory jurisdiction and the reliance on court-appointed agents are best understood as remedial mechanisms aimed at addressing the institutional dysfunction and political blockages that threaten rights at a systemic level, rather than punitive measures targeting the recalcitrance of individual public officials."

[140] See Taylor above n 80 at 21.

Contempt

[72] After the Land Claims Court granted the Negotiation Order in May 2016, which required the parties to negotiate in good faith in setting up a national forum of organisations in the field to assist the Department, the parties' relationship plunged to a nadir. The applicants contended that the Minister refused or failed to parley with them in good faith. They consequently charged that the Minister marginalised or excluded AFRA in the national meeting he convened in July 2016, which he conceived as a powerless talk shop. They thus sought a declaration that the Minister was in contempt of the Land Claims Court's order.

[73] In response, the Minister smoothly denied that he had refused or failed to comply with the order. If he did, he insisted that his conduct was not wilful or in mala fide (bad faith).

[74] In a judgment delivered on 14 November 2016, the Land Claims Court dismissed the contempt application but made no order as to costs.[141] The Supreme Court of Appeal unanimously dismissed the applicants' appeal against this order, but the order the majority granted added an adverse costs award against the applicants.[142] This contrasted with the Land Claims Court's dismissal order, which imposed no costs.[143]

[75] In this Court, the applicants persisted in complaining that the Minister interpreted the Negotiation Order in a disjointed and artificial way. The circumstances showed that the parties consented to negotiate the order because that would allow more time for settlement negotiations and would form an alternative to appointing a special master. Drawing a red line through this, the Minister instead precipitately (and deviously, the applicants claimed) set up the national forum without, the applicants alleged, consulting or including them (which the Minister

[141] Land Claims Court contempt judgment above n 56 at para 24.

[142] Supreme Court of Appeal judgment above n 6 at para 66.

[143] Land Claims Court contempt judgment above n 56 at para 24.

denied). The applicants further charged the order was not intended to license the Minister to act unilaterally in establishing the national forum.

[76] It is not difficult to appreciate why the applicants were incensed by their treatment at the hands of the Minister. Yet it is not possible on the affidavits before us to infer that he acted in mala fide.[144] This was why both the Land Claims Court[145] and the Supreme Court of Appeal[146] concluded that the Minister's sworn denials of bad faith sufficiently walled him off from a successful charge of contempt.

[77] That conclusion cannot be impeached. Making an inference of bad faith in the face of an affidavit denial will unfortunately often prove difficult. It certainly was here. The alternative, to ask the Court to order evidence under oath, with cross-examination, will certainly pierce the paper defence the affidavit provides, but the applicants did not ask for that here. It follows that their attempt to overturn the findings of the Land Claims Court and Supreme Court of Appeal on the contempt issue must fail.

Costs

[78] The adverse costs order the Supreme Court of Appeal granted against the applicants in the contempt proceedings cannot be supported. The Supreme Court of Appeal gave no reasons for imposing the costs burden. The applicants' charge that the Minister was in contempt was certainly not "frivolous or vexatious, or in any other was manifestly inappropriate" under *Biowatch*.[147] They were attempting to enforce

[144] In *Fakie N.O. v CCII Systems (Pty) Ltd* [2006] ZASCA 52; 2006 (4) SA 326 (SCA) the Supreme Court of Appeal held that the standard required to prove whether disobedience of a court order was committed mala fide is beyond reasonable doubt, though for certain civil declaratory relief the standard of proof is balance of probabilities; affirmed by this Court in *Pheko v Ekurhuleni City II* [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC).

[145] Land Claims Court contempt judgment above n 56 at para 22.

[146] Supreme Court of Appeal judgment above n 6 at para 63 (the applicants' allegations on contempt "were simply unsustainable on the evidence").

[147] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*) at para 24.

constitutional rights against a state institution in their contempt proceedings and did so in an unimpeachable way. They fully earned immunity from costs.

[79] In the main proceedings, the applicants had to come to this Court to reinstate the Land Claims Court order and have succeeded in doing so. Their costs (limited to two, not three, counsel as sought) must follow.

Order

[80] The following order is made:

1. Leave to appeal is granted.
2. The appeal in the main application succeeds and the order the Supreme Court of Appeal granted is set aside.
3. In its place there is substituted:
   "The appeal is dismissed with costs".
4. The respondents are to pay the costs, in this Court, including costs of two counsel.
5. The order granted by the Supreme Court of Appeal on the contempt application is set aside.
6. In its place there is substituted:
   "The appeal is dismissed with no order as to costs".
7. The appeal in this Court against the dismissal of the contempt application is dismissed with no order as to costs.

JAFTA J (Ledwaba AJ concurring):

Introduction

[81] How far may a court go in the exercise of its review powers before it intrudes impermissibly into the domain of the Executive? This question is central to the present matter which serves before this Court as an application for leave to appeal against the order of the Supreme Court of Appeal. That Court had reversed an order

granted in favour of the applicants and in terms of which a special master was appointed and authorised to carry out certain administrative functions. The Land Claims Court had mandated the special master to perform functions allocated by statute to the Director-General for the Department of Rural Development and Land Reform, in collaboration with the Director-General.

[82] The Supreme Court of Appeal had concluded that the Land Claims Court did not have the authority to appoint the special master and that the order mandating him or her to prepare an implementation plan for the performance of the Director-General's duties usurped the powers of the Director-General under the Labour Tenants Act. The Court held that the Land Claims Court's order amounted to "a gross intrusion by a court into the domain of the Executive".

[83] The Supreme Court of Appeal reasoned:

> "But of far greater concern is the effect of the Land Claims Court's order. It directed a complete outsider — the special master — effectively to take over the functions and responsibilities of the Director-General and officials of the Department in relation to labour tenant claims. That much is clear from paras 6 and 7 of the order. It does not mandate the Director-General or any official to prepare the implementation plan. Instead, the special master is required to prepare the implementation plan (in collaboration with the Director-General) regarding labour tenant claims, 'for the performance of the duties of the [Director-General] and the Department'. The role of the Director-General is secondary. In other words, the special master is squarely responsible for, and determines the content of, the implementation plan, which must be carried out by the Director-General and the Department. The implementation plan — of which the special master is the author — must set out, inter alia, the skills pool and infrastructure required for processing labour tenant claims; annual targets for the resolution of claims; the budget necessary in each financial year for carrying out the implementation plan; plans to ensure the adjudication or arbitration of unresolved claims; and any other matter which he or she may consider relevant. And, in the exercise of these 'powers' by the special master, the Minister and the Director-General must ensure that he or she is provided with all documents requested; that all

> officials are available to meet with the special master; and that all requests by the special master are timeously responded to."[148]

[84] However, the minority in the Supreme Court of Appeal took the view that in light of the multiple breaches of the Constitution by the Director-General and his officials, including their failure to perform functions under the Labour Tenants Act over an extended period, the order granted by the Land Claims Court was justified. The minority concluded that the Land Claims Court had the power to appoint the special master.

[85] I have had the benefit of reading the judgment prepared by my colleague Cameron J (first judgment). I agree with much of what is contained in it. I agree that the Land Claims Court had the power to appoint the special master but I am unable to embrace and endorse the whole order of the Land Claims Court as it stands. In my view there are parts of that order which extend beyond a constitutionally permissible intervention by a court in the performance of administrative functions.

[86] I am also not in agreement with the first judgment on the conclusion it reaches on the exercise of inherent powers by the Land Claims Court. The first judgment holds that section 173 of the Constitution affords the Land Claims Court an inherent power to regulate its own process and develop the common law.[149] In addition, I am constrained to disagree that section 173 provides courts with remedial powers like those suggested in the first judgment.

[87] The factual background to this matter is fully set out in the first judgment and I am grateful for its helpful narration. It is not necessary to traverse the same here.

[148] Supreme Court of Appeal judgment above n 6 at para 48.

[149] See above [66].

[88] Before I address the two issues which form the source of divergence between us, I need to briefly state my reasons for agreeing that the Land Claims Court had the power to appoint the special master.

Land Claims Court's competence to appoint special masters

[89] It is apparent from the impugned order of the Land Claims Court itself that in granting it, that Court was exercising the remedial powers conferred by section 172 of the Constitution.[150] This provision obliges courts to make declaratory orders pertaining to law or conduct that is inconsistent with the Constitution. This Court has construed the power to make a declaratory order as including the power to issue a supervisory order which may be granted in addition to the declaratory order. This emerges from the wording of section 172(1) of the Constitution. In *Treatment Action Campaign* the Court said:

> "The power to grant mandatory relief includes the power where it is appropriate to exercise some form of supervisory jurisdiction to ensure that the order is implemented."[151]

[90] The Land Claims Court's order has three components. The first comprises the declaratory order. The second deals with the appointment of the special master and the third is the supervisory order. Given the systemic breaches of the Constitution by

[150] Section 172 of the Constitution provides:

> "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"

[151] *Treatment Action Campaign* above n 97 at para 104.

the Department and which warranted the declaratory order that was confirmed by the Supreme Court of Appeal, the need for a supervisory order cannot be questioned.

[91] The special master was appointed to help the Land Claims Court in supervising the implementation of the order. The power to appoint him or her is sourced from the same provisions of section 172 of the Constitution. Exercising the same power in *Black Sash*,[152] this Court appointed a panel of experts to help it in evaluating a plan submitted to the Court in terms of a supervisory order.

[92] The fact that here the person to be appointed is called special master makes no difference. As stated in the first judgment, the special master would be an agent of the Land Claims Court and "acts in extension of the Court's own supervisory jurisdiction". The name assigned to the person appointed does not mean that he or she has powers and perform functions that are performed by special masters in other jurisdictions. For all we know, the Land Claims Court could have come up with a different name. What is important is the role he or she would play and the functions he or she would perform in ensuring implementation of the order.

Land Claims Court order

[93] While it was competent for the Land Claims Court to grant a supervisory order and appoint a special master to help that Court to implement the order, some of the functions the order authorised the special master to perform fell beyond the Court's supervisory jurisdiction. The order was issued in these terms:

> "1. The first respondent's failure to process or refer to the court applications brought under section 16 of the Land Reform (Labour Tenants) Act 3 of 1996 (the Act), is declared to be inconsistent with sections 10, 25(6), 33, 195 and 237 of the Constitution of the Republic of South Africa, 1996.
> 2. A special master of labour tenants (the special master) shall be appointed as set forth hereunder.

[152] *Black Sash I* above n 66.

3. By not later than 30 January 2017, any party may deliver a nomination of a person to be appointed as the special master. The nomination must be in writing, accompanied by:
   3.1 a short curriculum vitae of the nominated person;
   3.2 suggested terms of appointment and a remuneration structure acceptable to the nominee; and
   3.3 the nominated person's acceptance of the terms of appointment and the remuneration structure.
4. By not later than 28 February 2017, the first and second respondents / the Department may comment on all nominations submitted by the parties.
5. The Court will reconvene on Friday 3 March 2017 at 10h00 at the Land Claims Court, Randburg, at which hearing the Court shall:
   5.1 Consider the candidates nominated for the position of special master;
   5.2 Appoint a special master, if there is a suitable candidate;
   5.3 Establish his or her terms of appointment and remuneration; and
   5.4 Give such further directions as it may deem appropriate.
6. The special master, once appointed, is hereby ordered to prepare, in collaboration with the first respondent and / or his delegees, and to deliver by not later than 31 March 2017, a plan (the Implementation Plan), for the performance of the duties of the first respondent and the Department with supervision by the special master, in relation to pending labour tenant claims under sections 16, 17 and 18 of the Act. The Implementation Plan must set forth:
   6.1 The total number of claims lodged to date, and the number which have not yet been processed and finalised;
   6.2 An assessment of the skill pool and other infrastructure required for processing labour tenant claims, and to what extent such skill pool and infrastructure is available within the Department of Rural Development and Land Reform (the Department);
   6.3 Targets, on a year to year basis, for the resolution of pending labour tenant claims, either by agreement or by referring the claim to the court;
   6.4 A determination of the budget necessary during each financial year for the carrying out the Implementation Plan, including both the Department's operating costs for processing claims and the amounts required to fund awards made pursuant to applications in terms of section 6 of the Act;

6.5 Plans for coordination with the court to ensure the rapid adjudication or arbitration of unresolved claims referred to the court in terms of section 18(7) read with sections 19 – 25 of the Act; and

6.6 Any other matters which the special master may consider relevant.

7. The first and second respondent shall cooperate, and cause the Department to cooperate, with the special master in the preparation and execution of the Implementation Plan and shall ensure:

7.1 that the special master is provided with all documents (including archival documents) and records requested by him or her;

7.2 that all officials of the Department reasonably available to meet with the special master and provide him or her with such information as he may reasonably require; and

7.3 that all reasonable requests by the special master are timeously responded to.

8. By 15 April 2017 the first and second respondents / the Department shall file a report indicating which portions of the plan (if any) are objected to together with the grounds for objection and proposals for alternative provisions.

9. The court shall reconvene on Wednesday 19 April 2017 at 10h00 at the Land Claims Court, Randburg, at which hearing the court shall:

9.1 Consider the Implementation Plan delivered by the special master together with the report filed by the first and second respondents / the Department;

9.2 Approve the Implementation Plan, with or without amendments, or otherwise deal with the plan as it may deem fit; and

9.3 Make such further orders as may be advisable, including orders relating to the fulfilment of the Implementation Plan and the processing of pending labour tenant claims.

10. Any party may, on notice to the other parties and to the special master (when appointed), apply to the court for a clarification or amendment of this order.

11. The first and second respondents, jointly and severally, the one paying the others to be absolved, must pay the applicants' costs in these proceedings incurred up to the date of this order, taxed as between party and party, and including the costs consequent upon the employment of two counsel.

12. There is no order as to costs in respect of the third respondent."

[94] With regard to the special master, the order expressly directs him or her to prepare and deliver a plan for the performance of the Director-General's duties under specified sections of the Labour Tenants Act. The preparation of the plan is to be done in collaboration with the Director-General. In addition, the order states that the performance of duties by the Director-General and other officials in the Department will be under the supervision of the special master.

[95] Notably, the duties over which the Department is to be supervised are not specified. Instead, they are defined in general terms as duties relating to pending labour tenants claims under sections 16, 17 and 18 of the Labour Tenants Act. This means that all the duties of the Department under those three sections would be supervised by the special master, regardless of the time when the claim was lodged. It may have been lodged before the order was issued or after.

[96] But more importantly the order requires the special master to determine in the plan: the budget to implement the plan on a yearly basis, including the Department's operating costs for processing claims and "the amounts required to fund awards made pursuant to applications in terms of section 16 of the Act". In addition, the special master is required to include in the plan an assessment of skills and infrastructure required for processing labour tenant claims and record the skills and infrastructure available within the Department.

[97] What distinguishes the Land Claims Court's order from orders granted by the courts before is that it is not restricted to supervising a plan produced by the relevant Department. But, it requires the special master who is the agent of the Court to prepare the plan which entails the determination of the budget. In this regard the order goes beyond the order issued by this Court in *Black Sash I* by far.

[98] The question that arises is whether the supervisory jurisdiction which this Court said forms part of the power to grant mandatory relief extends to cover performance of departmental functions, including the preparation of budgets. An

answer to this question requires us to trace the use of supervisory orders in our jurisprudence. But first we must remind ourselves of the purpose served by a supervisory order. The purpose is two-fold. It is to ensure appropriate relief that is effective and the implementation of that relief.[153]

[99] While it is accepted that the courts' remedial supervisory power is wide, there can be no doubt that this power is not without limits.[154] In *Doctors for Life* this Court defined those limits in these terms:

> "The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institutions by which power can be exercised'. Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution."[155]

[100] This statement was an affirmation of a principle that was enunciated in earlier cases like *Van Rooyen*, where it was declared:

> "In a constitutional democracy such as ours, in which the Constitution is the supreme law of the Republic, substantial power has been given to the Judiciary to uphold the Constitution. In exercising such powers, obedience to the doctrine of the separation of powers requires that the Judiciary, in its comments about the other arms of the State, show respect and courtesy, in the same way that these other arms are obliged to

[153] *Treatment Action Campaign* above n 97 at para 106 and *Mhlope* above n 134 at para 98.

[154] *Economic Freedom Fighters* above n 77 at para 92.

[155] *Doctors for Life* above n 97 at para 37.

> show respect for and courtesy to the Judiciary and one another. They should avoid gratuitous reflections on the integrity of one another."[156]

[101] Quite early in its existence this Court had always recognised not only the limitation of its judicial authority but also the lack of capacity to perform functions reserved for the other arms of the state. For example in *Soobramoney*, the Court observed:

> "The provincial administration which is responsible for health services in Kwa Zulu-Natal has to make decisions about the funding that should be made available for health care and how such funds should be spent. These choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters."[157]

[102] Since then this Court and others have steered clear of determination and arrangement of budgets on the ground that this function falls exclusively within the domain of the Executive. Interference by the Judiciary on matters that have budgetary implications has always been limited to deciding whether plans adopted by the Executive itself, without any intervention by courts in the process leading up to adoption, constituted reasonable measures envisaged in the Constitution. In this way a balance was maintained between the Judiciary and other branches of the state.

[103] *Treatment Action Campaign* tells us how this delicate balance is to be achieved:

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[156] *Van Rooyen v The State (General Council of The Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246 (CC); 2002 (8) BCLR 810 (CC) at para 48. See also *Government of The Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39; and *Dawood* above at n 94.

[157] *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 CC at para 29.

> "Courts are ill-suited to adjudicate upon issues where Court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the Courts, namely, to require the State to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance."[158]

[104] To the extent that the Land Claims Court's order authorises its agent, the special master, to draw up the implementation plan that incorporates a determination of the budget, it goes beyond the usual bounds for judicial intervention. When courts interfere with the exercise of power by other arms of state, they discharge their primary function of upholding the Constitution. Having established the three arms of state, the Constitution charged the Judiciary with the responsibility of upholding and enforcing its provisions.

[105] Therefore, when the Judiciary declares that legislation or conduct is inconsistent with the Constitution and directs the relevant arm to act in accordance with relevant constitutional provisions, it is discharging its core mandate. In doing so the Judiciary cannot be accused of judicial overreach. A view to that effect is clearly misguided.

[106] The charge of overreach may have merit only if a court has exceeded limits of judicial authority. This may occur where a court reaches a decision that is inconsistent with the Constitution and which interferes with the exercise of power by other branches of the state. In the process of enforcing one provision of the Constitution, a court may not make a decision that breaches other provisions. One provision of the Constitution cannot be construed and applied in a manner that

[158] *Treatment Action Campaign* above n 97 at para 38.

abrogates another provision of the Constitution.[159] The Constitution requires to be upheld in its entirety.

[107] Any decision taken by a court which is inconsistent with the Constitution is invalid. This is because our Constitution is the supreme law that binds the state in the form of all its arms and is the source of their existence and the powers they exercise. Accordingly, a judicial decision or order that trenches upon the separation of powers principle is inconsistent with the Constitution and is invalid. This flows directly from the Constitution which declares that laws or conduct inconsistent with it is invalid.[160] Moreover, a decision or order that is inconsistent with any part of the Constitution does not amount to the discharge of the duty to uphold the Constitution.

[108] No matter how egregious the breaches of the Constitution by the other arm are and how loud the facts of a particular case call for justice, a court may not step in and exercise powers or perform functions entrusted to other arms of the state. This is because the Constitution does not authorise the Judiciary to replace the other arms and exercise their powers or perform their functions where there is a total failure by those arms and that failure causes gross injustice on innocent third parties. It bears repeating that the role of the Judiciary is to enforce the Constitution by declaring that the other arm has breached the Constitution and ordering it to rectify the breach. In addition, the Judiciary may supervise the rectification process by the errant arm.

Section 173

[109] The first judgment invokes section 173 of the Constitution to justify the appointment of the special master. I am unable to support this approach. First, I do not consider it necessary to rely on section 173 because section 172 sufficiently mandates every court, including the Land Claims Court to grant an appropriate

[159] *Speaker of The National Assembly v De Lille* [1999] ZASCA 50; 1999 (4) SA 863 (SCA).

[160] Section 2 of the Constitution provides:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

remedy when deciding a matter within its power. As mentioned, the remedial powers conferred on courts by section 172(1) incorporate the supervisory jurisdiction under which entities like a special master may be appointed.

[110] Second, it is apparent from the text of the section itself that courts whose inherent power is recognised in the section are the Constitutional Court, the Supreme Court of Appeal and the High Court only.[161] The Land Claims Court does not appear in the list of courts mentioned in the section. The fact that the Land Claims Court is a court of status similar to or equivalent to the High Court does not make it part of the High Court. Consequently, there is neither a linguistic nor a legal basis for concluding that the Land Claims Court enjoys the inherent power provided for in section 173 of the Constitution.

[111] *Public Servants Association*[162] is no authority for the proposition that the Land Claims Court has the inherent power to develop the common law. Some authority suggests that the power referred to in section 173 is the power that was previously exercised by the Supreme Court of Appeal under the common law and during the previous legal order.[163] At common law specialist courts that are established by statute did not enjoy inherent powers, especially the power to develop the common law.

[112] Nor does the power to make a just and equitable order include the inherent power of the kind referred to in section 173. The justice and equity power is sourced from section 172(1)(b) and not section 173. Conflating those separate provisions is not warranted.

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[161] Section 173 of the Constitution provides:

> "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[162] *Public Servants Association* above n 132.

[163] *Pohlman v Van Schalkwyk and Others* 2001 (1) SA 690 (E) at 697.

[113] For all these reasons, I conclude that the Land Claims Court's order revived in the first judgment needs to be tweaked so as to be in line with the Constitution. I would amend the order in paragraphs 6 and 7 in a manner that returns the exercise of power to determine the budget to the Director-General and his staff. The preparation of the implementation plan would also remain with the Directo-General and the special master's role would be limited to evaluating the plan devised by the Director-General and advising the Land Claims Court on its effectiveness. In other words the special master would play a role similar to that played by the panel of experts in *Black Sash I.*

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