National Association of Democratic Lawyers (NADEL)

SUBMISSION TO PARLIAMENT'S CONSTITUTIONAL REVIEW COMMITTEE

In re:

EXPROPRIATION WITHOUT COMPENSATION

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PROLOGUE

1. The Joint Constitutional Review Committee has called for written public submissions on the review of section 25 of the Constitution in order to effect the expropriation of land without compensation in the public interest. The spokesperson for parliament, Mr Moloto Mothapo said:

> "*The constitutional review committee has called for public submissions and other sections where necessary to make it possible for the state to expropriate land in the public interest without compensation*".

2. NADEL submits its written submissions and requests that it be allowed further to make oral submissions before the committee in parliament.

WHO WORKS THE LAND?

3. In the classic, *The Seed is Mine, The Life of Kas Maine, a South African Share Cropper 1894 – 1985* written by Charles Van Onselen, the author tells the story of a man and his family who successfully worked the land as a sharecropper for 35 years, but who died a broken man because

apartheid laws made it impossible for him and his family to survive as farmers.

4. As Van Onselen states in the introduction to the book:

> "*In South Africa the economic distance between landlord and tenant was widened by the racial and political and inequities that came first without conquest, then with segregation, later still with the policy of apartheid. Unequal access to state resources such as credit from the land bank, deepened the divide between landlord and tenant and hastened the decline of sharecropping as an institution. … As White landlords in the "wet" east slowly accumulated capital and put on the economic muscle that enable them to mechanise production and expand the areas under cultivation, so Black tenants were pressured into accepting wage labour; when they refused they were evicted, and in a renewed search for land rich but labour poor White landlords, they were driven further north and west into the drier areas where grain farming was less dependables*".

5. The story of Kas Maine is one of a diligent, entrepreneurial and successful farmer whose ability to make a living out of farming was denied him and his family in circumstances where even his landlords were successful because of him. When forced to leave one of the farms as a tenant sharecropper on 21 August 1956 he gave the reason for his decision not to accept another place to farm which was offered by the White landlord he said:

> "*I was sick and tired of being allocated a field and then being evicted once it had been cultivated and the soil proved fertile. You were chased away as soon as they discovered that you could produce a good harvest from*

soil that had previously been considered useless. You tamed the land and they got rid of you."

6. He obtained his *trekpas* (relocation pass) from his landlord which stated that he may proceed to Boons with 20 cattle, 15 sheep, 10 goats, 2 horses and 2 donkeys. The trekpas did not show that 6 years earlier he had possessed 8 horses, 12 donkeys, 60 cattle and 220 sheep.

7. As van Onselen states, the Maines had entered the Mooi River valley on a Ford truck with a chance of acquiring freehold property of their own, but left on an ox wagon for a residential stand on a communal farm in a "Black spot".

8. The author, describing what it means to be a sharecropper, says:

"*The seed is mine.*
The plough shares are mine.
The span of oxen is mine.
Everything is mine.
Only the land is theirs."

9. The story of Ramabonela Maine, also variously known as Kasianyane Maine, Philip Maine, Kas Deeu, Kas Teeu, Kas Teu or just "Old Kas" is a story of thousands others.

10. In Sol Plaatje's, *Native Life in South Africa*, he makes the following observation,

"*The campaign to compass the elimination of the Black from the farms, was not at all popular with land owners, who made huge profits out of the renting of their farms to natives. … but landowners pocketed the annual rents, and showed no inclination to substitute the less industrious "poor whites" for the more industrious natives*."

11. Writing about the aftermath of the 1913 Native Land Act, Plaatjie tells a story of an evicted black family that had had success and prosperity as sharecroppers. They had raised an average 800 bags of grain each season, which, with the increased stock and sale of wool, gave a steady income of about £150 per year after the farmer had taken his share."

12. Sharecropping is described as follows in Plaatjie's book:

> "*For the native provides his own seed, his own cattle, his own labour for the ploughing, the weeding and the reaping, and after bagging his grain he calls in the landlord to receive his share, which is 50% of the entire crop*."

13. Kgobadi reported Plaatjie that his landlord had demanded:

> "*The services of himself, his wife and his oxen, for wages of thirty shillings a month, whereas Kgobadi had been making over £100 a year, besides retaining the services of his wife and of his cattle for himself. When he refused the extortionate terms, the baas retaliated with a dutch note dated the 30th day of June 1913, which ordered him to "betake himself from the farm of the undersigned, but sunset of the same day, failing which his stock would be ceased and impounded, and himself handed over to the authorities for trespassing on the farm*."

14. It is our submission therefore, from these two authoritative sources and from contents of these submissions, that it is a myth that Blacks do not have the skills or the desire to work the land in a self-sustaining or profitable manner. Resources have been ploughed into making White farmers successful whereas they have consistently been withdrawn from Blacks in order to make them turn their back away from farming in order to provide labour in industrial areas and on the White farms.

15. We submit principally, that it is a poor argument to suggest that land reform should not be embarked on in order to restore land to Black people because they are unable or have no interest in farming.

INTRODUCTION

16. The National Association of Democratic Lawyers (NADEL) is a national non-profit organisation consisting of members, which operates as a voluntary association of progressive attorneys and advocates who are committed to the transformative vision of the Constitution and to principles of non-racialism, non-sexism, freedom, democracy, equality, justice and fairness. NADEL is not a law firm or a service provider; rather its members provide the necessary professional services, where required. NADEL remains a leading NGO with a solid record over more than 30 years of struggle and commitment to equality and justice, not only locally but also internationally. It seeks to promote a constitutional and legal case for the positive interpretation and application of land restitution, redistribution and tenure reform.

17. In June 2013, NADEL in partnership with the Foundation for Human Rights (FHR) held a community engagement seminar to coincide with the 100th anniversary of the 1913 Land Act. The programme focused on addressing the legacy of systematic dispossession and forced removals of black people from the land. The Minister of Rural Development and Land Reform, the Honourable Gugile Nkwinti, Chief Land Claims Commissioner, Ms. Nomfundo Gobodo, senior departmental officials from the Department of Rural Development and Land Reform (DRDLR), representatives from various organisations from civil society, lawyers, judges and human rights activists, all converged in Cape Town and participated in the programme.

18. The success of this programme prompted NADEL to strengthen its relationship with the DRDLR and during 2014 a Memorandum of Understanding (MoU) was concluded which records the parties' intention to collaborate on issues of mutual importance and concern, recognising that land reform remains a critical aspect on the transformation agenda of our constitutional democracy.

19. NADEL continues to be committed to providing technical legal support to the DRDLR to improve its organizational effectiveness, monitoring, capacity building and strategic planning, where this is needed. NADEL branches are also required to develop programmes and projects, which will contribute to the building of a progressive jurisprudence on land rights and land reform. All NADEL members endeavour to continue to engage relevant stakeholders on issues of land reform.

20. This submission has been developed in order to inform the key constitutional, legislative and policy considerations by Parliament's Constitutional Review Committee on the question of expropriation without compensation, especially for purposes of advancing land reform. It is made at a time when South Africa is undergoing profound and challenging tests of efficacy, legitimacy and relevance for the future transformed constitutional democracy. Across the country we see violent struggles of workers and communities for a better life for all. We are witnessing the rebirth of a worker and community consciousness and a revival of the struggle for socio-economic justice. The submission therefore endeavours to provide a framework to facilitate the achievement of constitutional rights and sound policies and practices on issues of land reform.

CONTEXTUAL ANALYSIS

21. During the period prior to 1993, a type of legal formalism guided the colonial and apartheid States' approach to black people's dispossession

of the land. There is an abundance of literature and case law that shows us how this approach conflicted with the harsh realities of especially poor black people, with tragic results.[i]

22. The Interim Constitution (1993) and Final Constitution (1996) changed the nature of this colonial apartheid legal formalism and introduced a human rights approach to achieving human wellbeing. While it gives everyone an opportunity to achieve their potential to acquire, hold and manage land, the larger goal of achieving substantive democracy has been challenging with the result that many gaps have developed between the constitution, laws and implementation, and policies and implementation.

23. One area (of law) where these gaps appear more pronounced and presents significant obstacles to building a new transformative social compact is property rights. The gaps and obstacles are compounded by the contested notion of ownership and dominion that pervades the discourse on land, and the absence of progressive State policies to reform and improve the status quo.

24. We can no longer deny that these gaps have also become more significant because of the widening poverty, unemployment and inequality, as well as the varied interests that have developed between rural and urban dwellers.

25. For the most part, it is the disparities in the social context within which the property rights exist that results in severe limitations placed on the meaning, process and outcomes for achieving redress through land reform.

26. These disparities present obstacles to building a new social compact based on the principles of *Ubuntu* and on the values and precepts of our constitution.

27. However, the structure of the property right (section 25) in the constitution also contains an imbalance of power in favour of an excessively *laissez faire* owner/dominion-centric approach, that directly imposes positive obligations in the wording *"subject to compensation"* (see s25 (2)(b) of the constitution), with clearly defined criteria for calculating compensation in terms of the monetary value of property rights.

28. In this sense, the power imbalance created in the structure encourages every aspect of property rights to be commodified and stratified thereby preventing universal access; while it simultaneously discourages regulation and interference by the government, to allow property rights to develop according to its own rules without any or very little regard to the policies and mechanisms for determining the social and communal value as well as the need for decommodification and destratification, and thereby grant universal access to property rights, especially for the poor, marginalized and indigent.

29. It therefore becomes imperative to not only address the disparities within the social context but also to review the balance of forces in the structure of property rights, if we are to mediate and facilitate the convergence of interests and rights between those who seek land redress and those who enjoy the relative comforts in the status quo currently.

30. Against this historical and contextual backdrop, NADEL submits that a bifurcated approach is needed, which reviews the structure of s25 (2) of the constitution and property rights in general; while simultaneously seeking legislative and other measures to achieve land, water and related reform (see s25 (8) of the constitution).

CONSTITUTIONAL TRANSFORMATION

31. Implicit to the transformative vision of the Constitution, is a social compact on land reform that is designed to: -

31.1. Achieve redress for apartheid injustices related to land dispossession and forced removal,

31.2. Build a culture of human rights, and

31.3. Promote spatial integration and development.

32. There appears however to be a disconnect on an ideological level between the transformative vision and the continued legal formalism that is guiding government's approach to property rights, with the latter sometimes conflicting starkly with the harsh realities of black people in rural and urban communities, and the interests of the poor in general.

33. While it is common cause that the governments goals of achieving land reform is a legitimate one, there is a perception that the owner/dominion-centric approach which it has adopted in order to achieve this goal may have contributed to the climate of mistrust on issues such as expropriation.

34. This mistrust is underpinned by a variety of obstacles to building a new social compact on land reform, such as: -

34.1. The absence of a progressive government policy on property rights which allows for expropriation without compensation;

34.2. The contested notion of ownership, dominion and possession that pervades the discourse on land reform;

34.3. The inability to effectively provide meaningful redress for black people who were dispossessed of their land rights under apartheid laws, policies and practices;

34.4. Opposition to a human rights approach to human wellbeing, which is often seen as an irritation rather than as a means to achieve land reform; and

34.5. Resistance to addressing the impact of apartheid spatial planning through the instruments of expropriation and land reform.

CRITICAL QUESTION

35. The critical question confronting us at this juncture is, whether we can achieve the balance of power needed in the structure of property rights in order to advance land, water and related reform in an equitable manner which provides adequate redress to the landless poor, marginalized and indigent, especially black people who were dispossessed under colonialism and apartheid?

WHO OWNS THE LAND?

36. The first statement that talks of ownership in the Constitution appears in the preamble and declares that:

> "*We, the people of South Africa,*
>
> *…*
>
> *Believe that South Africa belongs to all who live in it …*"

37. The second time that the country is referred to as a geographic space is in section 25 of the Constitution under the rubric of property. Subsection (4)(b) clarifies that reference to property is not limited to land.

38. Land is referred to for the third time in subsection (5), which gives power to the state to take reasonable legislative and other measures to "*enable citizens to gain access to land on an equitable basis*."

39. In order for the state to be able to deprive an owner of their ownership of land or any other property, it can do so only in terms of a law of general application, and such expropriation has to be in pursuit of the following objectives:

    39.1. For a public purpose or in the public interest;

    39.2. To foster conditions which enable citizens to gain access to land on an equitable basis;

    39.3. Give legislative, legally secure tenure to a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices;

    39.4. Restore property to a person or community disposed as a result of past racially discriminatory laws or practices.

40. We wish to point out that restoration of property under subsection (7) is preceded by subsection (4) which provides for expropriation in the public interest in order to fulfil "*the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources*."

41. It is submitted that the preamble to the Constitution and section 25(4) give primacy to land and other property in the form of natural resources, as belonging to all the people who live in South Africa and that post the colonial and apartheid errors, land and other property must be accessed by all on an equitable basis.

42. Therefore, it is submitted that the Constitution places a primary duty on the state to ensure that land and other natural resources are distributed or accessed equitably by all South Africans. In the circumstances, it is submitted that the state can do this best by passing a law of general application that empowers the state to expropriate all such property in the public interest as required by subsection (4).

COMMENTARY ON THE PROPERTY CLAUSE

43. Section 25 of the constitution permits expropriation of property *"for a public purpose"* and *"in the public interest"* by the State:

> ***25 Property***
>
> *(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*
>
> *(2) Property may be expropriated only in terms of law of general application –*
>
> *(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.

(4) For purposes of this section –

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa' natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament,

either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(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 thst any departure from the provisions of this section is in accordance with the provisions of section 36(1).

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

44. The above provisions, which enshrine the right to property as a standard human right, paves the way for the State to expropriate property, if this is in pursuit of a general public purpose or in the public interest.

45. The effect of an expropriation of property i.e. to deprive the individual owner of full ownership rights in terms of use and control of property, for a public purpose or in the public interest is to fulfill government priorities under dedicated programs such as the land reform programme.

46. The notion of “in the public interest” was specifically developed alongside “public purpose” to provide redress for black people who were dispossessed of their land under apartheid.

47. The state has so far utilised subsection (7) in pursuit of the land restitution programme.

48. Whether the state acts under subsection 2(a), subsection (5), subsection (6) or subsection (7) of the property clause (section 25), any deprivation of property that arises in these circumstances is subject to compensating the person who lays claim at the time of acting in terms of these subsections. Section 25 is unambiguous in as far as the requirement for compensation or redress is concerned, though it provides for circumstances where "*the market value of the property*" is not the only measure of redress.

49. Subsection (2) is peremptory in its provisions that property may be expropriated subject to compensation to those affected. The amount of such compensation has to be as agreed to by those affected or decided or approved by a court. Furthermore, subsection (3) is clear in its provisions that having taken the factors listed thereunder, the amount of the compensation "*must be just and equitable*".

50. In the circumstances, submissions to the effect that section 25 makes provision for expropriation without compensation where necessary border on the ludicrous. Should any such circumstances exist they would be very few and very far apart. Even where the purpose for the expropriation is for the public interest, a person with title to the property cannot simply be thrown off or be deprived when the Constitution stipulates that property may be expropriated for a public purpose or in the public interest and subject to compensation.

51. It is submitted therefore that the state should take "*legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination*" as provided in subsection (8).

52. It is submitted that such legislative and other measures would pass muster under section 36 of the constitution because the required

justifications are contained internally to section 25. The justification for the ownership of land and other natural resources by the state is that it is in the public interest to foster land reform and other reforms related to other forms of property in order to bring about equitable access to all South Africa's natural resources.

53. The Constitution however requires compensation for expropriation - see section 25(2)(b) which stipulates "*subject to compensation"* - and places an obligation on the State to pay the owner compensation, if the burden on him/her amounts to a deprivation, that is a: -

53.1. Diminution of his/her property rights, or

53.2. Divesting of his/her property.

54. The section however highlights two important aspects for consideration: The first relates to the fact that under its normal powers, Parliament may pass laws allowing expropriation with compensation to take place, though the compensation does not necessarily have to be market value. Indeed, market value is just one of several considerations to take into account. The second clearly demonstrates that arbitrary deprivation of property and compensation is dealt with in some detail, but makes no provision for expropriation without compensation. In regard to this aspect it is submitted that, as long as expropriation without compensation does not constitute arbitrary deprivation of property *per se*, and if such expropriation is in accordance with section 36(1), it might very well pass constitutional muster.

55. The Constitution provides for the departure from a binary focus on traditional property rights i.e. ownership/dominion vis-à-vis possession/occupation. It introduces aspects of social justice, *Ubuntu* and equality into property rights by recognizing:

55.1. Traditional property rights with the concern for social justice and human wellbeing i.e. the realisation of socio-economic rights.

55.2. The public purpose or public interest pursued by the State, and the rights of the property owner.

56. We are forced to recognise that at a philosophical level, the owner/dominion-centric approach presents a significant obstacle to the building of a new social compact based on principles of social justice and *Ubuntu,* and that in the broader context of constitutional democracy, this approach needs to structurally evolve in our law so that institutional change can follow. [ii]

57. The transformative vision underlying section 25 of the Constitution provides the necessary guidance to decision makers and the courts seeking to achieve the balance between traditional property rights and the goals of redress, development and ensuring human wellbeing.

58. This means that a balance of power in respect of property rights implies that the constitutional standards on expropriation, and concomitantly on compensation, need to be applied flexibly within the current context with due regard to principles of social justice, *Ubuntu* and equality.

59. The government, with specific emphasis on the legislature and judiciary, should not interpret the interests of owners as "trumping" the interests of landless people and communities, to the extent that the latter, whether individually or as a community, cannot identify and realize aspirations, to satisfy their basic needs and to change and cope with the environment.

60. Therefore the challenge is to encourage this evolution in the law by infusing the elements of "grace and compassion" into the ownership/dominion perspective, and thereby balance the interests of owners with the interests of the landless in a principled way, so that the

quality of life of the poor, marginalized and indigent can be meaningfully improved and not worsened.

61. The proposition for a moderated approach is supported by the Constitutional Court, which holds that in all cases, a balance must be struck. The Constitutional Court has noted on the one hand:

> *"The 'normality' assumption that the owner was entitled to possession unless the occupier could raise and prove a valid defence, usually based on agreement with the owner, formed part of Roman-Dutch law and was deemed unexceptional in early South African law, and it still forms the point of departure in private law. However, it had disastrous results for non-owners under apartheid land law: the strong position of ownership and the (legislatively intensified) weak position of black non-ownership rights of occupation made it easier for the architects of apartheid to effect the evictions and removals required to establish the separation of land holdings along race lines."*
>
> [*Port Elizabeth Municipality v Various Occupiers (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004)* at para 10].

62. This balance is referred to by the Constitutional Court in *Port Elizabeth Municipality v Various Occupiers (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC)* (1 October 2004) at paras 15-16, as follows:

> *"The blatant disregard manifested by racist statutes for property rights in the past makes it all the more important that property rights be fully respected in the new dispensation, both by the state and by private persons.*

Yet such rights have to be understood in the context of the need for the orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past.

As Ackermann J pointed out in First National Bank, subsections (4) to (9) of section 25 underlined the need for and aimed at redressing one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land in South Africa. The details of these provisions had to be borne in mind whenever section 25 was being construed, because they emphasised that under the Constitution the protection of property as an individual right was not absolute but subject to societal considerations. His judgment went on to state:

The preamble to the Constitution indicates that one of the purposes of its adoption was to establish a society based, not only on 'democratic values' and 'fundamental human rights' but also on 'social justice'. Moreover the Bill of Rights places positive obligations on the State in regard to various social and economic rights. Van der Walt (1997) aptly explains the tensions that exist within section 25:

> *'[T]he meaning of section 25 has to be determined, in each specific case, within an interpretative framework that takes due cognisance of the inevitable tensions which characterize the operation of the property clause. This tension between individual rights and social responsibilities has to be the guiding principle in terms of which the section is analysed, interpreted and applied in every individual case.'*

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. When considering the purpose and content of the property clause it is necessary, as Van der Walt (1997) puts it –

> *'. . . to move away from a static, typically private-law conceptualist view of the constitution as a guarantee of the status quo to a dynamic, typically public-law view of the constitution as an instrument for social change and transformation under the auspices [and I would add 'and control'] of entrenched constitutional values.'*

That property should also serve the public good is an idea by no means foreign to pre-constitutional property concepts."

DISCUSSION

63. NADEL has examined the question, whether section 25 of the constitution disallows expropriation without compensation completely?

64. Section 25(7) is notable and provides:

> *"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."*

65. This clearly provides a right to the return of property or redress to a person or community deprived thereof.

66. Furthermore, section 25(8) provides:

> *"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)."*

67. This indicates that section 25 of the Bill of Rights may be overridden, so as to provide for land reform to redress historical patterns provided it is done in a way, which is constitutionally compliant.

68. The above is consistent with international law, which recognizes the right of the state to expropriate private property.

69. However, the right to expropriate and the notion of *"subject to compensation"* is not an absolute requirement to expropriate land for land reform purposes. There are important limitations to take into account.

70. It is ultimately on the question of the scope and limitations on the states power to expropriate where the divergence of opinion occurs.

71. Indeed, the Constitutional Court has noted:

> "*In the first place, the rights of the dispossessed in relation to land are not generally delineated in unqualified terms as rights intended to be immediately self-enforcing. For the main part they presuppose the adoption of legislative and*

other measures to strengthen existing rights of tenure, open up access to land and progressively provide adequate housing. Thus, the Constitution is strongly supportive of orderly land reform, but does not purport to effect transfer of title by constitutional fiat. Nor does it sanction arbitrary seizure of land, whether by the state or by landless people. The rights involved in section 26(3) are defensive rather than affirmative. The land-owner cannot simply say: this is my land, I can do with it what I want, and then send in the bulldozers or sledgehammers."

[*Port Elizabeth Municipality v Various Occupiers (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC)* (1 October 2004) at para 20].

72. In the circumstances, NADEL submits that a blanket policy of expropriation of land without compensation, regardless of whether it is residential, commercial, agricultural, or recreational, which does not address *inter alia*, the question of arbitrary deprivation of property and without regard to the circumstances of the owner and the method of acquisition, would probably not be justifiable. The reason for this lies in notion of "adequate reparations", which is well recognized and entrenched in both international and domestic law.

73. There is however no absolute bar to a policy that provides for expropriation without compensation. Compensation is not indispensable to property rights. In certain situations, where large swaths of land have been passed down from generation to generation, and may be sitting idly, then expropriation of part thereof without compensation could be justifiable. In the alternative, far less than market value may suffice.

74. The following passage from a Constitutional Court judgment in the context of evictions, but which is equally applicable to weighing the various factors in relation to the question of expropriation without compensation, is instructive:

> *"Different considerations could arise depending on whether the land occupied is public or privately owned. In the case of public land, the state generally has further land to meet its obligations in terms of section 26 of the Constitution, while in the case of privately owned land there is normally no alternative land available unless the state takes steps to acquire some. On the other hand, private land may be derelict, with the owners having little practical interest in its utilisation, while public land may have been set aside for important public purposes, including the provision of housing. The motivation for settling on the land could be of importance. The degree of emergency or desperation of people who have sought a spot on which to erect their shelters, would always have to be considered. Furthermore, persons occupying land with at least a plausible belief that they have permission to be there can be looked at with far greater sympathy than those who deliberately invade land with a view to disrupting the organised housing programme and placing themselves at the front of the queue. The public interest requires that the legislative framework and general principles which govern the process of housing development should not be undermined and frustrated by the unlawful and arbitrary actions of a relatively small group of people. Thus the well-structured housing policies of a municipality could not be allowed to be endangered by the unlawful intrusion of people at the expense of those inhabitants who may have had equal claims to be housed*

on the land earmarked for development by the applicant. Municipalities represent all the people in their area and should not seek to curry favour with or bend to the demands of individuals or communities, whether rich or poor. They have to organise and administer their affairs in accordance with the broader interests of all the inhabitants."

[*Port Elizabeth Municipality v Various Occupiers (CCT 53/03) [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) (1 October 2004)* at para 25].

75. NADEL submits that in developing an amendment to the constitution or constitutionally compliant legislation or other measures, Parliament would need to take into consideration the following before resorting to expropriation of any specific land without compensation:

75.1. Whether there is suitable public land available in the area, which would achieve the same result as the private land?

75.2. If so, is such public land readily available, or is the land already serving a compelling public function, so that private land is more readily needed?

75.3. What is the purpose for which private land is sought? For instance, is it for land reform or for general housing?

75.4. If it falls into the former, are there alternatives to expropriation – like, for instance, entering into a joint venture or partnership with the current owners to allow redress?

75.5. For what purpose is the private land presently being used? For instance, is it derelict or used for recreational purposes, such as being a private game farm? If so, the private property interests, when weighed against the interests of poor individuals, may not be as strong.

75.6. To what extent has the private property owner benefitted from past racially exclusive practices, and to what extent will they suffer a financial disadvantage by way of expropriation? For instance, did the land previously belong to someone else?

75.7. Did the current owner or his predecessors in title pay market value for the land?

75.8. What are the financial and other circumstances of the current owner of the land and that of the proposed new occupants? This should be weighed by looking at the relevant circumstances of the owner of the land and the potential new occupiers. Again, regard should be had to alternatives short of expropriation, such, for instance, as a joint venture. Arguably, no landowner should be left landless or without any agricultural land, just to make way for others.

75.9. What connection does the community or individual seeking expropriation have to the specific land or area in question?

75.10. What connection does the individual currently owning the land have to the area in question? In this regard, a relevant question would probably be whether he resides in the area or on the land. Indeed, if he has property throughout the country and visits the specific piece of land rarely, the argument for expropriation may be stronger, as his personal connection to the land as a “home” will be missing, as will severe financial prejudice.

75.11. Is the State unable to pay any compensation for the land, even an amount significantly below market value? If so, why?

76. The question of the expropriation without compensation will need to pass a vigorous constitutional test to be valid or pass constitutional muster. It will require an individualised inquiry in each case into various factors.

77. Importantly, a lawful or legitimate expropriation without compensation policy must be non-discriminatory; be either for a public purpose or in the public interest; and subject to a legal process. This is almost a *sine qua non* for investor or economic protection, and generally the rights of owners and the landless seeking redress.

78. In most cases, it must be recognised that, at least some compensation would need to be paid, even if it is less than market value, although the possibility of situations where no compensation would be paid cannot be ruled out completely.

79. The alternative, of course, would be to amend section 25 of the Constitution itself. To amend the Bill of Rights, a 2/3's majority of Parliament will need to vote in favour thereof. However, to amend the Founding Provisions of the Constitution, a 75% majority is required. This would be difficult to achieve, without significant give and take.

80. NADEL submits that the Founding Provisions may need to be amended to allow for more flexibility in the system that regulates property rights, and is able to accommodate expropriation without compensation. Indeed, the Founding Provisions note:

80.1. *"Human dignity, the achievement of equality and the advancement of human rights and freedoms"* are fundamentally important precepts.

80.2. "*Non-racialism and non-sexism"* are founding values.

80.3. *"All citizens are equally entitled to the rights, privileges and benefits of citizenship; and equally subject to the duties and responsibilities of citizenship."*

81. A rigid or inflexible expropriation without compensation policy would potentially fall foul of the above, especially if it provides a racial test for land reform in this regard.

82. Equally so, taking away someone's residence or for that matter, even someone's farm, without regard to their individual circumstances and method of acquisition, may violate the right human dignity and may in essence, violate their freedom.

83. So too, the right to equality may be violated by a law, which does not take individual circumstances into account. Indeed, a small-time farmer may be in a very different position than a large-scale commercial farm operation.

84. Therefore, taking into account substantive equality, expropriation without compensation from a small-time farmer would have a disproportionately grave impact, as opposed to what it would have on a large commercial enterprise.

85. In the circumstances, NADEL submits that extreme care would need to be taken in balancing all the various rights involved, under the current constitutional framework.

FORMS OF LAND TENURE

86. Since the amendment of section 25 will result in the state being the custodian of land and other natural resources on behalf of the people and

to ensure equitable access to them, *"legislative and other measures"* must be taken in order to give tenure that achieves the objectives of a prosperous country. The considerations that may be taken into account in deciding on the appropriate forms land tenure arrangements in all circumstances shall include the factors set out in section 25 (3)(a) – (d).

RECOMMENDATIONS

87. It must be recognized that the economic and political realities and the need to attract development opportunities as well as the cost of perpetuating an excessively *laissez faire* owner/dominion-centric approach to property rights is too high for South Africa to pay. The adoption of an expropriation without compensation policy is necessary when viewed from the perspective of the landless poor, marginalized and indigent people and communities,

88. NADEL urges the Constitutional Review Committee to review the structure of property rights in its entirety at this juncture, such that a minimalist, flexible and balanced rights-based approach is adopted in order to enable the state to exercise its powers unrestrained and expropriate property without compensation for a public purpose and in the public interest.

89. In terms of this balanced rights-based approach, compensation should not remain an essential prerequisite or be treated as a fundamental right, but rather the public purpose and public interest coupled with judicial review, to restrain decision-making and eliminate unfair discrimination.

90. NADEL urges as amendment to section 25(2)(b) which removes the imbalance referred to above, and permits expropriation without compensation, subject to certain conditions. These conditions may include and are not limited to the following:

90.1. Suitable public land available in the area, which could achieve the same result as the private land under consideration.

90.2. The purpose for which private land is sought.

90.3. Alternative means of achieving the same public purpose or public interest objectives.

90.4. The extent to which the pubic purpose or public interest outweighs private property interests.

90.5. Benefits under past racially discriminatory practices.

90.6. Payment of market value for the property.

90.7. Financial circumstances of the current owner and those of the landless claimants.

90.8. Connection of the individual or community seeking expropriation to the property.

90.9. Ability of the state to pay compensation.

90.10. Harm that will be suffered if expropriation without compensation is implemented.

CONCLUSION

91. The Constitutional Review Committee is faced with the enormous task of reviewing a complex question of expropriation without compensation can be achieved using constitutional, legislative and other measures. There are many conflicts and tensions of laws, rights and interests, which emerge in the process of finding the answers. Thus far, the philosophical,

historical political and economic factors provide the necessary imperatives for constitutional, legislative and policy reform, however the differences in meaning, process and outcomes need to be overcome and so too the practical barriers to achieving land reform. This submission offers new avenues for understanding and advancing human wellbeing through a review of the structure of property rights at this critical juncture in our fledgling democracy.

SUBMITTED BY NADEL

5 JUNE 2018

FOOTNOTES

[i] A brief review of the history of laws regulating black land ownership in South Africa reveals the following:

1. During the period prior to 1910, the early position was generally that black people could not own land in their own names. For example, the Constitutional Court has noted:

> *"Until 1905, the practice in the former Transvaal or Zuid-Afrikaansche Republic was that ownership of land could not be registered in the name of a "native". This was justified on the basis of two instruments, namely, the Volksraad Resolution of 14 August 1884 and article 13 of the Pretoria Convention, 1881. The latter provided that: "Natives will be allowed to acquire land, but the grant or transfer of such land will in every case be made to and registered in the name of the Native Location Commission hereinafter mentioned, in trust for such natives."*
>
> *However, in 1905, and following the decision in Tsewu v Registrar of Deeds which held that neither of these instruments had the force of law and that title could be registered in the names of "natives", African people were able to purchase land from white farmers. It is said that subsequent to 1905 and before June 1913, African people purchased some 399 farms. All this changed in June 1913, when the Natives Land Act, 1913 (now the Black Land Act) was enacted."*
>
> [*Tongoane and Others v National Minister for Agriculture and Land Affairs and Others 2010 (6) SA 214 (CC)* at paras 10-11].

2. The history of dispossession, however, came about first through practice, and then through specific laws preventing black ownership.

> *"With the arrival of the Boer settlers in the Transvaal, came a rudimentary system of land registration which became more sophisticated over time. Each citizen or burgher of the Transvaal Republic could claim a farm of 3000 morgan. Initially the grants of such farms were performed informally by the landdrost who issued certificates of registration for land. Such claims of land by burghers encroached on the land settled historically by the Bafokeng. By the mid-19th century all the land forming the greater Rustenburg region had been granted to Boer farmers, who accordingly became the registered owners of the land. At law the registered owner of land had absolute rights of ownership*

and possession. Accordingly, whilst the Bafokeng continued to occupy portions of their ancestral land, at that stage they enjoyed no rights of ownership. Thus for example the principal village which was within the present municipal area of Rustenburg was vacated and moved to the village of Kana situate on what is today the farm Reinkoyalskraal 278JQ."

[Royal Bafokeng Nation, Submissions by the Royal Bafokeng Nation in Respect of the Communal Land Rights Bill, 2003 at para 9].

The same submissions contain an instructive summary of land ownership instruments in the Transvaal during this period (and how they were applied to the Royal Bafokeng Nation):

"In April 1844 the First Boer Constitution, being the Thirty-Three Articles drawn up at Potchefstroom, expressed the attitude that there would not be equality between blacks and whites as regards land rights. Article 29 thereof provided:

"No natives shall be allowed to settle near village lands, to the detriment of the inhabitants, except with the consent of the full Raad".

The Volksraad of The South African Republic (the "Transvaal Republic") resolved in November 1853 that Commandant-Generals and Commandants could grant farm land to blacks provided:

"... that such a farm be occupied by them and their descendants conditionally as long as they behave in accordance with the law and obediently. In case of disobedience such tenure may be declared lapsed, and, if so, it shall always remain only a loan farm, and the conditions or rent may be summed up in the words "good behaviour or obedience".

In June 1855 the Volksraad passed a resolution which provided that:

"... no one who is not a recognised burgher shall have any right to possess immovable property in freehold... All coloured persons are excluded herefrom, and the burgher-right may never be granted or allowed to them (in accordance with the Grondwet)."

The Grondwet which was the constitution of the Transvaal Republic was adopted at Rustenburg in 1858 and provided that:

"The people will not permit any equalisation of coloured persons with white inhabitants neither in Church nor in State".

The issue of whether blacks could purchase land arose when the Commandant of the Rustenburg district enquired of the Volksraad whether blacks in his district could purchase land from a burgher. The Executive Council proposed to the Volksraad that in such cases transfer should be made out in the name of the government, the use of the farm being available to the native and his heirs as long as they conducted themselves according to law. One member of the Volksraad proposed that, *"according to law no land should be sold to blacks"*, but this was rejected. The Volksraad referred the matter back to the Executive Council for a report as to the best way in which to provide the blacks with locations and what would be in accordance with the law. The Volksraad appointed a Commission to enquire into and report on the matter. The Commission duly reported whereafter a Volksraad resolution was passed in November 1871 which allowed for the purchase of land:

> *"... by Kaffir tribes, subject to the condition that they shall not be allowed to in any way dispose of this ground otherwise than with the consent of the Government ..."*

The government also retained a pre-emptive right to land where black purchasers wished to dispose of land.

This 1871 resolution of the Volksraad was however not acted upon and did not become law. A petition in 1872, which requested that land not be sold to blacks and that blacks not be entitled to obtain freehold ownership, was answered by the Volksraad stating that it was unknown that transfer had ever been given to blacks.

In 1873 the question of land ownership by blacks was again raised before the Volksraad, which referred the issue to the government for a report and proposal. Executive government submitted its report to the Volksraad in 1874 and placed before it a proposed law on the transfer of land to blacks. The proposed law provided for the transfer of:

> *"landed property to any coloured persons who shall produce a certificate from the Field-Cornet of the ward in which he abides or is resident, or from the Landdrost of the division which he resides, that such person is well known to him as an honest, quiet, industrious and peace-loving person, faithful to the Republic".*

The report and the draft law were both discussed by the Volksraad and rejected. The resolution, which rejected the proposed law, stated that it was in conflict with the Grondwet (Constitution). In law the status quo remained unaltered. The Volksraad resolution of 1855 continued to apply, whereby blacks were excluded from holding property in freehold.

In January 1875 Kgosi Mokgatle of the Bafokeng assisted by J.A. Butner enquired of the government whether a farm that the Bafokeng had purchased

could be transferred into their name, and, if that was not possible, whether the farm could be transferred into the name of the government in trust for the Bafokeng. The response from the Executive referred Butner to a Volksraad resolution of the previous year which, pursuant to a request by one Macapan Aapie had refused to approve the transfer of land into the name of either an indigenous community or the government in trust for such community.

Up to the time of the British occupation in 1877 the grants of land for black occupation made by the government of the Transvaal Republic were according to these principles.

On 12 April 1877 Sir Theophilus Shepstone annexed the Transvaal on behalf of Britain. The annexation proclamation guaranteed "equal justice to the persons and property of both white and coloured", but "without the granting of equal civil rights", such as the right of voting, or their being entitled to "other civil privileges incompatible with their uncivilized condition". The proclamation guaranteed that all private bona fide rights to property, guaranteed by the existing laws of the Transvaal Republic would be respected.

The British Administration altered the position in that it initiated the principle of vesting land title for blacks in a responsible representative of the government as official trustee. The Lagden Commission Report was later to record this change in policy towards the purchase of land by blacks which occurred during the British occupation as follows:

> *"With the British occupation of 1877 a modification of the principle of the South African Republic, which refused recognition of the right of Natives to purchase land, was introduced.*
>
> *It was considered inadvisable to make a violent change by which Natives should have the right to purchase land and to have it registered in their own names. The course adopted by the late Sir Theophilus Shepstone was to make the Secretary for Native Affairs ex officio trustee for the Native purchases; thus the latter were secured in their rights, and the office being a permanent one, all risk of their being put to trouble and expense, in the event of the death of a trustee, was obviated."*

The Lagden Commission Report also records that until the time of annexation of the Transvaal:

> *"The Government of the late South African Republic was, up to this point, unwilling to allow natives to acquire land by purchase. In these circumstances, the Natives resorted to the expedient of arranging with Missionaries to buy land for them, which was registered in the name of the Missionary. The purchase price*

was collected by each Native Chief from his tribe, principally in cattle, and the Missionary arranged the transaction."

As early as 1869 the Bafokeng had purchased and paid the purchase price of £9 for a portion of land, which was registered in the name of a missionary. In 1871 the Bafokeng purchased and paid the purchase price of £150 for a further portion of land. Further similar purchases followed in 1874, 1876 and 1879 with all these farms being registered for the Bafokeng in the names of missionaries with the Hermansburg Mission Society.

Sir Theophilus Shepstone did not approve of land purchased by indigenous communities being held by missionaries. He accordingly instructed:

"That until further legislation on the subject, all lands purchased by or for natives are to be held in trust by the Secretary for Native Affairs for such natives".

Prior to July 1879 Kgosi Mokgatle of the Bafokeng obtained an interview with Sir Theophilus Shepstone in regard to land ownership by blacks. Shepstone indicated to Kgosi Mokgatle that according to the law blacks could not obtain ownership in land and that until such time as the law was amended no change in this respect could be achieved. Accordingly Shepstone enquired from Mokgatle as to what arrangements had been made in respect of the land, which had already been purchased by the Bafokeng. Mokgatle informed Shepstone that the land was transferred into the name of a missionary, Reverend Penzhorn. The problem was that Penzhorn no longer wished to shoulder this responsibility as he anticipated that the Bafokeng would have problems in relation to the properties when Penzhorn died. Shepstone agreed with this and indicated that it would be better if the land could be transferred into the name of one or other government official in trust for the Bafokeng because the office of such official would continue to exist even if the holder of that office died. Shepstone nevertheless advised Kgosi Mokgatle that the Bafokeng leave matters as they stood for the present.

In December 1879 Reverend Penzhorn wrote to the Colonial Secretary, M. Osborne, requesting that the Bafokeng be given evidence of the fact that the government would transfer their land into the name of a trustee on their behalf. In that letter Penzhorn indicated that the Bafokeng intended to purchase a further farm and that the seller was prepared to sell it, provided it could be transferred into the name of Mokgatle or the government in trust. H. Shepstone in his minute to M. Osborne regarding this letter said:

"The suggestion that the land should be transferred to the Government in trust is a good one. There have been one or two similar applications and the land has been transferred to me in my capacity as Secretary for Native Affairs in trust for the native purchaser. I would suggest that a similar course be adopted in this case".

The Administrator of the Transvaal, W.O. Lanyon in his minute regarding the same matter said:

> *"this shows how ready the natives are to agree in the proposal to have a government trustee".*

In his Masters thesis on, *"The Question of Native Property Rights in Land in the Transvaal"*, W. A Stals states that the evidence shows that the British interim government for the first time at the beginning of 1880 officially decided that the Secretary for Native Affairs should be appointed *ex officio* as trustee for land purchased by native tribes. Thereafter the policy laid down in the case of the Bafokeng became general policy.

This period of British occupation of the Transvaal ended the following year at the battle of Majuba in February 1881. After that Boer victory the British accepted defeat and restored the independence of the Transvaal Republic. The Pretoria Convention signed in August 1881 contained the terms of cessation of war. Under that convention the British recognised the complete self-government of the Transvaal subject to certain reservations and limitations.

The day before the Pretoria Convention was signed, Sir Hercules Robinson, President of the Royal Commission and High Commissioner for South Africa, delivered an address to the Blacks of the Transvaal assembled at Pretoria. He explained the conventions upon which it had been agreed that the country would be given back to its former Boer rulers. In his address, which was later gazetted, Robinson said the following:

> *"In the conditions, to which as I have said they (Messrs Kruger, Pretorius and Joubert) agree, your interests have not been overlooked. All existing laws will be maintained, and no future enactment which specially affects your interests will have any effect until the Queen has approved of it. I am anxious that you should clearly understand this today, and realise that although there will be a change in the form of Government, your rights, as well as your duties, will undergo no alterations.*
>
> *You will be allowed to buy or otherwise acquire land, but transfer will be registered in trust for you in the names of three gentleman who will constitute a Native Location Commission. The Commission will mark out Native Locations, which the great Native Tribes may peacefully occupy. In marking out these locations, existing rights will be carefully guarded; and the Transvaal Government on the one hand and the native tribes on the other, will always have to respect the boundaries so defined ..."*

Article 13 of the Pretoria Convention formally recorded this position:

> *"Natives will be allowed to acquire land, but the grant or transfer of such land will in every case be made to and registered in the name of the Native Location Commission hereinafter mentioned, in trust for such natives".*

During March 1882 certain burgers in the Rustenburg district sent a written request to the Volksraad that no land should be transferred to blacks. The State Secretary to the Transvaal Republic replied by way of letter which document was subsequently approved by the Volksraad in August 1884. The letter of the State Secretary recorded:

> *"With reference to that portion in which you request that no ground may be sold to natives, or directly or indirectly transferred to their names, I have received instructions to refer you to Article 13 of the Convention whereby provision is made for retaining ground for Natives in the name of the Kaffir Location Commission, so that the Natives cannot hold ground in their own names.*
>
> *It is not possible for the Government to comply with the request about the sale of the ground to natives, and no laws exist or ever have existed which prohibit such".*

The Lagden Commission Report records that the Volksraad resolution of August 1884 was interpreted to approve of the principle that blacks could not hold land in their own names, and that this principle was acted upon by the Registrar of Deeds under the government of the second British occupation.

In 1882 and 1883 the farms Zanddrift and Beerfontein, which had been purchased by the Bafokeng were registered in the Deeds Register in Pretoria and transferred in "*full and free ownership"* to the Native Location Commission in trust for the Bafokeng. (The Commission included among its members Paul Kruger, Vice-President of The Transvaal Republic and George Hudson the British Resident).

The London Convention of 1884 replaced the Pretoria Convention and essentially abolished British supervision over the Transvaal Republic. This Convention provided that all transfers to the British Secretary for Native Affairs in trust for blacks remained in force, but that an officer of the South African Republic would take the place of such Secretary for Native Affairs. Consequently the Superintendent of Natives took over this role on behalf of the Transvaal Republic.

In 1896 the new constitution of the Transvaal Republic provided that:

> *"All persons who are within the territory of this Republic shall have an equal claim to protection of person and property".*

But at the same time laid down that:

> *"The people will not permit any equalisation of coloured persons with white inhabitants".*

In 1887 the farm Bierkraal purchased by the Bafokeng was transferred to the Superintendent of Natives in trust for the Bafokeng. In 1890 the farm Doornspruit was similarly transferred. The transfer of these farms to the Superintendent of Natives illustrates the prevailing policy of the government of the Transvaal Republic in regard to registration of land acquired by blacks.

Prior to 1898 Kgosi August Mokgatle of the Bafokeng requested the government to have all Bafokeng farms, which were at the time registered in the names of missionaries transferred to the Superintendent of Natives in trust for them. However the relevant documents were mislaid in the office of the Native Commissioner of Rustenburg.

In October 1899 Britain declared war on the Transvaal Republic, formally annexed the territory and renamed it the Transvaal Colony. War continued until peace talks were concluded with the treaty of Vereeniging in May 1902. In consequence of the British victory, the Superintendent of Natives was formally succeeded by a British official namely, the Commissioner of Native Affairs.

Lord Milner, the Administrator of the Transvaal, repealed and declared of no force and effect a large number of Transvaal Republic laws. Those included the Constitution of 1858 and 1896, various Volksraad resolutions and government notices published under the Transvaal Republic.

Under the second British occupation Sir G.Y. Lagden was appointed the Commissioner of Native Affairs. In 1903 a portion of the farm Kookfontein, which had been purchased by the Bafokeng was transferred to "Commissioner of Native Affairs in trust" for the Bafokeng.

In July 1904, the Lagden Commission issued its *"Report Relative to the Acquisition and Tenure of Land by Natives in the Transvaal"*, in which was stated in respect of the class of land held by the Bafokeng:

> *"Land Owned by Natives: These properties were almost entirely acquired under the late Government. Being property purchased by communal subscription, it is not practicable to exercise the same control as over Government Locations.*
>
> *The title to such property is or is about to be vested in the Commissioner for Native Affairs in trust for the owners, who cannot, therefore, encumber or dispose of their interests without the consent of the Government".*

In 1904 the farm Vaalkop, which had been purchased by the Bafokeng was similarly transferred to “The Commissioner of Native Affairs, his successors in office, in trust” for the Bafokeng.

In April 1905 judgement was handed down by the Supreme Court of the Colony of the Transvaal in case of *Tsewu v Registrar of Deeds*. On the basis that all the inhabitants of the country enjoy equal civil rights under the law the court held that an aboriginal native of South Africa was entitled to claim transfer in the deeds office of any land of which he was the owner. The court unanimously upheld the right of a black to obtain registration of transfer into his own name. The court held that there was no law, which justified the position adopted by the Registrar in refusing to register land in the name of the black plaintiff. Chief Justice Innes stated:

> *"No doubt the practice has prevailed for years in this country of not allowing transfer of land to be made direct to any native, but insisting upon transfer being taken in trust for him by an official appointed by the State. But the existence of that custom cannot in my judgement justify the attitude of the respondent. It is for the legislature to deal with the matter if it is thought right to make special provisions in regard to natives. When we find nothing in the statute book which would warrant us in drawing any distinction we are bound to draw none".*

In the *Tsewu* case the court referred to the Volksraad resolution of 1855 and accepted that had this not been repealed blacks would have been directly prohibited from holding landed property in the Transvaal.

In September 1906 the farm Klipgat purchased by the Bafokeng was transferred to the Commissioner of Native Affairs for the Transvaal in trust for the Bafokeng. Soon thereafter the Bafokeng purchased two further farms, Turffontein and a portion of Beerfontein from the Hermansburg Missionary Society for a purchase price of £680. On 11 July 1910 a resolution was passed by the Bafokeng that the transfer of these farms be passed from the missionaries to the Minister of Native Affairs in trust for the Bafokeng.

The Transvaal was granted Responsible Government in the Colony of the Transvaal in 1907. This change saw Johann Rissik appointed the Minister of Native Affairs in the Transvaal. He succeeded the Commissioner for Native Affairs.

In accordance with the recommendation regarding land owned by blacks contained in the Lagden Report, the Transvaal Government commenced the transfer of land nominally held by missionaries as representatives of indigenous communities into the name of the Minister of Native Affairs for the Transvaal. Accordingly in June 1907 six farms which had previously been purchased by the Bafokeng and nominally held by missionaries, were transferred free of transfer

duty to Rissik in his capacity as Minister of Native Affairs for the Transvaal, in trust for the Bafokeng.

In November 1909 the farm Reinkoyaalskraal was purchased by the Bafokeng and similarly transferred to the Minister of Native Affairs in trust.

[Royal Bafokeng Nation, Submissions by the Royal Bafokeng Nation in Respect of the Communal Land Rights Bill, 2003 at paras 10-50].

Further to the above, the South African Native Races Committee noted in 1908 that, *"Natives own 853 'square miles of land, nearly all of which has been purchased by tribal subscription and is occupied communally. Most of this land is situate in the Central and Western Transvaal. It had become the practice in the Transvaal to refuse the transfer of land to a native, and the Government nominated a trustee, in whose name such land could be registered. In some cases, however, the registration was effected in the names of unofficial Europeans or missionaries. It has recently been decided by the Supreme Court of the Transvaal (in the case of Tsewu v. Registrar of Deeds) that an aboriginal native of South Africa is entitled to claim transfer in the Deeds Office of land of which he is the owner."*

[South African Native Races Committee, "The South African Natives": Their Progress and Present Condition, 1908 at page 66].

And as a further publication noted:

> *"An important early principle regarding ownership of land in Potchefstroom was embodied in the ZAR's Resolution 159 of 18 June 1855, which had precluded anybody who was not a burgher from owning land in the Transvaal, and had also precluded natives^ from burgher rights" (Davenport & Hunt, 1974:40). Therefore, settlement in Potchefstroom was based on the allotment of land to citizens (burghers) and the ownership of land implied certain rights of citizenship. The dominant society did not accept individuals of mixed origin (the descendants of freed slaves and Afrikaans-speaking Africans) as equals or as citizens. The same applied to Tswana-speakers who, after the settlement of the Boers in the area, and the latter's conquest of Mzilikazi and his army, felt free to return to the surrounding area and also came to live in the Potchefstroom residential area as non-citizens (cf. Kruger, 1966:9).*
>
> *Later, the position regarding land rights changed slightly when the Pretoria Convention of 1881 laid down that "Natives will be allowed to acquire land, but the grant or transfer of such land will in every case be made to, and registered in the name of, the Native Location Commission". Although this did not have a significant effect on the life of "blacks", their right to own land in*

the Transvaal was subsequently tested in the Transvaal Supreme court in 1905. Rev. E. Tsewu, who had bought land near Johannesburg, sought a court order to pass transfer of this land."

["Limited access to land rights for the powerless in Potchefstroom", Potchefstroom University, N.S. Jansen van Rensburg].

The position during this period was also discussed in yet another publication which stated the following in this regard:

"Transvaal Africans controlled their land following their own systems of land tenure until the early nineteenth century. These patterns were disrupted by two major invaders, Africans from the southeast and Europeans from the south. The first invaders were those Africans who became known as the Khumalo Ndebele under Mzilikazi. During the early decades of the 19th century land ownership was contested amongst African communities themselves. Land ownership by African communities north of the Vaal was drastically interfered with between 1823 and 1837, after the arrival of the Khumalo Ndebele in 1823. A large number of African communities lost their land during this period.

After the settlement of Afrikaners north of the Vaal River in the late 1830s, several patterns developed. Following the defeat of the Ndebeleunder Mzilikazi, Afrikaners regarded the central and western part of the Transvaal as their property by right of conquest, distributing land to whites without regard to previous African ownership. In addition, they extended the area under their control to the east and north by concluding various treaties. Towards the end of the 19th century, the stronger African communities to the north and east were conquered. These societies had remained independent and controlled their land according to traditional African land tenure rules.

European domination had serious consequences with regard to landownership especially for those Africans in the immediate vicinity of large concentrations of whites. They were technically without any land and were dependent on Afrikaner officials to demarcate "locations" for them. The Afrikaners allowed Africans to live on the locations during "good behavior," but did not allow them to own the land with title deeds. Thus, a portion of the African population lived on land designated for their occupation and use as a result of grants or the creation of locations or reserves. Many other Africans lived on land owned by whites, but they are beyond the purview of this paper.

Afrikaners introduced a European land ownership system for them-selves, with title deeds and a land registration system. Land, in other words, became a commodity, with important consequences for Africans. During the late 1860s and 1870s, some African communities succeeded in getting around the restrictions on African land ownership by asking missionaries and other sympathetic whites to buy land for them (but paid for by the Africans) and to have it transferred and registered in their (the white's) names, creating an informal trusteeship system. Usually an agreement was concluded between the relevant African community and the missionary in which the missionary promised to keep the land in trust for the community. Some Afrikaner officials knew of this system and debated whether or not to create a formal trusteeship system during the 1860s, but the Volksraad, a very conservative institution, ultimately rejected any moves in this direction. Changes in the approach to land issues occurred after the British annexation of the Transvaal in 1877. Initially a few British officials favoured allowing Africans to obtain land in freehold, but never followed through. Instead, in 1880, they turned to the implementation of a formal trusteeship system. Land bought by Africans would be registered in the name of a public official or government agency, "in trust" for the relevant African communities. After the British left the Transvaal, the South African Republic government was required to retain the formal trusteeship system by two Anglo-Afrikaner treaties, the Pretoria Convention (1881) and the London Convention (1884). Article 13 of the Pretoria Convention of 1881 stated that "Natives will be allowed to acquire land, but the grant or transfer of such land will in every case be made to, and registered in the name of, the Native Location Commission." The Transvaal government maintained its commitment to these treaties and the formal trusteeship system during the remainder of the 19th century, but also firmly rejected transfer of property into the names of Africans.

To summarize to this point: a small number of black South Africans in the Transvaal owned land under a European system based on title deeds and the registration of the transfer of the land from one owner to another during the 19th and 20th centuries. During the 19th century, the ability to own land was circumscribed and linked to a trusteeship system where registration of the transfer had to be in the name of a white man, either a missionary (or other sympathetic white) or a public official. Law and custom in the South African Republic prevented registration in the names of the black African buyers.

This system changed in 1905. On April 4, 1905, the Supreme Court of the Transvaal decided that Reverend Edward Tsewu, a black South African, had the right to register, in his own name, the transfer of a piece of land that he had legally purchased the previous year. The Registrar of Deeds had refused to record the transfer because Reverend Tsewu was a "native." The Registrar defended himself by referring to the trust system described above. The judges of the Supreme Court disagreed with the Registrar and ordered him "to register the said Lot in the name of the applicant." After April, 1905, African buyers had a choice: to register the purchase in their own names or in the name of the Commissioner (later Minister) for Native Affairs in trust for the owners. Many Africans took advantage of their new option, but not all buyers did. No matter what the choice was, the number of farms purchased after 1905 increased."

[The Failure of Rural Segregation (Land Policies) in South Africa: Black Land Ownership After the Natives Land Act, 1913-1936].

And as another publication noted:

"Unlike Natal and the Cape, the Transvaal Government paid little attention to the governance of the African population or to their land requirements. The first evidence of any land policy is a Volksraad resolution of 1853 providing that Africans could be granted land conditional upon their "good behavior", but two years later another resolution declared that non-burghers were forbidden to own land. Indigenous land rights were eventually secured by Britain. The Pretoria Convention of 1881 expressly stipulated that Africans had the right to acquire land in the Republic' and art. 21 obliged the SAR to appoint a standing "Locations Commission" to delimit such reserves as the peoples of the territory "may be fairly and equitably entitled to". In accordance with the Commission's recommendations reserves were created in the Rustenburg, Lichtenburg, Marico, and Sekhukuneland districts.

However, it was not clear whether the trusteeship principle applied to reserves in the Transvaal, since the Pretoria Convention, the charter for their creation, made no provision in this regard. Land purchased by Africans on the other hand, was held in trust, for art. 13 of the Convention provided that whatever land they bought was to be transferred to the Locations Commission in trust."

[Southern Cross: Civil Law and Common Law in South Africa, at page 80].

This essentially summarizes the position in the Transvaal in respect of black land ownership prior to 1910. The remaining area to consider is the periods following thereafter. In relation thereto,

> *"The Land Act 27 of 1913 came into operation on June 19, less than two months after the first reading on April 25, 1913. The 1913 Land Act prohibited land purchases by Africans outside of the scheduled reserves, making these the only places where Africans could legally occupy land. The 1913 Land Act also outlawed sharecropping and "squatting". The Act effectively dispossessed millions of South Africans and immediately reduced African access to land by excluding over one-and-a-half million hectares of white owned land rented by Africans, as well as half a million hectares owned and occupied by Africans at the time."*
>
> ["A History of Dispossession", online thesis accessible at http://wiredspace.wits.ac.za/bitstream/handle/10539/275/13_chapter1.pdf?sequence=13].

The Constitutional Court has also commented on this period in history in the following words from a judgment:

> *"The Black Land Act and the Native Trust and Land Act, 1936 (now the Development Trust and Land Act) were the key statutes that determined where African people could live. The former contained a schedule which set out areas in which only African people could purchase, hire or occupy land. In terms of section 2(1), the sale of land between whites and African people in respect of land outside of the scheduled areas referred to in the Act was prohibited. The effect of this legislation was to preclude African people from purchasing land in most of South Africa.*
>
> *In exceptional circumstances, sales of land to African people could be approved by the Governor-General, later the State President, under the Native Administration Act, 1927 (now the Black Administration Act). African people purchasing land pursuant to such approval had to accept, however, that land would not be registered in their names but would be held in trust on their behalf by the Minister of Native Affairs who would recognise their permanent rights of use and occupation of the land consistent with the position of an owner.*
>
> *The Development Trust and Land Act was enacted in 1936 to make provision for the establishment of the South African Native Trust (the Trust) and the release of more land for occupation by African people. In terms of section 6 of this Act,*

all land "which [was] reserved or set aside for the occupation of natives" and "land within the scheduled native areas, and . . . within the released areas" vested in the Trust. However, there was a limit on the amount of land that could be acquired by the Trust, and by implication, land that could be occupied by African people. The affairs of the Trust were administered by the Governor-General in his capacity as the Trustee who, in turn, could delegate his powers and functions to the Minister of Native Affairs.

The land that vested in the Trust was "held for the exclusive use and benefit of natives". The Trustee had the power to "grant, sell, lease or otherwise dispose of land . . . to natives" and "on such conditions as he [deemed] fit". Further, the Governor-General had the power to make regulations, among other things, "prescribing the conditions upon which natives may purchase, hire or occupy land held by the Trust" and "providing for the allocation of land held by the Trust for the purposes of residence, cultivation, pasturage and commonage".

The conditions under which African people could lawfully purchase, hire or occupy land held by the Trust were comprehensively dealt with in the Bantu Areas Land Regulations and the Township Regulations. The former dealt with rural areas while the latter dealt with townships in African areas.

The Bantu Areas Land Regulations recognised two forms of land tenure, namely, quitrent tenure of land and occupation of land under permission to occupy. Although quitrent title was defined to mean a "title deed relating to land", it did not confer full ownership on the holder. This title was subject to strict conditions prescribed in the regulations which included the right of the Bantu Affairs Commissioner, uNdabazabantu (People's Affairs) or any person authorised by him to "enter upon and inspect the land" to ensure compliance with the regulations and a prohibition against transferring title or disposing of land without the consent of the Bantu Affairs Commissioner. In addition, the rights of the holder could be cancelled if the holder failed to comply with any condition upon which the right to occupy land was granted; or upon conviction for certain offences such as theft, stock theft, cultivation or possession or dealing in drugs, or, if a person is on a second occasion sentenced to imprisonment for 12 months.

Substantially similar conditions applied to the permission to occupy. However, in the case of the permission to occupy, the

regulations made it clear that "[p]ermission granted to occupy the allotment shall not convey ownership".

In addition, African people could not be absent from the land allotted to them without written permission issued by the Bantu Affairs Commissioner. Where a person absented himself from the land allotted to him for more than a year without permission, that person was presumed no longer to require the land and it reverted to what was called "commonage" and could be re-allocated to another person.

These regulations recognised the application of indigenous law in the areas reserved for African people. This is apparent from provisions of the regulations dealing with succession to land. Succession to land allotted under the regulations was governed by indigenous law. In addition, tribal authorities or, where they did not exist, traditional leaders played a role in the allocation of arable and residential allotments. To occupy land in these areas, African people required the permission of the Bantu Affairs Commissioner who would grant permission after consultation with the tribal authority having jurisdiction or a traditional leader, as the case may be.

What emerges from these regulations therefore is that (a) the tenure in land which was subject to the provisions of the Black Land Act and Development Trust and Land Act and which was held by African people was precarious and legally insecure; (b) indigenous law governed succession to land in these areas, and the application of indigenous law in relation to land in these areas subject to regulations was recognised; and (c) tribal authorities and traditional leaders played a role in the allotment of land in these areas.

The Black Land Act and the Development Trust and Land Act, together with the regulations made under these statutes, must be read together with the Black Administration Act and the Bantu Authorities Act, 1951 (now the Black Authorities Act). The latter statutes formed part of the colonial and apartheid legislative scheme for the control of African people. As indicated previously, the Bantu Areas Land Regulations were made under section 25(1) of the Black Administration Act read with section 21(1) and 48(1) of the Development Trust and Land Act. The Township Regulations were made under the provisions of both the Development Trust and Land Act and the Black Administration Act. As will appear below, the Black Authorities Act established a tribal structure for the administration of African people in African areas.

The Black Administration Act made the Governor-General (later the State President) the "supreme chief of all Natives in the Provinces of Natal, Transvaal and Orange Free State" (later extended to the Cape Province), and vested in him the legislative, executive and judicial authority over African people. Specifically, it gave him the power to govern African people by proclamation, to establish tribes, and to "order the removal of any tribe or portion thereof or any Native from any place to any other place". It dealt with, among other matters, the organisation and control of African people, land administration and tenure, and the establishment of separate courts for African people which had the authority to apply indigenous law. It proclaimed the "Code of Zulu Law" to be the "Law for Blacks in Natal".

The Black Authorities Act gave the State President the authority to establish "with due regard to native law and custom" tribal authorities for African "tribes" as the basic unit of administration in the areas to which the provisions of CLARA apply. These tribal authorities had the power to "advise and assist the Government and any territorial or regional authority . . . in connection with matters relating to . . . [among other things] the development and improvement of any land within [their areas of jurisdiction]". And they were required to exercise their powers and perform their functions "with due regard to the rules, if any, applicable in the case of similar bodies in terms of the native laws or customs of the respective tribes or communities in respect of which [they have been] established". It is these tribal authorities that have now been transformed into traditional councils for the purposes of section 28(4) of the Traditional Leadership and Governance Framework Act, 200351 (the Traditional Leadership Act). And in terms of section 21 of CLARA, these traditional councils may exercise powers and perform functions relating to the administration of communal land."

[*Tongoane and Others v National Minister for Agriculture and Land Affairs and Others 2010 (6) SA 214 (CC)* at paras 12-24].

Further to the above,

"In 1924, the Pact government came to power and set out to eliminate independent African access to land and to create a uniform system of black administration throughout South Africa. The then Minister of Native Affairs, J.B.M Hertzog, introduced the Black Administration Act 38 of 1927, which became one of the principle methods of forced removals. The power to forcibly

remove African communities was contained in Section 5(1)(b) of the Act. Hertzog also introduced the Native Trust and Land Act of 1936. The Act expanded the total reserve area to 6.21 million hectares or approximately 13% of the national land area. It also created the South African Native Trust to acquire and administer that land. The Trust became the registered owner of most reserve land. Until 1937, African land purchases had continued, in a few cases, but the introduction of the 1937 Native Laws Amendment Act removed the surviving rights of Africans to acquire land in urban areas. This was followed by the 1946 Asiatic Land Tenure Act, which was introduced to control Indian land purchases in the Transvaal and Natal."

["A History of Dispossession", online thesis accessible at http://wiredspace.wits.ac.za/bitstream/handle/10539/275/13_chapter1.pdf?sequence=13].

And as another publication stated:

"1. The Lagden Report and the 1913 Land Act

In 1903, after the Anglo-Boer War, Lord Milner convened a Commission under the chairmanship of Sir Godfrey Lagden to report on 'native' affairs in the four Southern African colonies that were soon to become the Union of South Africa. The Commission's almost unanimous conclusion, 'conceived to be in the interests of the Europeans'. was that the country should be segregated: land owned by Africans, held in trust for them or subject to customary law, was to be kept strictly separate from land in 'white' South Africa.' The Lagden Report and the legislation it spawned have traditionally been interpreted as the racist response of a threatened white minority, but the decision to divide South Africa had far more complex origins, as the economic implications of this policy were to demonstrate. Segregation put an immediate brake on the development of African agriculture by limiting the amount of land available for expansion. Land shortage, together with an increase in the African population, meant that the inhabitants of the reserves became dependent for subsistence upon work on white farms and in the mining industry. In other words, the effect of segregation was to transform the reserves into labour pools. The Natives Land Act the first pillar of apartheid was originally intended to be an interim measure to halt the acquisition of land by Africans outside 'scheduled' areas'. In 1916 a commission was appointed according to the terms of the Act (the Beaumont Commission) to determine which lands were to be demarcated as African. When interest groups objected to what they

considered to be overly generous proposals, the Government instructed local committees to re-examine the recommendations. The Beaumont proposals were then drastically reduced: Africans were given only 7.3 per cent of the South African land area.

So far as tenure in the scheduled areas was concerned, the Lagden Commission was torn between the Cape and Natal models: pursuing individual tenure or allowing customary, communal tenure. It finally recommended that although 'sub-division and individual holding' were to be encouraged the 'communal or tribal system' should be retained. Where individual tenure was introduced the Commission felt that it should continue to be subject to quitrent-like conditions. The tenure proposals in the Lagden Report marked a departure from Britain's mission to 'civilize' its colonial territories in favour of a decision to 'retribalize' the African population. The new policy came into effect in the 1920s, a time when traditional leaders, who in the nineteenth century had constantly threatened the colonial venture, were debilitated and losing popular support. Former subjects of chiefly rule now formed a sizeable urban proletariat. Through political and labour associations they had begun to challenge the government on their own terms. The decade was marked in urban areas by labour unrest and in rural areas by stiffening resistance to state interference in land tenure. By reviving African institutions it was hoped that confrontation might be deflected.

2. The 1936 Trust and Land Act

In urban centres the process of segregation was carried forward by the 1922 Transvaal Local Government (Stallard) Commission. Its report laid down the broad principle that towns were a creation of the white man and that Africans should be allowed there only as temporary sojourners. From this understanding flowed the second pillar of apartheid: the Natives (Urban Areas) Act. This Act mandated local authorities, assisted by 'native advisory councils', to establish African locations and single-sex hostels in urban areas. Africans were not allowed to live outside these areas and, of course. Non-Africans were barred from acquiring land rights in them. In 1927 the Native Administration Act was passed. This, the third and in many respects the most formidable pillar of apartheid created an entirely new legislative, administrative, and judicial infrastructure for controlling the African people. From now on ultimate powers vested in the Governor- General, who was accorded the title of 'Supreme Chief' with authority to create

tribes and to move either tribes or individuals as he saw fit. His position, however, was titular. In practice the Governor-General's powers were exercised by the Native Affairs Department, which soon had an all- embracing jurisdiction over the lives of Africans. Unchecked by other branches of government, it took on the quality of a state within a state. Henceforth the Department prepared all legislation regarding Africans (which was now passed by simple proclamation) and controlled the separate system of courts set up to hear African civil suits. During the depression of the 1930s the effects of segregation became distressingly apparent. The 1932 Native Economic Commission revealed that erosion, overstocking, and over-population had already seriously damaged land in reserves and that food production was declining. Urgent remedial action was recommended. The proposed solutions to these problems were the Native Trust and Land Act of 1936 and betterment regulations. The primary purpose of the Act was to increase the size of the reserves. The Government set a target of buying an additional seven million morgen of land, which would increase the size of the reserves from 7 to 13 per cent of the country's area. A statutory authority, the South African Native Trust, was established on the model of the Natal Trust to acquire land and supervise tenure 'for the settlement, support, benefit, and material and moral welfare' of Africans. (Although the Governor-General was sole trustee, he could delegate his powers to the Minister of Native Affairs.'") Earlier trusts were merged into this body, which became nominal owner of all Crown land in the reserves.' Land vested in the SADT was progressively subjected to a special statutory tenure, which had antecedents in the quitrent and Glen Grey tenures. Officers of the Department of Native Affairs, 'native commissioners', supervised the control and allotment of all SADT lands. Without their written permission no person was permitted a right of occupancy, and without their approval transfer, leasing, sub-letting, hypothecation or sub-division was prohibited. The principle of one man, one lot still prevailed, and rights were still precarious. Despite the origins of this system in the colonial drive to promote individualism, rights of occupancy were not consciously intended to break with customary tenure. Far from it: the legitimacy of this tenure lay in its similarity to customary law. Individuals had no absolute rights to their land: tenancy was granted by political authorities, and was contingent on good behaviour and observance of the regulations. All SADT land was subject to 'betterment planning'. While occasioned by the best of intentions, betterment provoked more ill-feeling in rural areas than any other government intervention, including even the implementation of segregation. The invasiveness of

betterment was a major cause of resentment: long-established patterns of tenure were totally disrupted by an increasingly authoritarian bureaucracy."

[Southern Cross: Civil Law and Common Law in South Africa, at pages 80-82].

3. We now deal with some Constitutional Court judgments dealing with the backdrop of apartheid and the remedial objectives of the Constitution in regard thereto:

3.1. The Constitutional Court has noted that, *"the architecture of the apartheid system placed about 87 percent of the land and the mineral resources that lie in its belly in the hands of 13 percent of the population. Consequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty. To address this gross economic inequality, legislative measures were taken to facilitate equitable access to opportunities"*.

[*Agri South Africa v Minister for Minerals and Energy (CCT 51/12) [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) (18 April 2013)* at para 1].

3.2. In another case, the Constitutional Court stated:

"[7] A major dispossession of land occurred in 1913 when 13% of the country's land was set aside for the use and occupation of the African majority and 87% of the land was reserved for other races. The Natives Land Act of 1913 was later reinforced by a suite of statutes which advanced the policy of apartheid. Chief among those statutes were the Natives (Urban Areas) Act, the Group Areas Act and the Native Laws Amendment Act. Because in the main, mineral rights were held by landowners, the effect of these statutes was to exclude black people from holding mineral rights but for negligible exceptions in the areas set aside for occupation by them.

[8] The only role that was permitted to black people in the mining industry under apartheid was the provision of cheap, unskilled labour. These workers were obliged to perform their work under appalling conditions which exposed them to all sorts of illnesses and dangers associated with mining operations. The apartheid government reserved skilled work for white workers.

[9] When racist statutes were repealed before the dawn of the democratic dispensation in 1994, the inequalities and imbalances they had caused remained embedded in our society. The Constitution not only rejected the racist policies of the past but it also imposed obligations on the democratic government to take legislative and other measures to address the inequalities caused by racist colonial and apartheid laws."

[*Minister of Mineral Resources and Others v Sishen Iron Ore Company (Pty) Ltd and Another (2014 (2) BCLR 212 (CC); 2014 (2) SA 603 (CC)) [2013] ZACC 53; [2013] ZACC 45 (12 December 2013)* at paras 7-9].

3.3. In yet another case, the Constitutional Court stated:

"I have given an account of the historical context of dispossession of land rights in general and of the specific instances we are confronted with in this case. It is clear that they are a consequence of social and governance trends of spatial and other forms of apartheid, which cover a period of nearly 85 years. These trends took the form of race-based state practices, policies and laws related to rights in land. In their very natures, racist practices and policies cannot mean a single decisive cause but a concurrence of events conducted over time. In enacting the Restitution Act, the legislature must have been aware that apartheid laws on land were labyrinthine and mutually supportive and in turn spawned racist practices. And vice versa. Therefore, often the cause of historical dispossession of land rights will not lie in an isolated moment in time or a single act. The requisite causal connection must be gathered from all the facts as long as the connection commends itself to common sense and is reasonable rather than remote or far-fetched."

[*Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd (CCT69/06) [2007] ZACC 12; 2007 (10) BCLR 1027 (CC); 2007 (6) SA 199 (CC) (6 June 2007)* at para 66].

[ii] In *Port Elizabeth Municipality v Various Occupiers 2005 (1) SA 217 (CC),* Sachs J highlighted the Constitutional values underlying the adjudication of eviction disputes:

'*Thus, PIE expressly requires the court to infuse elements of grace and compassion into the formal structures of the law. It is called upon to balance competing interests in a principled way and to promote the constitutional vision of a caring society based on good neighbourliness and shared concern. The Constitution and PIE confirm that we*

are not islands unto ourselves. The spirit of Ubuntu, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.' (at para 37)