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Judge Justice Moloto*

I. Historical Introduction

In order to understand the purpose and effect of the South African reform laws enacted since 1994, a brief overview of the laws that previously prevailed is necessary. As with all colonies around the world, the arrival of the settler community in South Africa prompted serious land ownership disputes. In some cases these conflicts were resolved by wars in which the vanquished had to give way to the victor. Other disputes were resolved in the course of fragile negotiations between various indigenous and settler communities. There was, however, no formal legislative protection afforded to these arrangements. The earliest legislative measures, the Location Acts of 1869, 1876, and 1884, were passed by the Cape Assembly.1 A farm labour shortage had impelled some white farmers in the Cape to rent out their land to black2 farmers. With this, the practice of sharecropping among black farmers began, enabling black persons to enjoy considerable economic freedom. The Location Acts were intended to dispossess these sharecropper farmers and force them to work as labourers on white-owned farms.

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2 Over the years, the term applied to indigenous persons in South Africa has varied. It was “Native,” then “Bantu,” and then “Black.” There was even a time when they were referred to as “Plurals.”
Other South African regions enacted additional legislation in the latter half of the nineteenth century. For example, the Free State Ordinance No. 5 of 1876 prohibited the sale of land to blacks, while the infamous Glen Grey Act, "under the guise of benevolent provision of individual land tenure rights for blacks in the Cape, imposed a ten acre limit on the size of all holdings with no man permitted to own more than one holding."³

It was not until after the formation of the Union of South Africa in 1910 (when the four provinces that had been independent republics formed a unitary state) that national legislation was enacted to regulate land allocation to blacks. The first such legislation was the Blacks Land Act 27 of 1913,⁴ which came to be known as the first pillar of apartheid.⁵ Largely a device to deny blacks the right to buy land in areas designated for whites only,⁶ the Act prevented blacks from living on white-owned farms unless they provided a minimum of 90 days annual labour to the landowner.⁷ The Act also demarcated parts of South Africa for occupation by blacks only and prohibited acquisition of land by blacks outside the "scheduled" areas.⁸ The scheduled areas comprised approximately seven percent of the land area of the country.⁹ Similarly, non-blacks were not permitted to acquire land or an interest in land in the scheduled areas unless a specific exception was granted by the Governor-General (now State President). This Act was the precursor to a long list of racially based legislation designed to further limit black persons' access to land and to regulate their movements within the country.

In 1923, the second pillar of apartheid was passed: the Blacks (Urban Areas) Act 21 of 1923, which established locations for

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³ RUTSCH ET AL., supra note 1, at 3.
⁶ Id.
⁷ Id.
⁸ Id.
⁹ Id.; see also D.L. CAREY-MILLER & ANNE POPE, LAND TITLE IN SOUTH AFRICA 21 (Juta & Co. ed., 2000) (explaining that the Beaumont Commission's proposals were drastically reduced due to pressure from interest groups, leaving Africans with only 7.3 percent of the land area in South Africa).
blacks and single-sex hostels in urban areas. Blacks could live only in these specified locations, and non-blacks could not acquire land rights there. Soon thereafter, the Black Administration Act 38 of 1927 created the third and most formidable pillar of apartheid. This Act consolidated the control and administration of blacks into one act. Its administrative provisions regulated such matters as the solemnization of marriages between blacks, the appointment of native commissioners, chiefs and headmen, the hearing of cases between blacks, the demarcation of tribal boundaries, land registration and tenure, and the administration of black deceased estates. The Act ostensibly provided for the complete subjugation of blacks in South Africa. Section 1 of the Act states:

The Governor-General [later State President] shall be the supreme chief of all Natives in the Provinces of Natal, Transvaal, and Orange Free State, and shall in any part of the said Provinces be vested with all such powers and authorities in respect of all Natives as are, at the commencement of this Act, vested in him in respect of Natives in the Province of Natal. Section 5 enumerates the “powers and authorities” of the Governor-General. Specifically, the Governor-General could:

(a) define the boundaries of the area of any tribe or of a location, and from time to time alter the same, and may divide existing tribes into one or more parts or amalgamate tribes or parts of tribes into one tribe, or constitute a new tribe, as necessity or the good government of the Natives may in his opinion require;

(b) whenever he deems it expedient in the general public interest, order the removal of any tribe or portion thereof or any Native from any place to any other place within the Union upon such conditions as he may determine; provided that in the case of a tribe objecting to such removal, no such order shall be given

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10 Blacks (Urban Areas) Act 21 of 1923 (repealed 1945); see also Bennett, supra note 5, at 82 (describing how this Act, although repeatedly amended, remained the key statutory device controlling Africans in urban areas until 1986).

11 Bennett, supra note 5, at 82.


13 CAREY-MILLER & POPE, supra note 9, at 25.

14 Black Administration Act 38 of 1927.

15 Id. § 1.
unless a resolution approving of the removal has been adopted by both Houses of Parliament.\(^{16}\)

On the basis of these and similar powers in other statutes, the government forcibly removed many communities from their areas without compensation.\(^{17}\)

The Black Administration Act also contained provisions for the control of movements by blacks outside the scheduled areas\(^{18}\) and for the control of their speech and behavior.\(^{19}\) South African legal scholars have criticized this Act extensively:

This Act was used constantly to promulgate a vast variety of regulations impinging on every aspect of the life of blacks. Featuring strongly amongst these proclamations and regulations was the administrative control of land, land tenure, land use and every conceivable activity that took place on land in black rural and urban areas as demarcated by the two Land Acts of 1913 and 1936.

One of the worst aspects of the Black (Native) Administration Act and the Proclamations/Regulations promulgated in terms of the Act was that the legislation created and thereafter sustained "another world" wherein black persons have been forced to live, work and raise their families under rules and conditions which do not apply to other races in South Africa. The legislation was coercive, oppressive and regulatory to a degree that in almost

\(^{16}\) Id. § 5(1).

\(^{17}\) See infra notes 37-42 and accompanying text.

\(^{18}\) Id. § 28(1) (repealed 1952). The Act provided that:

The Governor-General may, by proclamation in the Gazette:

(a) create and define pass areas within which Natives may be required to carry passes;

(b) prescribe regulations for the control and prohibition of the movement of Natives into, within or from any such areas; and

(c) repeal all or any of the laws relating to the carrying of passes by natives.

\(^{19}\) Id. § 29(1) (repealed 1993).

Any person who utters any words or does any other act or thing whatever with intent to promote any feelings of hostility between Natives and Europeans shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding one year or to a fine of one hundred pounds or both.

\(^{19}\) Id.
every hour of a black person's life (whether awake or asleep) he or she might well have been committing an "offence." In respect of rights to occupy land for any purpose its provisions were multifarious. 20

The Development Trust and Land Act 18 of 1936 followed the Black Administration Act. 21 The purpose of this Act was to "provide for the establishment of a South African Native Trust and to define its purposes; to make further provision as to the acquisition and occupation of land by natives and other persons; to amend Act 27 of 1913; and to provide for other incidental matters." 22 More specifically, this Act increased the scheduled land area set aside for black occupation in the 1913 Blacks Land Act. These additions were called "released" areas and, together with the scheduled areas of the 1913 Act, constituted approximately thirteen percent of South Africa's land area. The Governor-General, the so-called supreme chief of the blacks, was the designated trustee—the practical result being that areas allocated or demarcated for black occupation were owned by a white head of state who had far-reaching powers over black tenure on such land. 23 In other words, blacks occupied this land at the sufferance

20 RUTSCH ET AL., supra note 1, at 5.
23 § 5(1) of Black Administration Act 38 of 1927. Section 5(1)(b) of the Act was amended by § 20 of Black Laws Amendment Act 54 of 1952 to read:

The Governor-General may—

(b) whenever he deems it expedient in the general public interest, order that, subject to such conditions as he may determine, any tribe, portion of a tribe or native shall withdraw from any place to any other place or to any district or province within the Union and shall not at any time thereafter or during a period specified in the order return to the place from which the withdrawal is to be made or proceed to any place, district or province other than the place, district or province indicated in the order, except with the written permission of the Secretary for Native [subsequently referred to as Black] Affairs: Provided that if a tribe refuses or neglects to withdraw as aforesaid no such order shall be given or, having been given, shall be of any force and effect until a resolution approving of the withdrawal has been adopted by both Houses of Parliament: Provided further that any such order made in respect of a portion of a tribe or a native which is still in force after the expiry of a period of twelve months from the date of service thereof shall be laid upon the Tables of both Houses of Parliament within fourteen
of the Governor-General so that non-blacks effectively owned one hundred percent of the land.\textsuperscript{24} This legislation also separated the black rural areas from the white rural areas, thereby degrading black land tenure through administrative control and forcing blacks to become wage labourers on white farms or in the industrial centers of the country.\textsuperscript{25}

The migration of blacks from the rural areas to the cities led to the enactment of The Blacks (Urban Areas) Consolidation Act 25 of 1945,\textsuperscript{26} more commonly known as the “Influx Control” Act. The South African government wanted the cities to be preserved for white occupation only and designed this legislation to implement that objective. In order to qualify for residence in an urban area under this act, blacks either had to (1) have been born in the urban areas, (2) have lawfully and continuously lived there for fifteen years, (3) have worked for one employer for more than ten consecutive years, or (4) have entered the urban area pursuant to a work permit as a migrant worker, in which case one was expected to return “home” to the rural areas at least once a year to renew the work permit. This Act also required blacks to carry identity documents (passes or dompas)\textsuperscript{27} at all times.\textsuperscript{28} The document was endorsed according to whether you were born or had lived days after the expiry of such period if Parliament is then in ordinary session, or if Parliament is not then in ordinary session, within fourteen days after the commencement of its next ensuing ordinary session, and shall if both Houses of Parliament pass resolutions disapproving thereof during the session in which it is so laid upon the said Tables cease to have effect on the day on which the last of such resolutions is passed.

6 BSRSA pt. 28 (2000). In terms of subsection 5(3), the Governor-General had the power to order the removal of any Black who ignored a § 5(1) order. § 5(3) of Black Administration Act 38 of 1927.

\textsuperscript{24} When blacks in the Cape were finally disenfranchised by the Representation of Natives Act, the application of “Native” acts to all blacks in South Africa was accomplished. Blacks were but mere occupiers of land and no longer owners. Representation of Natives Act 12 of 1936 (repealed 1959).

\textsuperscript{25} Id.

\textsuperscript{26} Blacks (Urban Areas) Consolidation Act 25 of 1945 (repealed 1984). This Act was further amended in the era of Verwoerd’s reign as Minister of Native Affairs in the early 1950s.

\textsuperscript{27} The identity document came to be called the “dompas.” “Pas” would be translated to mean “pass.” If you had the document you could pass, that is, go on. In Afrikaans “dom” means stupid.

\textsuperscript{28} § 23(1)(b) of Blacks (Urban Areas) Consolidation Act 25 of 1945.
continuously and lawfully in the urban areas for fifteen years, or were employed by one employer for ten years or more, or were a migrant labourer, or other. If other, you were summarily arrested, prosecuted and sent either to a labour colony or permanently "endorsed" out of the urban area.  

The Blacks (Urban Areas) Consolidation Act worked in conjunction with the Population Registration Act 30 of 1950, which racially classified every person in South Africa and endorsed that classification in one's identity document. The Act eliminated doubts as to a particular person's race for purposes of the "Influx Control" Act. Thus, it was an offence for a black person not to carry his or her "dompas" at all times, and failure to produce them for a peace officer (policeman) on demand was grounds for arrest. Those who were clearly not black, however, were not required to carry any documentation as to their racial identity.

These various pieces of legislation would later be "elevated" into what has become known as grand apartheid, a time when the government not only separated blacks from whites, but also sought to separate blacks ethnically into different Bantustans or homelands. After the homeland policy was established, the white government claimed moral legitimacy on the grounds that no single black ethnic group was larger than the white population. Therefore, so the argument went, the imposition of white rule on blacks was the will of the majority. Of course, the whites were not being sorted into their different ethnic groups, such as English, Afrikaner, German, Jew, Italian, Greek, and so on. Economic realities dictated otherwise. Commerce and industry in the urban areas required cheap labour, and through nefarious stratagems like a heavy tax on livestock and restrictions on the number of livestock that could be owned by blacks (under the pretext of preserving grazing areas), the white government forced blacks from rural to urban areas. Because the urban centers lay outside the "scheduled" and "released" areas, blacks could not own land in these areas. Under the terms of the Group Areas Act, vibrant

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29 Id. § 29(2); Bennett, supra note 5, at 87.
31 Bennett, supra note 5, at 87.
black residential areas like Sophiatown, Newclare, Cato Manor, Lady Selbourne, and District Six were demolished and the people forcibly moved from within the cities to locations outside the cities. Black townships sprung up on the outskirts of cities and towns while new laws ensured a total separation of the races socially, economically, culturally, and residentially. The workplace represented the only integrated location, and even there blacks and whites had separate amenities such as toilets and eating places.

The separation in urban areas was further accomplished by the promulgation of the Group Areas Act. 33 This Act proclaimed certain areas as “reserved” for occupation by particular racial groups. 34 Members of disqualified groups could not live, trade in, or own land in the reserved area. 35 This Act increasingly relegated blacks to small houses owned by the municipalities and located far from their places of employment. Blacks were expected to live in these houses for as long as they provided cheap labour to white-owned industry. Once they retired, or could not provide labour for some reason, they were expected to relocate to their designated rural areas, there to starve to death out of sight of the white man. While this was the government’s plan, people’s movements proved difficult to control and curtail. People naturally move between rural and urban areas to visit relatives and friends. Many looked for employment in order to obtain the privilege of living in the urban areas.

The final objective of grand apartheid was to link each black in South Africa with some homeland and then to deny blacks any claim whatsoever to the urban areas. The government wanted blacks to work in the white-owned factories, industries, and offices by day and return to some homeland by night. Hence, some urban townships such as Kwa-Mashu, Zwelitsha, and Mdantsane, for example, were surreptitiously given to their respective neighbouring homeland governments of Kwa-Zulu and Ciskei. In addition to this policy, the Physical Planning Act encouraged urban industry to decentralise the homeland borders. 36 Those

33 Id.
34 Id.
35 Id.
employers who heeded the government's call received various incentives such as tax rebates or outright subsidies. This practice ensured that by crossing a street from work, a black employee would be in a homeland by the time he or she arrived home.

Rural blacks also faced their share of forced removals. With the consolidation of the homelands, black rural communities were moved from established areas against their will and often dumped in bare fields with nothing but military tents for shelter. There would be no infrastructure such as roads, sewerage, electricity or water, nor facilities and amenities like schools, hospitals, clinics, or shops. The government forcibly moved many black communities without compensation. In instances where families received compensation, it usually constituted a small amount, meant only for improvements and not for the land itself. On this process of exclusion and dispossession, Professor John Dugard noted:

Pretoria has set in motion the implementation of its ultimate fantasy—a South Africa in which there are no black South African nationals or citizens; a South Africa that cannot be accused of denying civil political rights to its black nationals for the simple reason that there will be no black South Africans, only millions of migrant labourers (or guest workers, as the fantasy sees them) linked by nationality to a collection of unrecognized, economically dependent mini-states on the periphery of South Africa.37

Using its vast powers, the government separated black communities and forced them to come together as strangers in other parts of the country. Families were torn apart, never to meet again. Apartheid policy disempowered and dehumanized black people and inflicted untold pain, both physical and emotional, on communities, families, and individuals. Writing in 1969, Cosmas Desmond described the misery of those forced to relocate:

I have seen the bewilderment of simple rural people when they are told they must leave their homes where they have lived for generations and go to a strange place. I have heard their cries of helplessness and resignation and their pleas for help. I have seen the sufferings of whole families living in a tent or a tiny hut. Of

children sick with typhoid, or their bodies emaciated with malnutrition and even dying of plain starvation.\textsuperscript{38}

It is estimated that between 1960 and 1983, the government forcibly removed 3.5 million blacks.\textsuperscript{39} In addition, a little over 1.9 million were under threat of removal in the rural areas alone. Arrests under the influx control laws in the metropolitan areas "increased from 117,518 in 1980 to 160,600 in 1981 and to 206,022 in 1982."\textsuperscript{40}

In the recent case of \textit{Port Elizabeth Municipality v. Peoples Dialogue on Land & Shelter & Others},\textsuperscript{41} the Honourable J.P. Horn, acting judge, stated:

The apartheid era saw the indiscriminate removal and resettlement of families and whole communities. People were relocated to areas where they had never been before and where development was completely stultified. They were far removed from schools, work places, transportation routes and cities. Until 1991 the land tenure system was based on race. A vast and intricate system of land and tenure control emerged which made drastic inroads on the common law and communal tenure rights. A person's rights of tenure or where he could own or occupy land were governed by legislation. (Compare the Group Areas Act 36 of 1966.) The rights of blacks to occupy and own land were stringently controlled by the Black Land Act 27 of 1913, the Development Trust and Land Act 18 of 1936, the Blacks (Urban Areas) Consolidation Act 25 of 1945 and the Black Communities Development Act 4 of 1984. (citation omitted) These statutes brought endless misery and strife to the black population and virtually cast them as sojourners in their own country. Any form of illegal occupation or squatting on land was prohibited.\textsuperscript{42}

\textsuperscript{38} COSMAS DESMOND, THE DISCARDED PEOPLE (1969), quoted in PLATZKY & WALKER, supra note 37, at 7.

\textsuperscript{39} PLATZKY & WALKER, supra note 37, at 9.

\textsuperscript{40} Id. at 9 (quoting statistics from \textit{THE STAR} newspaper from Feb. 23, 1982, and statistics released by the South African Institute of Race Relations in 1982). There are no figures for small towns.

\textsuperscript{41} 2000 (2) SALR 1074 (SE).

\textsuperscript{42} Id. at 1082 (C-F). Cf. Prevention of Illegal Squatting Act 52 of 1951.
II. The Period Immediately Preceding April 1994

A. Abolition of Racially Based Land Measures Act 108 of 1991

The Abolition of Racially Based Land Measures Act repealed the 1913 and 1936 Land Acts. The land owned by the Development Trust (i.e., "released" areas) was to vest in "an Administrator, a Minister or the State." The Group Areas Act was also abolished. The Land Measures Act 108 of 1991 presented the embryonic stage of the land restitution process. When the pillars of apartheid were knocked over in early 1991, few blacks had reason to rejoice in the streets:

Two major reasons suggest themselves. "First . . . nothing much had changed. The children went off to their segregated schools. The elderly went to collect their discriminatory pensions . . . ."

Secondly, the repeal of these Acts did nothing to reverse generations of dispossession and discrimination. Those physically dispossessed in the cities . . . remained dispossessed, without even a faint hope that the wrongs done in the past would be reversed . . . . "Apartheid is not dead . . . [t]he social, educational and economic inequalities created by apartheid remain with us.” Yet there has been a victory and a triumph. Laws which have been roundly and rightly condemned throughout the world as abuses of fundamental human rights, and which have visited untold suffering on millions of people, have been repealed.

B. Upgrading of Land Tenure Rights Act 112 of 1991

The Upgrading of Land Tenure Rights Act introduced a system to convert land tenure rights to full ownership. Schedule 1

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44 CAREY-MILLER & POPE, supra note 9, at 249 (citing § 12(2)(a) of Abolition of Racially Based Land Measures Act 108 of 1991).

45 Id. at 250.


of the Act contained a list of all tenure rights that would be automatically upgraded in terms of section 2(1) of the Act. Of other rights could only be converted by registration. According to the 1991 White Paper on Land Reform, this legislation was designed to stimulate economic growth and the property market in particular.

C. The Less Formal Township Establishment Act 113 of 1991

The Less Formal Township Establishment Act was passed to address the ever-increasing need for housing. An estimate by the Development Bank of Southern Africa in 1989 indicated that seven million people lived in informal housing. The practice of occupying vacant land for residential purposes, without any legally recognized right, has been going on for a very long time. In the past, it was referred to as squatting. With the passage of this Act, it has become known as informal occupation. Carey-Miller calls this a paradigm shift from "the priority of the land title holder's legal right to an acknowledgment of the interest of the citizen denied access to housing both directly and, more significantly, indirectly in the sense of exclusion from the decision-making system of the state."

III. The Period after April 1994

The two constitutions of South Africa that came into being after 1994 laid the foundation for land reform. The first (the 1993 Interim Constitution) provided for land reform in a limited way because it referred to restitution of land rights only in sections 121, 122, and 123. These sections read as follows:

§ 121 Claims

(1) An Act of Parliament shall provide for matters relating to the restitution of land rights, as envisaged in this section

48 Id.
49 CAREY-MILLER & POPE, supra note 9, at 255.
51 CAREY-MILLER & POPE, supra note 9, at 266 n.199.
52 Id. at 266-67.
and in sections 122 and 123.

(2) A person or a community shall be entitled to claim restitution of a right in land from the state if—

(a) such a person or community was dispossessed of such right at any time after a date to be fixed by the Act referred to in subsection (1); and

(b) such dispossession was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), had that section been in operation at the time of such dispossession.

(3) The date fixed by virtue of subsection (2)(a) shall not be a date earlier than 19 June 1913.

(4) (a) The provisions of this section shall not apply to any rights in land expropriated under the Expropriation Act, 1975 (Act 63 of 1975), or any other law incorporating by reference that Act, or the provisions of that Act with regard to compensation, if just and equitable compensation as contemplated in section 123(4) was paid in respect of such expropriation.

(b) In this section “Expropriation Act, 1975” shall include any expropriation law repealed by that Act.

(5) No claim under this section shall be lodged before the passing of the Act contemplated in subsection (1).

(6) Any claims under subsection (2) shall be subject to such conditions, limitations and exclusions as may be prescribed by such Act, and shall not be justiciable by a court of law unless the claim has been dealt with in terms of section 122 by the Commission established by that section.

§ 122 Commission

(1) The Act contemplated in section 121(1) shall establish a Commission on Restitution of Land Rights, which shall be competent to—

(a) investigate the merits of any claims;

(b) mediate and settle disputes arising from such claims;

(c) draw up reports on unsettled claims for submission as evidence to a court of law and to present any other relevant evidence to the court; and
(d) exercise and perform any such other powers and functions as may be provided for in the said Act.

(2) The procedures to be followed for dealing with claims in terms of this section shall be as prescribed by or under the said Act.

§ 123 Court Orders

(1) Where a claim contemplated in section 121(2) is lodged with a court of law and the land in question is—

(a) in the possession of the state and the state certifies that the restoration of the right in question is feasible, the court may, subject to subsection (4), order the state to restore the relevant right to the claimant; or

(b) in the possession of a private owner and the state certifies that the acquisition of such land by the state is feasible, the court may, subject to subsection (4), order the state to purchase or expropriate such land and restore the relevant right to the claimant.

(2) The court shall not issue an order under subsection (1)(b) unless it is just and equitable to do so, taking into account all relevant factors, including the history of the dispossession, the hardship caused, the use to which the property is being put, the history of its acquisition by the owner, the interests of the owner and others affected by any expropriation, and the interests of the dispossessed: Provided that any expropriation under subsection (1)(b) shall be subject to the payment of compensation calculated in the manner provided for in section 28(3).

(3) If the state certifies that any restoration in terms of subsection (1)(a) or any acquisition in terms of subsection (1)(b) is not feasible, or if the claimant instead of the restoration of the right prefers alternative relief, the court may, subject to subsection (4), order the state, in lieu of the restoration of the said right—

(a) to grant the claimant an appropriate right in available alternative state-owned land designated by the state to the satisfaction of the court, provided that the state certifies that it is feasible to designate alternative state-owned land;

(b) to pay the claimant compensation; or
(c) to grant the claimant any alternative relief.

(4) (a) The compensation referred to in subsection (3) shall be determined by the court as being just and equitable, taking into account the circumstances which prevailed at the time of the dispossession and all such other factors as may be prescribed by the Act referred to in section 121(1), including any compensation that was paid upon such dispossession.

(b) If the court grants the claimant the relief contemplated in subsection (1) or (3), it shall take into account, and, where appropriate, make an order with regard to, any compensation that was paid to the claimant upon the dispossession of the right in question.  

The Constitution of 1996 (the final Constitution) expanded on the concept of land reform by providing in the property clause as follows:

§ 25 Property

(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. 

The Government's land reform policy is based on the three paragraphs of section 25 and, hence, has three elements: redistribution of land rights, tenure security, and restitution of land

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54 Id.

A brief explanation of each of these policy elements follows.

A. Redistribution

Redistribution is driven very much by the responsible Minister of State. As can be expected, the responsible minister is the Minister for Land Affairs. The approach here is that those people who never had land of their own and who qualify for state subsidy can apply to the Minister for such a subsidy for the purpose of acquiring land or developing it. At times, the subsidy is given to people who already have land or access to land, but who do not have the resources to develop it. The amount of the subsidy is R15,000.00, and the applicant family must qualify. The advantage of this redistribution leg of the policy is its flexibility. The minister uses it for people who apply for redistribution, but it can also be used in respect to the other two elements of the policy.57 For example, under the restitution facet, the Restitution of Land Rights Act 22 of 1994 provides in section 6(2)(b) that, where a claimant does not qualify for restitution, the regional land claims commissioner may advise the Minister on the most appropriate relief, if any, for the claimant.58 Usually, the advice given is for the minister to deal with the claimant in terms of the redistribution leg of the policy.

Although the Land Reform (Labour Tenants) Act 3 of 1996 (hereinafter Labour Tenants Act) is usually described as falling under the security of tenure element of the policy, it also falls under the redistribution leg by virtue of Chapter III thereof.59 This chapter provides that a labour tenant60 may apply for an award of

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56 Id.
57 See id.
60 “[L.]abour tenant” means a person—
(a) who is residing or has the right to reside on a farm;
(b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and
(c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of
that portion of the owner's land that he has historically occupied and used.\textsuperscript{61} The owner of the land would, of course, be appropriately compensated for the award, and the money for the purchase would come from the minister's funds for redistribution.\textsuperscript{62} This method of redistribution has been used quite often.

Similarly, the Extension of Security of Tenure Act 62 of 1997 (ESTA) is also intended for tenure security and also has redistribution elements.\textsuperscript{63} Section 4 of the Act provides for subsidies from the Minister for the planning and implementation of what are called on-site and off-site developments.\textsuperscript{64} On-site and off-site developments are really residential arrangements for the occupier,\textsuperscript{65} either on or off the land of the owner. The major limitation of this type of redistribution is that it is limited to spouses and dependants of people over the age of sixty years.\textsuperscript{66} No record could be found of this method ever having been used by anybody since the Act's creation.

\textbf{B. Tenure Security}

A number of acts, some of which were alluded to above, are

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\textsuperscript{61} See id.

\textsuperscript{62} Id. § 23.


\textsuperscript{64} Id. § 4.

\textsuperscript{65} "\textit{Occupier}" means a person residing on land which belongs to another person, and who has or on 4 February 1997 or thereafter had consent or another right in law to do so, but excluding—

\begin{itemize}
  \item [(a)] a labour tenant in terms of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996); and
  \item [(b)] a person using or intending to use the land in question mainly for industrial, mining, commercial or commercial farming purposes, but including a person who works the land himself or herself and does not employ any person who is not a member of his or her family; and
  \item [(c)] a person who has income in excess of the prescribed amount . . . .
\end{itemize}

\textsuperscript{66} Id. §§ 8(4)(a), (5).
used to secure the tenure of people living under weak and precarious tenure. These are the Labour Tenants Act, the ESTA, and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). Prior to the passage of these three acts, evictions of people from land could take place either pursuant to (1) contract, (2) the common law, or (3) statute (e.g., the Prevention of Illegal Squatting Act 52 of 1951). Naturally, where contract regulates the parties’ relationship, eviction must take place according to the terms of the contract. For various categories of black people, however, such as farmworkers, labour tenants, sharecroppers, or ordinary occupiers, living on white-owned farms, either the common law or the Prevention of Illegal Squatting Act was used. Evictions were relatively easy to obtain under these two methods. Under the common law it was sufficient to show that the plaintiff/applicant was the owner, that the defendant/respondent was on the land, and that the former gave the latter notice to vacate. Similarly, once permission to stay on the land was withdrawn, it was a simple matter to secure a criminal conviction and eviction under the Prevention of Illegal Squatting Act.

These three acts—The Labour Tenants Act, ESTA, and PIE—together with section 26(3) of the Constitution have affected the common law in certain circumstances and caused the repeal of the Prevention of Illegal Squatting Act. These acts, to varying degrees, prescribe certain procedures for securing an eviction that make it more difficult than ever before to obtain one.

1. The Land Reform (Labour Tenants) Act 3 of 1996

The Land Reform (Labour Tenants) Act 3 of 1996 grants labour tenants protection against arbitrary eviction by permitting eviction only in prescribed circumstances, pursuant to a court decision.
order issued by the Land Claims Court (LCC). The Labour Tenants Act also grants labour tenants the right to apply for ownership of that portion of the farm over which they have historically had use rights. It is the task of the LCC to decide whether such ownership rights should be granted, or whether the granting of lesser rights or compensation would be more appropriate. Where ownership is granted to labour tenants, farm owners are entitled to fair compensation. It is the task of the LCC to determine the amount of such compensation.

Great dissension in the ranks existed regarding the proper interpretation of the definition of a labour tenant. Some argued that the word "and" after subsection (b) need not be read conjunctively. The LCC, however, determined that the various subsections had to be read conjunctively. The Supreme Court of Appeal, the highest court for non-constitutional issues, confirmed the interpretation of the LCC. An interpretation of "such farm" in subsection (c) was given as being any farm, not just a farm belonging to the owner of the land referred to in subsections (a) and (b). This means that more people could qualify as labour tenants and, hence, for the protection afforded by the Act. This interpretation was accepted by the Supreme Court of Appeal:

I am of the view that the change from "the" farm to "a" farm in the definition cannot be ignored, i.e., that "a" cannot simply be replaced by "the." The same reasoning which I have applied earlier in this judgment in respect of "and" and "or" would seem

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75 Id. § 16.
76 Id. § 23.
77 Id. § 23(2)-(3).
78 Id. § 1.
79 Tselentis Mining (Pty.) Ltd. & Another v. Mdlalose & Others, 1998 (1) SALR 411 (N) (a judgment of Judge Meskin in the High Court in Kwa-Zulu Natal); Salimba v. Ngcoobo & Others, (unreported judgment of Judge Hurt in Kwa-Zulu Natal case 340/96 handed down on November 4, 1997). Overturned on appeal, see n.45.
80 Ngcoobo & Another v. van Rensburg & Others, 1999 (2) SALR 525 (LCC), 1997 (4) AllSA 537 (LCC).
82 § 1 of Land Reform (Labour Tenants) Act 3 of 1996.
83 Ngcoobo & Others, 1999 (2) SALR at 1059.
The object of the Act was to give a wide and equitable protection to labour tenants without ignoring the rights of the owners of farms. This balance can be achieved more justly and equitably by adhering to the text of paragraph (c) of the definition, rather than by substituting "the" for "a" farm.  

The judge writing the opinion explained further:

It is important to keep in mind that the Act was intended to reform the legal relationship that had prevailed between the owner of a farm and labour tenants since the apartheid era. Under that regime, the "rights" of those who served an owner in return for the privilege of working and grazing pieces of land for their own benefit were as illusory as they were precarious. These labour tenants occupied the land at the whim of the landowner, who could eject them subject only to compliance with the common-law requirement of reasonable notice. In our country, land ownership was effectively beyond the reach of the majority of black people—people who were, because of the apartheid system and its concomitant discriminatory education system, kept in ignorance even of their rudimentary rights. Rural people had little choice but to become either farmworkers, with no prospect of building up even a minuscule estate, or tenant labourers, with no legal protection of their tenancy. The last group was thus reduced to feudal dependency: they had either to comply with the orders of the landowner, even if harsh and unjust, or face the prospect of nomadic trekking and seeking, in an unsympathetic environment, new land to occupy.

The Honorable P.J.J. Olivier, judge of appeal of the Supreme Court of Appeal commented on the "bad and sloppy draftsmanship of the Act." Unfortunately, it is not the only area where poor draftsmanship has led the landowners on a merry dance.


The government passed the Extension of Security of Tenure Act in November 1997 to protect non-urban occupiers of land

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84 Id. at 1072-73.
85 Id. at 1069.
86 Id.
87 See infra text accompanying notes 88-100.
(other than labour tenants) against arbitrary eviction. It provides for eviction only in certain circumstances. Under the common law, all that the landowner needed to allege was that he (or she) was the owner and was entitled to possession. Ross v. South Peninsula Municipality discussed the allegations required in order to secure an eviction under the common law. The Court held that section 26(3) of the 1996 Constitution had amended the common law.

ESTA gives parties a choice of court. The parties may approach a magistrate’s court, the LCC, or, if both parties consent, a high court. ESTA does, however, make the LCC the final arbiter as far as these three courts are concerned. It provides that all eviction orders granted by magistrates must go on automatic review to the LCC. It further provides that whenever a high court is required to interpret ESTA, the proceedings must be stopped and referred to the LCC. It is important to note that cases can still be appealed from the LCC to the Supreme Court of Appeal, and in appropriate cases, to the Constitutional Court.

ESTA is a poorly drafted piece of legislation. The number of cases that the reviewing court (the LCC) has had to send back due to procedural errors is testimony to this. Moreover, Parliament, via piecemeal amendments for every statutory loophole, increases the difficulty on affected parties to protect their rights. These problems are not lessened by the fact that people on the ground seem to have the notion that occupiers in terms of ESTA have permanent land rights. This notion, being put into the heads of the frequently poorly educated and illiterate people, often works to their great detriment. They have been advised that ESTA gives them permanent land rights. Consequently, they behave in a fashion that jeopardises their right of residence. This is especially true of employees who are encouraged or threatened into becoming involved in illegal strikes and who then find themselves not only without employment but without homes as well. The Government needs to embark on a massive campaign to educate occupiers about their rights and duties.

Returning then to the piecemeal approach adopted by the legislature, section 9(3) is a new addition to ESTA, which, though

89 2000 (1) SALR 589 (CC), 2000 (4) AllSA 85 (CC).
90 Id.
laudable in purpose, has added even more confusion to an already confused piece of legislation. The section provides that:

For the purposes of subsection 2(c),\(^91\) the Court must request a probation officer contemplated in section 1 of the Probation Services Act, 1991 (Act No. 116 of 1991), or an officer of the department or any other officer in the employment of the State, as may be determined by the Minister, to submit a report within a reasonable period—

(a) on the availability of suitable alternative accommodation to the occupier;

(b) indicating how an eviction will affect the constitutional rights of any affected person, including the rights of the children, if any, to education;

(c) pointing out any undue hardships which an eviction would cause the occupier; and

\(^91\) § 9(1)-(2) of Extension of Security of Tenure Act 62 of 1997. Paragraphs (1) and (2) of section 9 provide:

(1) Notwithstanding the provisions of any other law, an occupier may be evicted only in terms of an order of court issued under this Act.

(2) A court may make an order for the eviction of an occupier if—

(a) the occupier’s right of residence has been terminated in terms of section 8;

(b) the occupier has not vacated the land within the period of notice given by the owner or person in charge;

(c) the conditions for an order for eviction in terms of section 10 or 11 have been complied with; and

(d) the owner or person in charge has, after the termination of the right of residence, given—

(i) the occupier;

(ii) the municipality in whose area of jurisdiction the land in question is situated; and

(iii) the head of the relevant provincial office of the Department of Land Affairs, for information purposes, not less than two calendar months’ written notice of the intention to obtain an order for eviction, which notice shall contain the prescribed particulars and set out the grounds on which the eviction is based: Provided that if a notice of application to a court has, after the termination of the right of residence, been given to the occupier, the municipality and the head of the relevant provincial office of the Department of Land Affairs not less than two months before the date of the commencement of the hearing of the application, this paragraph shall be deemed to have been complied with.
(d) on any other matter as may be prescribed.\(^9\)

Judges of the court differ on whether such a report must be obtained if a long-term occupier (i.e., a person who was an occupier on or before February 4, 1997) has done something to cause his loss of occupation rights.\(^9\) Prior to the addition of section 9(3), alternative accommodation was not necessary in such a case. One view holds that, as there were no constitutional rights that would be affected and as hardship need not enter the picture in such a case, a section 9(3) report would add nothing to the information before the court and need not be obtained.\(^9\) Another view argues for the submission of the section 9(3) report even in the circumstances of section 10(1):

I would have thought that one of the most important factors to consider when determining the justice and equity of an eviction would be hardship. That does not mean that an occupier is entitled to disregard the fact that the property belongs to the land owner. It simply means that even in a section 10(1) eviction the hardship an eviction will cause must nonetheless be considered.

\(^{92}\) Id. § 9(3).

\(^{93}\) Id. § 10(1). Section 10(1) provides:

An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if—

(a) the occupier has breached section 6(3) and the court is satisfied that the breach is material and that the occupier has not remedied such breach;

(b) the owner or person in charge has complied with the terms of any agreement pertaining to the occupier’s right to reside on the land and has fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term of the agreement, although reasonably able to comply with such term, and has not remedied the breach despite being given one calendar month’s notice in writing to do so;

(c) the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship; or

(d) the occupier—

(i) is or was an employee whose right of residence arises solely from that employment; and

(ii) has voluntarily resigned in circumstances that do not amount to a constructive dismissal in terms of the Labour Relations Act.

\(^{94}\) Westminster Produce (Pty.) Ltd. t/a Elgin Orchards v. Simons & Another, 2000 (3) AIISA 279 (LCC).
In a section 10(1) situation it is likely that the most the hardship aspect will do is delay the inevitability of an eviction to minimise the hardship the occupier and his family will suffer. I wish to express my concern that the Legislature saw fit to require a report dealing only with the hardship that the occupier may suffer. I see no reason why the hardship the land owner may suffer if the eviction is not granted should not be mentioned in the report. In fact it would be of great assistance to the court if the independent person preparing the report also investigated this aspect. Of course the court is at liberty to call for evidence from the landowner on this aspect once the section 9(3) report arrives.\footnote{Valley Packers Coop. Ltd. v. Dietloff, LCC 84R/00, para. 8 (2000).}

The latter view has been expressed in yet another case.\footnote{Glen Elgin Trust v. Titus & Another, LCC 81R/00 (2000).} This difference of opinion makes it even harder for the magistrates, usually the judicial officers of first instance, to know whether or not to request such a report.

Add to this confusion the fact that section 9(3) was inserted into the legislation without proper consultation and one finds that “probation officers” who are under the jurisdiction of the Department of Justice, not the Department of Land Affairs (DLA), refuse to accept the additional burden of preparing such reports. The DLA has since designated the Director of the Provincial Office of the DLA to prepare these reports. Very few section 9(3) reports are being obtained, but not for want of trying. The need to obtain an independent report is pressing. Once the minister appoints the necessary additional staff to prepare the requested report in a timely manner, such a report will have a valuable role to play, especially in undefended matters. Meanwhile the LCC has held that if a reasonable time has lapsed and no report is forthcoming, there is no need to wait indefinitely for the report.\footnote{Holt Leisure Park (Pty.) Ltd. v. Josephs & Another, LCC 62R/00 (2000).} This is an unfortunate state of affairs considering the important role such a report plays.

Deputy Judge President Flemming also raised the issue of constitutionality in \textit{Joubert v. van Rensburg} on October 3, 2000.\footnote{2000 W.L.D. 13735/00.}
36.1 Some interventions and discriminations of the Tenure Act are packaged as if they are protective of that which in fact required no additional statute.

36.2 Section 5 commences by stating rights which would have existed in any event. Section 5 adds nothing to the Constitution. It subtracts. The constitutional right to privacy must now tolerate hordes of “unlawful” occupiers who are protected by the Tenure Act.

36.3 An occupier is as a starting point entitled to nothing more than that which was explicitly, tacitly or impliedly agreed. Section 6 is not there to confirm that. It exists to move towards the opposite pole. If the contract provides less, the right to contractual freedom and to choice of association yields. The occupier who bargains for nothing more than that which in common law becomes a tenant or licensee, may now take the owner’s limited supply of water. Never mind the owner, the cattle or the crops.

36.4 An occupier is given a “right to security of tenure” (section 6(2)(a)) over another’s property. Ownership has to yield to this right. In terms of choice of words the point of departure is again apparently an established one: a right to residence may still be terminated on “any lawful ground.” But then lawful grounds are made inadequate. Any (lawful) ground of termination is subjected to a very severe qualification the terminal effect of which is that the right of residence may only be brought to an end if there is alongside a lawful ground to do so also something which makes termination “just and equitable.” Section 8(1).

37.1.1 “Just and equitable” from whose point of view? The immediate response ought to be that the fairness at least to every party must be considered. Also that of an occupier’s child who is an invalid? And if the plight of the occupier’s child is relevant, what about the child of the owner who is a quadriplegic and who needs better income from the property to care for the child?

37.1.2 There is no guideline for “just and equitable.” “Just and equitable” will in the particular field vary according to the presiding individual’s personal make-up, life experience, and views about socio-political matters. It amounts to an unguided missile.

37.1.3 The statute gives no special attention to what is fair to the
It does force fairness in favour of the occupier. It does so by requiring that certain factors weigh in the equation even if on normal logic they would not affect fairness.

37.1.4 It is decreed that fairness be guided *inter alia* by the “existence of a reasonable expectation of the renewal of the agreement” although the owner has no control over the thinking of the occupier.

37.1.5 Giving lawful rights their due is subjected to “comparative hardship” between owner and occupier. Unless one subscribes to the belief that every owner in a rural area has things easy, in fact has things so easy that he ought to lose whatever one or more occupiers decide to take, the party with legal rights must take the knock merely because, on a relative basis, the grabbing party will in some degree suffer some greater hardship. In the result the teacher who sub-let a holiday bungalow on a farm can not get rid of the insolvent who moved in for a month’s hire.

37.2.1 The statute goes further. If occupation has endured for ten years, no termination at all is possible if the occupier is older than 60 years unless specified breaches occur. Why?

37.2.2 Bearing in mind that non-payment of rental is always of a nature which can be remedied, the Tenure Act creates an indefinite lease. If no rental was payable the statutory creation is more like a servitude—unilaterally taken. A person who was tolerated from the kindness of the heart for 10 years acquires a permanent right as a birthday gift for turning sixty. Why? On the death of that occupier the lease or other arrangements endure for at least twelve months in favour of a relative. Why? Answers may have followed if protection had been made dependent upon a basis of occupation which points to some unfairness of ending occupation. The statute does not do that. Once the Tenure Act creates a wide net and itself gives no justification for limiting its wording along logical lines, limitation can only find a level with some fairness by way of the discretion of a presiding officer who must try to import a limit which Parliament did not or could not disclose. How come that a magistrate determines ad hoc what Parliament might have wanted to say?

37.3.1 Even if an owner has overcome the overriding rights to (unlawful) tenure which I have mentioned, an order for ejectment is prohibited unless additional requirements are met. One of these is that there must be at least two months’ notice to
a local authority (section 9(2)(d)(ii)). Then sections 10 and 11 imply that some unlawful occupiers may not be removed unless the court forms an opinion that ejectment is "just and equitable." The owner is made dependent *inter alia* upon the question whether the occupier has "suitable alternative accommodation" available. *Cf.* section 11(3)(a). Ownership is again overridden by the right of *unlawful* occupation unless and until e.g. a local authority has the funds and the willingness to take the intruder off the owner's hands. The effect is, of course, that unless a local authority or someone else provides, the owner of the land chosen by the occupier pays the price in the interests of society out of his personal pocket. The Tenure Act protects relationships with as little inherent "equitable" quality as when an unintelligent student decides to go to university and then chooses my bank account to pay the price.

37.4 An owner who eventually succeeds in obtaining an order, is then burdened *inter alia* by a duty to pay compensation. Had it been a common law approach of enforcing contractual arrangements or being guided by enrichment-impoverishment, the statute need not have decreed anything. The court must, however, not determine whether there is a duty to compensate but only the extent. That is to be assessed by the court's view of what is "just and equitable." By a subjective opinion in which the factors mentioned in section 13(1) and 13(2) must play a role. The statute has in mind the costs to the occupier and not whether the owner derives benefit. Section 13(2). The court may subject ownership to the arrival of the end of the crop gathering season. Section 3(c)(2)(a) [sic]. Never mind that one person is unlawfully (in law and even according to what is just and equitable) in occupation of another's property and is unlawfully deriving farming benefit therefrom. 99

The poor draftsmanship of ESTA raises another concern. There is an obvious but illogical distinction between the treatment of section 10 and section 11 occupiers. In the case of section 10(1), the legislation clearly seeks to diminish the protection afforded to a longer-term occupier. The importance of alternative accommodation has less weight if the longer-term occupier misbehaves. On the other hand, there is no mention of any censure for misbehaviour in section 11 situations. This is absurd especially

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99 *Id.*
when one considers that the section 11 occupier would have been on the land for a lesser time than a section 10 occupier.

Another obvious problem with the review process is that in most cases the process depends upon the magistrate sending the papers to the LCC for review. A close look at the LCC review register will reveal that very few of more than 260 magisterial districts have ever sent their evictions for review. It is very doubtful that all the evictions that have been granted have found their way to the LCC. Some nongovernmental organizations have monitored the evictions in their areas and various requests have come from outsiders for a particular eviction to be reviewed. It is unclear, without further information, whether the failure to send the papers for review is based on the fact that the evictions are being granted under the common law, and thus not reviewable, or being incorrectly granted under other legislation, or whether section 19(3) is being ignored intentionally by the magistrates.


The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) affords protection against arbitrary eviction to people who occupy another’s land without the latter’s permission. The genesis of the Act can be traced to section 26(3) of the Constitution Act 108 of 1996. Section 26(3) reads: “No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.” Unlike all the other acts on land reform, PIE is not justiciable in the LCC, but in the magistrate’s court and High Court.

100 Nineteen cases were sent for review in 1998, seventy-nine cases in 1999, and 106 cases in 2000.
The purpose of PIE was set out by the Honourable J.P. Horn, acting judge, in *Port Elizabeth Municipality v. Peoples Dialogue on Land & Shelter & Others*:\(^{104}\)

The preamble to the Act spells out what the Legislature sought to achieve. The Act seeks to protect the cardinal rights of inhabitants of so-called informal settlements to share in the constitutional right to housing and accommodation. It does not want to see people evicted from their homes without the intervention of the court. This can only happen once certain prescribed requirements have been met by the landowner and all the relevant circumstances of the situation have been taken into account by the court.\(^{105}\)

PIE is commendable in a society where there has been so much abuse of those with less power and money. What I do not understand is the fact that various separate acts all dealing with property rights have had to be promulgated. It has created much confusion. For example, why is a PIE eviction not reviewable by the LCC? The only distinction between a person protected by ESTA and a person falling under PIE is the consent of the landowner. Should this merit such a divergence in treatment? Jurisdictional problems often arise where a case comes to the LCC on the misunderstanding that it falls within ESTA. These problems often result in unnecessary delays in finalising the case and escalation of costs. These concerns have been raised in our judgments, but the legislature, in its wisdom, has seen fit to do nothing about the matter.

### C. Restitution

The third and last element of the policy of land reform is called restitution. This process is regulated in terms of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act).\(^{106}\) This Act was enacted pursuant to the provisions of sections 121 to 123 of the Interim Constitution\(^ {107}\) to flesh out the constitutional framework for restitution.\(^ {108}\) Any person who, or any community which was,

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104 2000 (2) SALR 1074 (SE).
105 *Id.* at 1083 (A-B).
dispossessed of a right in land as a result of a racially discriminatory law or practice has a right to claim restitution of that right against the State.

To qualify for a claim under the Act, which claim must be made against the State, the following requirements must be satisfied. There must have been: (a) a dispossession of a right in land; (b) due to racially discriminatory laws or practices; (c) after June 19, 1913; (d) the claim must be lodged not later than December 31, 1998; and (e) just and equitable compensation must not have been paid at time of dispossession.\(^{109}\)

The Blacks Land Act 27 of 1913 referred to in the background history above was the first national act to regulate land in a discriminatory manner and was promulgated on June 19, 1913.\(^{110}\) This explains the requirement that the dispossession must have taken place after June 19, 1913. This does not mean that there were no racially motivated disposessions prior to June 19, 1913, but that such disposessions would have taken place in terms of other provincial laws or even brute force. Any such disposessions are dealt with in terms of the redistribution element as explained above.

Why there is a deadline by which the claims must be lodged is not clear, particularly given that the majority of prospective claimants are unlettered people staying in rural areas where information travels slowly, if at all. The first deadline was April 30, 1998, but was extended to December 31, 1998. Even after the later date, one still comes across people who plan to claim, blissfully unaware of the fact that the deadline has come and gone.

With respect to the Restitution Act, claims are to be lodged with any of the regional offices of the Commission on Restitution of Land Rights. The Commission’s role is to assist the claimants to present the claims, investigate the merits of the claims and attempt to settle them through mediation.\(^{111}\) Once the claim has been settled, the Commission, together with the Minister, make an award that concludes the matter.\(^{112}\) Where the claim is not settled,

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\(^{109}\) *Id.* § 2.


\(^{111}\) § 6(1) of Restitution of Land Rights Act 22 of 1994.

\(^{112}\) *Id.* Previously, the Commission was obliged to submit the settlement to the LCC for approval and to be made an order of Court.
the Commission must compile a report to which all documents found in the investigation must be annexed and submitted to the LCC for adjudication. The Commission’s report stands as a statement of the case before the court and all parties to the claim must then respond to the recommendations therein.113

The functions of the LCC under the Restitution Act include the determination of any claim to restitution of a right in land. “Restitution of a right in land” means “(a) the restoration of a right in land; or (b) equitable redress.” Equitable redress is defined as:

any equitable redress, other than the restoration of a right in land, arising from the dispossession of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices, including—

(a) the granting of an appropriate right in alternative state-owned land;

(b) the payment of compensation.114

Where compensation is payable, either to a claimant or to a current owner who is being expropriated, it is also the task of the LCC to determine the quantum of such compensation.115

Judicial process is by its very nature slow and can be protracted. Coupled with an initial investigation by the Commission, it makes the process of investigating and determining the claim even slower. When there was public concern about the pace of the restitution process, the Act was amended by the Land Restitution and Reform Laws Amendment Act 63 of 1997 to allow claimants to approach the LCC directly without first going to the Commission. If claimants choose this option they must do all the necessary investigative and preparatory work before submitting a claim to the court. This amendment was introduced in an attempt to expedite the land restitution process. Very few, if any, direct access claims have been lodged with the court since the amendment.

While it may be slow, the judicial process, as opposed to an administrative one, has the distinct advantage of credibility and legitimacy, phenomena which are very important in a situation

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114 Id. § 1.
115 Id. § 35(b).
where freedom was won at a negotiating table and not on the battlefield. Other problems beside the slow pace are associated with the restitution process. These include:

lack of co-ordination between the restitution process and the planning, budgeting and development programmes of provincial government;

shortage of land;

absence of proper planning before the resettlement of the land;

disputes over entitlement to membership of the community; and

a shortage of skills and resources needed to redevelop the land.\textsuperscript{116}

What sort of problems have been experienced by those who have enjoyed the legal benefit of restoration?

This brings us to the most pressing and painful part of the problem—which is that the moment of return to the land cannot live up to the expectations and hopes generated by it. For of course what was lost can never be returned. Part of the problem is the fact that the land is not the only thing that was lost. What was destroyed through . . . removals was a whole way of being, a set of community relations, a system of authority and let [us] not forget, a broader system of economic relations and livelihoods \textit{of which the land was but a part}, and which gave it its function and its value. The terrible truth of Restitution has thus been that the moment of return to the land is often a moment of disappointment and anti-climax. To settle on the spot from which one’s forebears—or even a younger, more vigorous, more hopeful self—were once removed, is not necessarily to return to that more authentic, more dignified, more hopeful mode of existence. As we have seen in numerous cases, from Riemvasmaak and Elandskloof to Doornkop and Ratsegae, to return from exile to the promised land is to return to face the complex, dispiriting and painful problems in the new South Africa once again in new and often more intractable ways. For

communities have grown, services are needed and the rural and national economies that made certain forms of existence possible may no longer be in place. If existence without piped water and electricity was acceptable in the past, it is no longer so—and these services have to be paid for, and paid for in a very different, increasingly globalised, economy. In all too many cases, we may be looking at a scenario where the land is returned to those who lost it—only to be lost again to the banks, or to those who are willing to pay good cash for it. . . . This is not to suggest that the project of restoration or return is pointless and should be given up. The moment of the [realisation of the implications of returning] is of course potentially an immensely fruitful one. It can be the moment at which reality, however painful it is, is accepted, and at which a more modest, more grounded process of decision making can start on new terrain. But this is very difficult, not least because it must involve a final and full acceptance of the difficulties of the present. And negotiating this transition requires forms of practice—and forms of support—which have not thus far been made available to claimants or implementors.\footnote{Du Toit, \textit{supra} note 116, at 14-15.}

In order to counteract some of the aforementioned problems, the LCC sought in \textit{Kranspoort Community concerning the Farm Kranspoort}\footnote{2000 (2) SALR 124 (LCC).} to ensure that the restitution (and upgrading of land rights) did not fall victim to such tragedy. The court put in place what it considered to be safeguards against the unsustainable depletion of non-renewable resources, as well as conditions upon the forming of the Community Property Association.\footnote{\textit{Id.} para. 123.}

If what I have been saying sounds too gloomy, I quote the following passage from the website of the DLA by way of statistical information and for your comfort:

A deadline for the lodgement of claims was set at the 31 December 1998 [sic] and the Department embarked on a major communications drive to ensure that all people who were victims of forced removals knew that they needed to claim, and where they could go to claim. The results were astounding and 63,455 claims have been lodged (the Commission is still processing claims so the final number may change; also note

\footnote{\textit{Id.} para. 123.}
that this number reflects both individual and group claims and so does not reflect the actual number of people claiming restitution. Approximately 80% of these claims are for urban areas and the majority of these will be for financial compensation. Since 1995, 241 claims have been finalised representing the restoration of 311,484 hectares to 13,584 households (that is 83,378 beneficiaries). The Department has spent R60 million in settling these claims (financial compensation and purchase of land). A further 4,365 claims have been gazetted (that means they have been verified and work is being done on settling them), 284 have been rejected and another 200 are nearing completion either through the Land Claims Court or a fast track out-of-court settlement procedure. Concerned with the slow pace of delivery, the Minister instituted a review of the restitution process in June last year which has recommended far reaching changes that will make this year the year of Delivery in Restitution. The White Paper on South African Land Policy outlined time frames for the resolution of restitution as follows: 3 years for lodgement of claims; 5 years for processing claims and 10 years for implementing agreements.

D. The Holding of Property

In line with the protection of property rights in the Constitution and with a view to securing tenure rights, the Communal Property Association Act 28 of 1996 was enacted (CPA Act). This Act can be used where a community either has land restored to it or has applied for an award of land it has been occupying, or for an on-site or off-site development respectively under the Restitution Act, Labour Tenants Act, and ESTA. I deal with this Act last because it straddles the entire spectrum of restitution, redistribution, and tenure security.

Prior to the implementation of this Act, a community could only own land under very limited circumstances. One method was by common or joint ownership, which required inclusion of all

names on the title deed. The trust represented another method. But it bore the disadvantage of land vesting in trustees who were not necessarily the beneficiaries of the trust. Finally, there was the option of creating a juristic personality. Clearly, this limitation ignored the realities of the African tradition of communal living. The purpose of the CPA Act is “[t]o enable communities to form juristic persons, to be known as communal property associations in order to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written constitution; and to provide for matters connected therewith.”

Obviously the legislature did not consider the existing forms of juristic personality as adequate. The main reasoning appears to have been the cost and the complexity of those systems. The new juristic personality does not, however, replace the old options, but merely adds to them. For example, section 2(3) of the CPA Act expressly provides for a “similar entity” to apply to the minister in order to have the various sections of the CPA Act apply to it. A similar entity is defined as “a trust, association of persons or company registered in terms of section 21 of the Companies Act, 1973 (Act No. 61 of 1973).”

Communities need ministerial approval in order to form a communal property association (CPA). The community will have to convince the minister that it is disadvantaged and that approval is in the public interest. The similar entity needs to apply for exemption from compliance with some of the provisions of the CPA Act if it does not wish to follow all the formalities of the Act. With respect to the legislature, it seems as if the plans to implement a new system because the old one was too complex have failed.

Drawing up the register of intended members for the Elandskloof community, which was the first to receive its land back under the Restitution of Land Rights Act . . . took three years to finalise . . . . Difficulties encountered included deciding on the acceptable extent of family affiliation and eligibility.

123 CAREY-MILLER & POPE, supra note 9, at 467, 470.
124 Pmb. of Communal Property Association Act 28 of 1996.
125 Id. § 2(3).
126 Id. § 1.
127 CAREY-MILLER & POPE, supra note 9, at 467-69.
concerns about pressure on available space . . . and access to state subsidies . . . . The latter two concerns are somewhat in conflict in that, on the one hand, it would appear to be desirable to have as many families as possible involved because the subsidy is available on a family basis, while, on the other, it would be undesirable to overcrowd and thus threaten the viability of subsistence if the resultant plots were to be very small. 128

The CPA also has to comply with certain principles. 129 A CPA needs to be aware that it may approach the Director-General in terms of section 6(1) to ask for assistance in the drafting of a constitution. 130 This service will be invaluable but must not be seen as replacing the will of the community.

E. Commentary on the Land Reform Laws

The effect of the land reform laws has been somewhat mixed. In some cases it has resulted in cooperation between white farm owners and black farm occupiers. In other situations it has resulted in the most acrimonious court cases and, in worst cases, in violent mutual attacks. Thankfully, the latter unpleasant method of resolving the problem occurs in far fewer cases than where cooperation is shown.

An example of the strong feelings about the land reform laws is perhaps best illustrated in the case brought by a union of white farm owners in which they challenged the constitutionality of the Restitution Act. 131 The Transvaal Agricultural Union argued, inter alia, that section 11(1) of the Restitution Act contravened the most basic principle of law, the audi alteram partem: "The main objection, and the one primarily relied upon by the applicant as the basis for its contention that landowners have been prejudiced by the legislation, is that no provision is made in the statute for regional land claims commissioners to hear owners before issuing a section 11(1) notice." 132

128 Id. at 471.
129 § 9 of Communal Property Association Act 28 of 1996.
130 Id. § 6(1).
131 Transvaal Agric. Union v. Minister of Land Affairs & Another, 1997 (2) SALR 621 (CC).
132 Id. at 630.
Section 11 deals with procedures that must be followed in processing claims for restitution. Persons or communities claiming restitution of land are required to complete a prescribed form, in which a description of the land and the nature of the right being claimed must be given, and to lodge the form at a regional office of the Commission. The regional land claims commissioner, if he or she is satisfied that the claim has been lodged in the prescribed manner, is not frivolous or vexatious, and that no order has been made by the LCC in respect to that piece of land, must cause notice of the claim to be published in the Gazette. Once the notice has been published in the Gazette, the commissioner is required by section 11(6) to advise the owner of the land and any other party which, in his or her opinion, might have an interest in the claim, of the publication of the notice, and instruct the Registrar of Deeds to note on the deeds office records the fact that a claim for restitution of a right in the land has been instituted.

There are very important consequences for a landowner:

A decision to publish a notice of the claim in the Gazette has certain consequences. Sections 11(7)(b) and (c) provide that no claimant who was resident on the land in question at the date of commencement of the Act may be evicted from the land, and no improvement on the land may be removed or destroyed, without the written authority of the Chief Land Claims Commissioner. Section 11(8) empowers a regional land claims commissioner who “has reason to believe that any improvement on the land is likely to be removed, damaged or destroyed or that any person resident on such land may be adversely affected as a result of the publication of such notice” to authorise officials or delegates of the Commission to enter upon the land to draw up an inventory of assets on the land, a list of persons employed or resident thereon, and to report on the “agricultural condition of the land and of any excavations, mining or prospecting thereon.”

The Constitutional Court did not decide this important question, but indicated that the solution was one that the Supreme Court would have to decide. It did however give a few tips as to how the Supreme Court would have to consider the issue.

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134 Transvaal Agric. Union v. Minister of Land Affairs & Another, 1997 (2) SALR 621, 627-28 (CC).
In deciding whether the constitutional requirement that there be procedurally fair administrative action calls for notice to be given by regional land claims commissioners to the landowners before issuing a section 11(1) notice, or whether their interests are sufficiently protected by notice given to them after such claims have been accepted, various matters would have to be considered by the court. Without attempting to lay down what will be involved in such an enquiry, it seems clear that a court would have to weigh up the interests of the claimants against those of the landowners, and consideration would have to be given to issues such as the temporary nature of the impediment; the purpose served by the status quo provision of section 11(7); the need for expedition in securing that purpose once a claim has been lodged; the harm done to landowners by the impediments placed upon them by sections 11(7) and (8); the vulnerability of the claimants and the harm that might be suffered by them if the status quo is not preserved; and the fact that there is an unrestricted right to approach a different official, the Chief Land Claims Commissioner, for authority to evict a claimant or interfere with improvements on the land. It might also be necessary to consider whether the Act reasonably requires claims to be processed expeditiously.

These are all matters on which the Supreme Court can and should give a decision, and which ought to be canvassed in the Supreme Court in the light of any evidence placed before it, before any approach is made to this court for relief. A constitutional issue will arise only if the Supreme Court were to hold that the Act requires claims to be dealt with in a manner inconsistent with procedurally fair administrative action. It is premature to approach this court for a decision, before that issue has been determined.  

The DLA immediately made changes to the Act by inserting section 11A. This new section entitles any person affected by a section 11(1) notice to make representations to the regional Commissioner for the withdrawal or amendment of the notice.

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135 *Id.* at 632.


137 *Id.*
The piecemeal amendment to these acts confuses those members of the public who use them. Unfortunately, the responsible department, in order to beat deadlines, rushes amendments through Parliament, while neglecting the long-term view of the Act as a whole and failing to ensure streamlining to obviate jurisdictional and other problems. The jurisdictional problem is easily solved by making the laws justiciable in one court. In addition, consultation between the drafters and the implementers of the legislation would facilitate the drafting process.

The confusion exists among people who believe they have a claim for restitution of land rights and then are told that they do not and should wait their turn in the redistribution queue. These people sometimes labour under the misconception that the same piece of land they laid claim to under the restitution process will be redistributed to them. When this does not happen, there is great disappointment, resulting at times in unnecessary, expensive litigation. An in-depth consultation with claimants explaining the various processes and options open to them would be helpful.

The cutoff dates in the Restitution Act, namely June 19, 1913 and December 31, 1998 have left too many people unhappy with the process. It is often traumatic for claimants to hear that their claims must fail because they were dispossessed on June 12, 1913 when their neighbours, who were dispossessed on June 19, 1913, succeed. Such claimants resort to demanding aboriginal title, which is beyond the jurisdiction of the LCC. People dispossessed prior to June 19, 1913 are referred to the redistribution process, meaning that any hope of restoration is lost. Similarly, there are many people who feel aggrieved by the cutoff date of December 31, 1998. Some argue that the land issue is a very sensitive, emotive, and emotional issue. It is an issue about which nations go to war. Therefore, in a situation where a political dispensation was negotiated, it is imperative for people to be given sufficient opportunity to claim reparations. Put differently, if they cannot get what they went to war to attain and what they negotiated at the settlement talks, why should they not go back to war? The proponents of the argument appreciate the need for finality on the process, but argue that in this process one is dealing with a

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138 See, e.g., Mahlangu NO v. Minister of Land Affairs & Others.
population, some 45 percent of which is illiterate, scattered in the rural areas without any sophisticated communication means. Therefore, to give such a short time to people to come forward with their claims is equivalent to not giving them any opportunity at all.

As discussed above, the process is laden with frustration and impatience as a result of its slowness. On the other hand, it lends legitimacy and credibility, which is very important given the fact that the political dispensation is a product of settlement negotiations.

Finally, the lack of a developmental strategy in the restitution process has long been a cause for concern for the judges of the court and they have expressed this concern in their judgments.\textsuperscript{139} It would not be surprising to find that this is the one main reason people suddenly develop cold feet once restitution has been ordered and the moment of returning to the land has arrived. Thankfully, the DLA has now incorporated this strategy into its policy. It only remains to see how it will be implemented.

When all is said and done, all the above-mentioned problems are but minor irritations in an otherwise very successful process. If it was so perfect that nobody complained, then it would not be a human endeavor, but God-given.

\textsuperscript{139} See, e.g., Kranspoort Cmty. Concerning the Farm Kranspoort, 48 LS 2000 (2) SALR 124 (LCO).