IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.
26/09/17
DATE SIGNATURE

CASE NO: 101250/2015

DATE: 26 September 2017

IN THE MATTER BETWEEN:

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| **MANTSHABELLE MARY RAHUBE** | **Applicant** |
| AND | |
| **HENDSRINE RAHUBE** | **1st Respondent** |
| **MEC FOR HOUSING AND LAND AFFAIRS, NORTH WEST PROVINCE** | **2nd Respondent** |
| **MINISTER FOR RURAL DEVELOPMENT & LAND REFORM** | **3rd Respondent** |
| **REGISTRAR OF DEEDS, PRETORIA** | **4th Respondent** |
| **REGISTRAR OF DEEDS, MAFIKENG** | **5th Respondent** |
| **THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY** | **6th Respondent** |

**MEC FOR HUMAN SETTLEMENTS, GAUTENG PROVINCE**

**7th Respondent**

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**JUDGMENT**

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**KOLLAPEN J:**

1. The applicant has launched proceedings in which she seeks the following relief:

*1) Declaring that the Applicant is the owner of the property situate at Stand 2328 Block B, Mabopane ("the property").*

*2) Alternatively, declaring that the Applicant is entitled to have the property registered in her name.*

*3) Directing the Registrar of Deeds to take all steps necessary to effect transfer of the property into the Applicant's name.*

*Alternatively to Prayer 1 to 3 above:*

*4) Declaring that the First Respondent holds title to the property on behalf of and for the benefit of the Applicant and her descendants.*

*Alternatively to Prayer 1 and 4 above:*

*5) Declaring section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 ("the Upgrading Act") unconstitutional and invalid to the extent that it deprives occupants of the property who are not registered on a deed of grant claiming ownership of the property.*

*6) Declaring section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 unconstitutional and invalid to the extent that it fails to ensure that occupants of property that is subject to a land tenure right listed in Schedule 1 of the Act are given notice and an opportunity to be heard prior to the conversion of those rights into full ownership.*

7) *Ordering that the declaratory relief in prayers 5 and 6 above shall operate retrospectively.*

*Alternatively to Prayer 7 above:*

8) *Suspending the declaration of invalidity for a period of one year to allow the Legislature an opportunity to introduce a constitutionally permissible regime for the determination of rights of ownership and occupation of land subject to the provisions of section 2(1) of the Upgrading Act.*

9) *Directing the Second Respondent (or his nominee) to hold an inquiry in accordance with the provisions of section 3 of the Upgrading Act in respect of land tenure rights over the property, and to provide the Applicant with an opportunity to be heard at such inquiry.*

*Costs*

10) *That costs be awarded jointly and severally against Respondents that oppose the application.*

2. The first and third respondents oppose the relief sought.

**Factual background**

3. The applicant and the first respondent are siblings and together with other members of their family moved into the property known as Stand 2328 Block B, Mabopane ("the property") in about 1970 following their removal from the area known as Lady Selbourne. At that time, there were 8 people who occupied the property, namely, the applicant, her grandmother, her uncle, her three brothers (including the first respondent), and her two children (Rosina and Matthews).

4. The applicant moved out of the property from 1973 to 1977, in order to live with her husband, but returned to the property in 1977 and has lived there continuously since then.

5. The applicant's grandmother died in 1978. All three of the applicant's brothers moved out of the property during the 1980's and early 1990's. Her uncle moved out of the property in the year 2000.

6. Accordingly, and even though the occupants of the property have varied over time, since 2000, the property has been exclusively occupied by the applicant and her immediate family.

7. The applicant, her children, and her grandchildren continue to reside in the property but currently face a threat of eviction from the first respondent. In those eviction proceedings, which are still pending, the first respondent in support of his *locus standi* alleges he is the lawful owner of the property and placed reliance on a Deed of Grant issued by the Republic of Bophuthatswana on 13 September 1988 in his favour. The Deed of Grant was issued in terms of the provisions of Proclamation R293 of 1962 (the "Proclamation") in terms of the Native Administration Act 38 of 1927 (the "Native Administration Act"), which was renamed the Black Administration Act 38 of 1927 (the "Black Administration Act").

8. The first respondent thereafter became the registered owner of the property following a conversion of the land tenure rights, evidenced in the Deed of Grant he held, into full ownership in terms of the provisions of section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 ("the Upgrading Act").[1]

9. The first respondent does not reside on the property, nor do any other family members except for the applicant and her immediate family.

10. The applicant states that when the first respondent instituted eviction proceedings against her in 2009, she then became aware that the rights he held in terms of the Deed of Grant were converted into full ownership. In this regard, she states that neither she nor any other occupant of the property had been notified of the change in land tenure rights nor afforded the opportunity to make representations with regard to their relationship to the property or their own claim to title.

11. The applicant concludes that when the tenure rights of the first respondent were converted into full ownership, she lost the opportunity to assert her own interest in the ownership of the property and, in addition, that conversion to full ownership, rendered her and her family more vulnerable to the risk of eviction.

12. The applicant further states that she is the current head of the household and has always been responsible for the expenses relating to the upkeep and maintenance

[1] The Upgrading Act commenced on 1 September 1991.

of the property. In this regard, she and her uncle, Mr Mishack Matjila, shared those costs, but since he moved out in 2000, she has been exclusively responsible for those costs including the payment of municipal levies. She also alleges she has made improvements to the property including the installation of security bars and fences. In response thereto, the first respondent simply offers a bald denial of these allegations, does not seek to provide any details in explanation of the denial, nor does he offer any explanation with regard to how and by whom the property has been maintained for all these years, if by anyone other than the applicant.

13. I now proceed to deal with the relief sought by the applicant.

**Relief based on the Restitution of Land Rights Act 22 of 1994**

14. In advancing her case for relief, the applicant claims ownership of the property based on section 3(b) of the Restitution of Land Rights Act 22 of 1994 ("the Restitution Act").

15. Section 3 of the Restitution Act reads:

> *"Subject to the provisions of this Act a person shall be entitled to claim title in land if such claimant or his, her or its antecedent –*

(a) *was prevented from obtaining or retaining title to the claimed land because of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 9(3) of the Constitution had that subsection been in operation at the relevant time; and*

(b) *proves that the registered owner of the land holds title as a result of a transaction between such registered owner or his, her or its antecedents and the claimant or his, her or its antecedents, in terms of which such registered owner or his, her or its antecedents held the land on behalf of the claimant or his, her or its antecedents.*"

16. In support of this argument, the applicant contends that she has occupied and exercised control over the property for over 32 years, has been responsible for its maintenance and upkeep, and paid for all municipal services over the years. In addition, she argues that the first respondent obtained title by virtue of a tacit agreement between the first respondent and the remaining members of the family that he would hold such title on behalf of the head of the household and/or family members who elected to remain in occupation and control of the house.

17. The difficulty with this argument is that, on the applicant's own version, the first respondent may have held title not just on her behalf, but, also on behalf of other members of the family. If such a tacit agreement existed, other members of the

family, who have not been joined in these proceedings, may well have a direct and substantial interest in the relief claimed as well as possible entitlement to ownership in their own right.

18. For these reasons, I am inclined to hold that the declarations that the applicant seeks that she is the owner of the property, or, alternatively, that it be declared that she is entitled to have the property registered in her name, should not be granted. This is substantially on account of the failure of the applicant to join the other members of the family, who would have a direct and substantial interest in these proceedings.

19. It may, however, still be open to the applicant to pursue that relief, if it becomes necessary, provided she joins those who may have a direct and substantial interest in the relief she seeks.

**The relief sought pursuant to the Upgrading Act**

20. The second and substantial thrust of the applicant's case is the argument that the Court is enjoined to declare section 2(1) of the Upgrading Act unconstitutional and invalid to the extent that it deprives the occupants of the property, who are not holders of a Certificate of Occupation or a Deed of Grant, from claiming ownership of the property. Such exclusion from holding a Certificate of Occupation or a Deed of Grant is argued to be based on gender discrimination.

21. In support of this argument, the applicant provides a history and description of circumstances relating to the occupation of the property, none of which is substantially in dispute.

22. When the Rahube family were removed from Lady Selbourne to Mabopane in 1970, the property was occupied by a family of eight (including the applicant's grandmother, her uncle, her three brothers, the applicant, and the applicant's two children).

23. In 1987, a Certificate of Occupation was issued by the Department for the Interior of the Bophuthatswana Government Service in respect of the property. This certificate described the property as a "family... letting unit" and was issued in the name of the first respondent. Other members of the family including the applicant were listed on the Certificate of Occupation as "members of the family permitted to reside in unit".

24. At the time the Certificate of Occupation was issued, the uncle of the applicant, Mr Matjila, was the head of the household. It is, accordingly, unclear why the Certificate of Occupation was issued in the name of the first respondent and not in the name of Mr Matjila. Be that as it may, it remains the stance of the applicant that, at that time, she, as well as all other women of the household, would have been

precluded from having a Certificate of Occupation issued in their name on account of their gender.

25. The certificate was issued under the Proclamation which in turn was promulgated in terms of the Black Administration Act.

26. It is clear if one has regard to the provisions of the Proclamation, as a whole, apart from the exceedingly wide and untrammelled powers it confers on township managers with regard to land tenure rights, it is also characterised by language and an ideological underpinning that has correctly been described as racist and sexist. The repeated reference to the head of the family, in the masculine form, is simply an example of the sexist and patriarchal underpinnings of the Proclamation.

27. Thus, even if some uncertainty exists as to why the Certificate of Occupation was issued in the name of the first respondent, instead of in the name of Mr Matjila, it does not detract from the conclusion that the applicant would have been excluded from any entitlement to have a Certificate of Occupation or a Deed of Grant issued to her, in her own name and in her own right. The third respondent does not dispute the assertion that Certificates of Occupation were invariably issued in the name of men and that women were largely precluded from holding any title or right in land in their own name.

28. The Constitutional Court in *DVB Behuising* described the Proclamation in the following terms:

> "One is dealing here with legislation that is admittedly racist and sexist and that constituted a key element in the edifice of apartheid."[2]

29. On 13 September 1988, the Department of Local Government and Housing of the Republic of Bophuthatswana, acting in terms of the Proclamation, issued a Deed of Grant in favour of the first respondent in respect of the property. The Deed of Grant described it as being in respect of an "ownership unit . . . for residential purposes".

30. Section 9(1) of Chapter 2 of the Proclamation provides for the issue of a Deed of Grant in respect of residential units and limits the issue of such a Deed of Grant to a person who is the head of the family who desires to purchase a dwelling for "occupation by him and members of his family for residential purposes".

31. Thus, the Certificate of Occupation in this matter was a precursor to the issue of the Deed of Grant. One significant difference, however, is that while the Certificate of Occupation listed the family members who were permitted to reside in the unit, the Deed of Grant did not.

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[2] *Western Cape Provincial Government and Others In Re: DVB Behuising (Pty) Limited v North West. Provincial Government and Another* [2000] ZACC 2; 2000 (4) BCLR 347 (CC); 2001 (1) SA 500 (CC) (*DVB Behuising*) at para 40.

32. Section 2(1) of the Upgrading Act reads:

"*Any land tenure right mentioned in Schedule 1 and which was granted in respect of –*

a) *any erf or any other piece of land in a formalized township for which a township register was already opened at the commencement of this Act, shall at such commencement be converted into ownership;*

b) *any erf or any other piece of land in a formalized township for which a township register is opened after the commencement of this Act, shall at the opening of the township register be converted into ownership;*

c) *Any piece of land which is surveyed under a provision of any law and does not form part of a township, shall at the commencement of this Act be converted into ownership, and as from such conversion the ownership of such erf or piece of land shall vest exclusively in the person who, according to the register of land rights in which that land tenure right was registered in terms of a provision of any law, was the holder of that land tenure right immediately before the conversion.*"

33. It is clear if one has regard to section 1 of Schedule 1 of the Upgrading Act that the Deed of Grant issued to the first respondent, in terms of the Proclamation, is one of the land tenure rights specifically listed and which would then activate the provisions of section 2(1) of the Upgrading Act.

34. Thus, by the operation of section 2(1), the tenure rights evidenced in the Deed of Grant were automatically converted to full ownership without the need for an application or an inquiry or investigation.

35. All that the Upgrading Act requires is for the Registrar of Deeds to make the necessary endorsements in the Deeds Registry.[3] It is not clear if this has occurred, but nothing turns on it as the vesting of ownership is automatic and not dependent upon the endorsement being effected.

36. Thus, the applicant contends that section 2(1), which provides for the automatic conversion of a tenure right into full ownership without an inquiry, is unconstitutional. The conversion perpetuates the exclusion of women from ownership. The applicant's historical exclusion from being able to hold a Certificate of Occupation or a Deed of Grant, now, has the consequence of automatic exclusion of the applicant from any claim to ownership of the property that she has occupied for some 30 years.

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[3] See section 2(2)(a) of the Upgrading Act.

**Mabopane's establishment as a township and the Upgrading Act's application to the former Bophuthatswana**

37. The provisions of the Upgrading Act, operative from 1 September 1991, did not immediately apply to the areas that fell within the territory of the former "Republic of Bophuthatswana" including Mabopane.

38. The laws then applicable in South Africa, including the Upgrading Act, were not applicable in the former "Republic of Bophuthatswana" territory. The Upgrading Act was first applicable to the former "Republic of Bophuthatswana" territory, which now forms part of the North West Province, on 28 September 1998, when the Land Affairs General Amendment Act 61 of 1998 came into effect which inserted section 25A into the Upgrading Act which reads as follows:

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

39. The 28 September 1998 is, accordingly, the operative date when the Upgrading Act became applicable in general to the territory that was known as Bophuthatswana. If regard is had, however, to section 2 of the Upgrading Act, the date when conversion of land tenure rights into ownership occurs, could potentially be at different times.

40. The Upgrading Act's converting effect is linked to whether a township register was opened at the time of the commencement of the Upgrading Act. Given that the Upgrading Act became operative in the geographical area of Mabopane (where the property is situated) on the 25 September 1998, it becomes necessary to then determine when a township register for Mabopane was opened.

41. In a supplementary affidavit filed by Ms Tarisai Mugunyani, an attorney with Lawyers for Human Rights, it is stated that she conducted enquiries at the Office of the Registrar of Deeds in Pretoria, in order to establish when the township register for Mabopane was opened.

42. Ms. Mugunyani was advised that the township file for Mabopane B was missing, but, was able to locate a "log entry on when a township register or file was opened" which indicates "Mabopane B with reference AA6/5/1 was opened on the 25 September 2008". Ms. Mugunyani contends, with which conclusion I concur, that the records she found in the Deeds Office do not provide the "factual clarity required". There remains an absence of necessary evidence with regard to when the township register for Mabopane was opened.

43. Given this absence of clarity, with regard to when a township register for Mabopane was opened, Ms. Mugunyani postulates two scenarios as to when the land tenure rights of the first respondent would have been automatically converted into full

ownership. First, on 28 September 1998, when the Land Affairs General Amendment Act came into effect and made the provisions of the Upgrading Act applicable throughout the Republic of South Africa. Second, on 25 September 2008, when the records of the Registrar of Deeds indicate that a township register for Mabopane may have been opened.

44. Section 4 of Upgrading Act, however, contains a specific provision that even in the absence of a township register and pending conversion into full ownership, the holder of "a land tenure right mentioned in Schedule 1" shall enjoy "all rights and powers as if he is the owner of the erf or land in respect of which the land tenure right has been granted".

45. Accordingly, it must follow, and notwithstanding the uncertainty as to when Mabopane was proclaimed a township, that even pending such conversion, the first respondent was for all intents and purposes the owner of the property.

46. Therefore, I conclude that in substance the first respondent became owner of the property on 25 September 1998, when the Upgrading Act became applicable to the area within which the property is situated.

**Is section 2(1) of the Upgrading Act unconstitutional?**

47. The Preamble to the Upgrading Act states that its purpose is "To provide for the upgrading and conversion into ownership of certain rights granted in respect of land".

48. The Upgrading Act, on its face (*ex facie*), and to the extent that its legislative scheme was aimed at providing full ownership rights to those whose tenure rights fell short of ownership, may have been a well-intentioned legislative intervention. Well-intentioned reasons for legislation, however, should not be the end of an inquiry into possible discrimination or other constitutional violations. The effects of the legislation on the rights and interests of the affected individuals should be at the heart of the inquiry.

49. If one has regard to the architecture in terms of which the conversion of land tenure rights was to be effected, then the following is inescapable. In section 2, reference is made to any land tenure right mentioned in Schedule 1. These rights, as emerges from the facts of this matter, would include rights granted under the Proclamation. It is common cause that the Deed of Grant issued in favour of the first respondent was issued in accordance with the provisions of the Proclamation.

50. It must, accordingly, follow that the land tenure rights that the Upgrading Act sought to recognise and convert may well have, and certainly in the context of this application, been acquired under a legislative or regulatory scheme that was

discriminatory. While it is not being suggested that every land tenure right granted under the Proclamation was tainted, given the racist and sexist nature of the Proclamation it is hardly in dispute in these proceedings that the applicant would not have succeeded in becoming the holder of a land tenure right in respect of the property she occupied, largely on account of the sexist nature of the Proclamation.

51. That being the case, the Upgrading Act perpetuated the exclusion of women, such as the applicant, from the rights of ownership in so far as it provided for automatic conversion and failed to provide any mechanism in terms of which any other competing rights could be considered and assessed and a determination made.

52. It has been suggested by the third respondent that section 24D of the Upgrading Act provides a mechanism for any party aggrieved by an entry in a land register to appeal to the Minister of Rural Development and Land Reform (the "Minister") or the Minister's delegates for the correction of such entry and that the remedy for the applicant lies in section 24D rather than in seeking the order of unconstitutionality.

53. The problem with this argument is that even if section 24D could encompass the complaints of the applicant, then the time period within which to lodge such a grievance has long passed as it must be submitted not more than one year after the entry was made.[4] While it is not clear on the papers when such an entry was made, it

[4] See section 24(10)(a) of the Upgrading Act.

is, however, clearly evident that the period of one year contemplated in section 24D has long passed.

54. However, and more significantly, I am not convinced that it is permissible, as the third respondent has contended, that an appeal to the Minister as section 24D provides for, is a sufficient response to cure the operation of a legislative scheme that is predicated on a racist and sexist Proclamation. Section 24D, at best, offers *ex post facto* recourse to an aggrieved party who must then depend on the exercise of the Minister's discretion. This can hardly be considered an adequate remedy under these circumstances.

55. I must, accordingly, conclude on this aspect, that the legislative scheme introduced by the Upgrading Act, on the one hand, effectively vested all rights of ownership in the property in the first respondent and similarly divested the applicant and others, who may have been similarly situated, of any entitlement to the property. The Act did so without affording the applicant and potentially others an opportunity to be heard and present a claim for entitlements to the property.

56. The conversion process prescribed in the Upgrading Act takes as its starting point the land tenure rights granted in terms of the Proclamation, which has been described as racist and sexist, and does not consider the genesis of how such rights were granted, and, in particular, whether they were granted under circumstances that

excluded women from consideration as rights-holders. This was the case for the applicant.

57. Of course there was no constitutional guarantee of equality when the Proclamation was enacted and later when the Certificate of Occupation and Deed of Grant were issued in respect of the property. These issuances of land tenure rights may well have been consistent and in accordance with the law which then prevailed, however, they are no longer permissible in the post-Constitutional era. The present application is not about disturbing all tenure rights which may have flowed from the Proclamation, odious as it was. The applicant challenges the conversion of the tenure rights to ownership, granted in terms of the Proclamation and affected by the provisions of the Upgrading Act. To that extent, there is a clear and inextricable link between the Proclamation and any assessment of the constitutionality of the Upgrading Act. Such an analysis cannot occur in an insulated fashion. It must occur within a proper understanding of the context and the history underpinning the conversion of the first respondent's tenure rights.

**The Upgrading Act's failure to provide a hearing process for all putative persons involved before automatic conversion of land tenure rights to ownership**

58. The applicant and her descendants are not the only persons affected by the operation of the Upgrading Act, as previously mentioned, other family members were

also listed as part of the "family…letting unit" for purposes of the Certificate of Occupation. All affected persons, those listed in the Certificate of Occupation or the descendants thereof, have the right to be heard in respect of the ownership of the property. An appropriate procedure affording such an opportunity to be heard, however, was not provisioned by the Upgrading Act. This led to the effect that land tenure rights were converted based purely on a Deed of Grant held by a person and without taking into consideration the consequences and powers emanating from obtaining full ownership of the property.

59. The Upgrading Act's automatic conversion mechanism, the lack of notice of the conversion, and the absence of a procedure for raising issues with the conversion of land rights into ownership, defies the *audi alteram partem* principle (that all parties be given the opportunity to respond to evidence).

60. Accordingly, this mechanism is not reconcilable with the purport and spirit of our Constitution[5] and democracy based on human dignity and equality, not to mention the right to adequate housing.

61. It must therefore follow that section 2(1) of Upgrading Act is unconstitutional, to the extent that it provides for the automatic conversion of tenure rights into ownership without any procedures to hear and consider any competing claims to ownership.

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[5] Section 39(2) of the Constitution of the Republic of South Africa, 1996.

62. In particular, I find section 2(1) is unconstitutional in that it violates sections 9 (right to equality) and 34 (right to access to courts). There are also a potential violation of section 25 (right to property) to those disentitled by the automatic conversion effect of the Upgrading Act, but for the reasons mentioned above, that, in the context of the applicant's dispute, all potentially affected persons have not had notice of and the opportunity to present submissions on the status of ownership rights to the property, any section 25 violation cannot be properly disposed of at present.

63. The violation of the applicant's right to equality flows from the Upgrading Act's automatic conversion of the land tenure rights which has a disproportionate and discriminatory impact on the applicant due to her gender.

64. The Upgrading Act could potentially also have discriminatory impact based on race in some circumstances, however, the applicant's submissions do not establish that the automatic conversion has such a racially discriminatory effect in the present dispute. Further, there is the potential that the Restitution Act could cure any established racial discrimination, and the applicant could further pursue recourse under that legislation. The applicant has also submitted that she wishes to pursue remedies in the Land Claims Court in terms of section 3(1) of the Restitution Act and

she remains at liberty to do so, subject to the necessary joinder of affected parties, as I have discussed above.[6]

65. There is the potential that the combined scheme of the Proclamation, which has been found to be racist by the Constitutional Court in *DVB Behuising*,[7] combined with the automatic conversion process of the *Upgrading Act*, could not qualify for the curative legislative mechanism in the Restitution Act. Should such a situation occur, and the racially discriminatory effects endure, there may be recourse for further findings of unconstitutionality. Such facts have not been presented in this dispute and that question should remain unresolved for the time being.

66. The violation of the applicant's right to access to courts flows from the Upgrading Act's failure to notify occupants of affected properties that land tenure rights in those properties would be converted to ownership rights. It further flows from the failure to provide an opportunity to be heard prior to the conversion of the Deed of Grant.

67. Though the applicant contends that the Upgrading Act arbitrarily deprives her of her property and fails to protect her security of tenure, which could violate her rights to property, this claim is premised on facts not fully before this Court. To establish a right to property all potentially affected parties must be notified and this

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[6] See [17]-[18] above.
[7] *DVB Behuising* above n 2.

Court must afford those parties an opportunity to provide submissions on the wider context surrounding the particular property.

**The retrospective application of a declaration of invalidity**

68. Having found a violation of the rights in sections 9 and 34 of the Constitution, it is now necessary to determine the scope of the declaration of invalidity necessary to remedy the violations. The scope may need to be restricted in terms of the timeframe of application and the categories of individuals to which it applies. This Court must be cognisant of the scope necessary to provide an adequate remedy to the applicant but also to other similarly situated individuals whose constitutional rights to equality and access to courts have been similarly violated.

69. Section 172 of the Constitution provides that:

"*When deciding a constitutional matter within its power, a court*

*a. must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and*

*b. may make any order that is just and equitable, including*

*i. an order limiting the retrospective effect of the declaration of invalidity; and*

*ii. an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.*"

70. The applicant argues that this Court should invalidate section 2(1) of the Upgrading Act retrospectively to 5 July 1991, which is before the operative date of the Upgrading Act of 1 September 1991. The applicant also argues that retrospective application should fall within the limits of the Constitution, particularly the property rights of others protected by section 25 and the justification requirements in section 36 that allows limitations of rights that are "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". The first respondent argued that if this Court should find an invalidity it should be retrospective to 27 April 1994, which is the operative date of the Interim Constitution.[8] The third respondent argued against retrospective application citing concern for "annulment of purchasers' title deeds", "banks and/or estate agents, susceptible to claims for proceeds of the finalised sales", and "risk [of] disrupting the operation of the third respondent", which all run contrary to the stated aim of section 2(1) to "creat(e) legal certainty (to confer) ownership" which was "well-intentioned".

71. When one has regard to the scheme of the Proclamation, and its ultimate effect of excluding women from obtaining ownership rights, by its operation in conjunction with the Upgrading Act, then an order that only renders a prospective declaration of invalidity, from the date of this Court's judgment, cannot be justified. Only providing prospective relief will leave intact the consequences of an unfair, unjust, and sexist system of land ownership, wholly inconsistent with the spirit and tenor of the

[8] The Constitution of the Republic of South Africa Act, No. 200 of 1993 ("Interim Constitution").

Constitution. It would ultimately deny the applicant any effective vindication of her constitutional rights, notwithstanding the recognition by this Court of her long tenure of the property and at the very least her claim to make a competing bid for ownership. A limitation to prospective application would bring to an end any hope she may have had of becoming owner of the property and will in all likelihood lead to her eviction from the property she has not only occupied but maintained and preserved over a long period of time.

72. If the purpose of the Upgrading Act was to grant ownership rights to those who were previously excluded from acquiring them, then it is a matter of great irony that in pursuing such an objective the extension of rights operates to exclude women – a self-defeating exercise.

73. In my view and for these reasons, I am satisfied that compelling circumstances exist to justify an order of retrospectivity.

**Retrospective timeframe**

74. The next issue is the timeframe of the retrospective application of the declaration of invalidity. While, on the one hand, the Upgrading Act only became applicable to the area in which the property is located, Mabopane, in 1998 its provisions would have applied to other areas in South Africa from 1 September 1991,

the Act's operative date. People in those other areas would have similarly suffered from discriminatory effects resulting from the Upgrading Act.

75. The applicant has submitted that the declaration of invalidity should date back to 5 July 1991. This appears consistent with the applicant's argument that she "should not be singled out for the grant of relief" and "relief should be afforded to all people who are in the same situation". The first respondent argues that any declaration of invalidity should be retrospective to 27 April 1994, which is the Interim Constitution's operative date.

76. To only allow gender discrimination to be cured to the 27 April 1994 inception of the Interim Constitution, while countenancing the same discrimination effected by the Upgrading Act for the more than three years from its operation date of 1 September 1991 and that period, arguably, condones discrimination stemming from the same legislation. This said, the Constitutional Court has accepted similar temporal limitations on retrospective application, in a case involving gender discrimination's effects on proprietary rights, in the context of succession in *Bhe*.[9]

77. Consistent with the approach in *Bhe*, I find that the declaration of invalidity should apply retrospectively to the operative date of the Interim Constitution, 27 April 1994. When the Interim Constitution came into force on the 27 April 1994, the situation would have automatically arisen when the provisions of section 2(1) became

[9] *Bhe and Others v Khayelitsha Magistrate and Others* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (*Bhe*) at paras 128-9.

inconsistent with the Interim Constitution. It would accordingly be "just and equitable" that the declaration of invalidity be retrospective to at least 27 April 1994. The applicant's potential claim based on gender discrimination, accordingly, remains open as the potential discriminatory effects of the Upgrading Act's automatic conversion of the property, occurred in 1998, as discussed earlier.[10]

**Limiting retrospective effect to certain categories of individuals**

78. I am, however, also mindful that an open-ended order of retrospectivity may well have serious and far-reaching consequences for persons who in good faith (*bona fides*) relied on and acted upon the ownership rights they would have acquired upon automatic conversion by the Upgrading Act. To simply negate all those rights would also visit a serious injustice on those categories of persons. In addition, and while the provisions of the Proclamation were correctly described as racist and sexist, it does not necessarily follow that every act of creating land tenure rights that was located within the provisions of the Proclamation is tainted and or subject to attack. In each instance, the determination of whether the application of the Proclamation and the eventual conversion was unjust, unfair, and unconstitutional may well have to be determined on a case-by-case basis and in instances where aggrieved persons come forward to seek redress.

[10] See [46] above.

79. This dispute is similar to the Constitutional Court's decision in *Bhe*.[11] In *Bhe*, Langa DCJ (as he then was), for the majority, found that succession legislation and customary law rules of male primogeniture for inheritance of property were declared invalid due to their inconsistency with the Constitution. Despite the constitutional violations, the scope of the retrospective application of the declaration of invalidity was limited and did not invalidate —

> "*the transfer of ownership prior to the date of this order of any property pursuant to the distribution of an estate in terms of section 23 of the Black Administration Act 38 of 1927 and its regulations, unless it is established that when such transfer was taken, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicants brought challenges in this case.*"[12]

80. The applicant suggests that this Court limit the retrospective effect of its order in two cases: (i) where the "property has been sold to a third party"; and (ii) where "the property in question has been inherited by a third party in terms of the law of succession". The first respondent agrees with this suggested limitation.

81. I agree with these submissions in part, however, think there should be further qualifications of the scope of the limitation of retrospectivity. As was the case in *Bhe*,

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[11] *Bhe* above n 9.
[12] Id at para 136 clause 8.

where a transfer occurs (pursuant to sale, to fulfil succession obligations, or for other reasons) and a party is on legal notice that the underlying property is subject to a dispute, that transfer should not qualify for this exception. Such a transfer is not *bona fide*. I would also restrict the limitation on retrospectivity, in the succession context, only to situations where the estate has been finalised. Where a party has been transferred property and acts on ownership rights conveyed prior to the estate's finalisation that party cannot reasonably rely on the ownership rights.

**Suspension of the declaration of invalidity**

82. This may well be a matter where the order of unconstitutionality and its effect should for now not extend beyond the parameters of the dispute between the parties. Parliament should be afforded the opportunity to consider the order of invalidity and craft a mechanism to deal with instances where aggrieved parties may well seek redress under circumstances where a grant of land tenure rights and automatic conversion are considered unfair and unjust.

83. Even with the above-mentioned categories of individuals excluded from the effect of the retrospective declaration of invalidity, the residual categories of individuals potentially affected and transactions potentially impugned could be substantial and create enormous potential for uncertainty. There are many complex policy issues that could require further consideration. Primarily, what is the most resource efficient way to provide opportunities to raise the issue of potential

discrimination and resulting unconstitutional conveyance of ownership rights? There remains an open question whether an affected party can only challenge the Upgrading Act's discriminatory effects on ownership of property they directly live or lived in or whether descendants of those dispossessed of property due to this discrimination could found a claim. Does an affected party's access to alternative state-provided housing factor into consideration? Should occupants of the disputed properties have any special rights or privileges impacting assessments of ownership rights? In the event that discrimination occurred, but the property in question was transferred *bona fides*, what recourse is appropriate? Parliament might even consider incorporating similar disputes into existing property restitution schemes or create a new one to remedy situations where property rights are potentially unconstitutionally removed.

84. Given all these important considerations and others likely implicated in this complex area involving policy decisions and resource allocation, this is a matter where Parliament is better placed to fashion an appropriate mechanism. Further, such an approach accords with the separation of powers principle.

85. The present dispute is unlike *Bhe*, where immediate effect was given to the declaration of invalidity. There the constitutional violations could be cured by reading-in to existing legislation. That remedial process was able to affect the necessary substantive relief to cure the constitutional defect. The present dispute involves constitutional violations of a different qualitative character. The realisation

of substantive equality (and potentially property) rights are barred by ineffective procedural relief and lack of access to an appropriate forum to resolve the rights-based dispute flowing from the Upgrading Act's automatic conversion of rights. Relief is not as simple as reading-in substantive property rights to the Upgrading Act to cure the effect. Some form of dispute mechanism is required along with a mechanism to positively reclassify unconstitutionally conveyed property rights.

86. It must therefore follow that the order of invalidity should be suspended for an appropriate period to enable Parliament to amend the Upgrading Act consistent with this judgment. A period of 18 months, as requested by the third respondent in its submissions, would be appropriate in my view.

87. This present dispute is not one where it would be appropriate to prescribe conditional actions, to take effect on Parliament's failure to cure the constitutional defect in section 2(1) of the Upgrading Act. The social and legislative context is different from the *Fourie* decision where such a conditional remedy was utilised.[13]

88. In *Fourie*, Sachs J, for the majority, found that marital legislation and the common law unconstitutionally denied same-sex couples equal "status and benefits" accorded to heterosexual couples.[14] Sachs J determined that the order of invalidity should be suspended for 12 months, however, if Parliament failed to cure the defect

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[13] *Minister of Home Affairs and Another v Fourie and Another* [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC) (*Fourie*).
[14] Id at para 120.

the words "spouses" would be read-in to the marital legislation.[15] This "minimal textual alteration" would have effectively upheld the values of the Constitution.[16]

89. The unconstitutionality in the present matter cannot be similarly cured with minimal textual alteration. As mentioned earlier, dispute and ownership rights reclassification mechanisms would be required to cure the defect to the Upgrading Act. This will require substantive amendments to the Upgrading Act or some form of fresh enactment, much more than the mere addition of a single word to the existing Upgrading Act.

90. Again, Parliament is better able to fashion this necessary remedy. Courts should defer to their genuine attempts to enact curative legislative reforms, subject to any new legislation complying with the Constitution. This Court's role is not "at this stage to pronounce on the constitutionality of any particular legislative route" but to provide "certain guiding principles of special constitutional relevance so as to reduce the risk of endless adjudication".[17] I have endeavoured to provide such guidance throughout my earlier discussion of the retrospectivity and suspension of this Court's order.

91. I have exercised this Court's remedial discretion in section 172 of the Constitution to avoid placing a conditional read-in within the Upgrading Act to cure

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[15] Id at paras 161 and 158.
[16] Id at para 159.
[17] Id at para 148.

its constitutional defect. It may be appropriate for a competent court to retain supervisory jurisdiction over this matter. Should Parliament fail to cure the constitutional defect, by the end of the 18 month period of the suspension, the parties could refer the matter back to a competent court to dispense further "just and equitable" relief. It is in the discretion of the Constitutional Court, who must exercise their constitutional powers to confirm a declaration of invalidity, pursuant to section 167(5) of the Constitution, before this Court's order declaring section 2(1) of the Upgrading Act constitutionally invalid will take effect. The Constitutional Court may determine whether or not it is best-placed to retain supervisory jurisdiction to deal with any potential non-compliance by Parliament, or if it is appropriate and in the interests of justice to refer the issue of remedial response to potential non-compliance back to this Court.

**Interim relief**

92. To the extent that the remedy must respond effectively and appropriately to the position of the applicant, there would, in my view, be a need to ensure that during the 18 month period of the suspension of the order of invalidity, the property should be protected in that there should be a prohibition on its further transfer or encumbrance. To effect this appropriate relief the first respondent is interdicted from passing ownership, selling, or encumbering the property in any manner whatsoever until such a time as Parliament has cured the constitutional defect.

93. Should any interested person face serious administrative or practical problems as a result of this Court's order they may approach this Court or another competent Court for a variation. The Constitutional Court has endorsed such a general approach to solving administrative problems in its decisions in *Bhe* and *Gumede*.[18]

94. I am cognisant that during the period of the 18 month suspension there may be attempts at wrongful evictions or *mala fide* transactions utilising unconstitutionally conveyed property rights. Nothing in this decision prevents an affected party from approaching a competent court and requesting relief similar to that obtained by the applicant, where they can satisfy that court of the status of their claim of discrimination in the conveyance of ownership rights. Unfortunately, not all potentially affected parties are likely to be made aware of this decision, in the interim period of the suspension, so it is incumbent on Parliament to expeditiously take steps to redress any potential losses of property rights made possible by the proven discriminatory mechanism of the Upgrading Act during that time.

## Costs

95. This Court has a discretion regarding its costs award. As the applicant was successful in establishing a form of constitutional violation caused by the third

[18] *Bhe* above n 9 at paras 132 and 136(10). *Gumede (born Shange) v President of South Africa and Others* [2008] ZACC 23; 2009 (3) SA 152 (CC); 2009 (3) BCLR 243 (CC) (*Gumede*) above n 9 at paras 54 and 59(10).

respondent, through its role as the responsible state authority to answer for the discriminatory effects of legislation, the normal costs rule should apply with a variation. The applicant should recover all of her costs from the third respondent. That the applicant was not at this juncture successful in altering rights to the disputed property should have no bearing on that outcome. This fact and the first respondent's lack of resources should militate against a finding that he should be apportioned responsibility for any of the applicant's costs. The first respondent, through no fault of his own, acquired tenure rights which he sought to protect in these proceedings. The first and third respondents are to bear their own costs.

**Order**

96. The following order is made:

a. Section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 is declared unconstitutionally invalid insofar as it:

i. automatically converted holders of land tenure rights into owners of property, without providing the occupants and affected parties lacking ownership rights notice or the opportunity to make submissions to an appropriately established forum, prior to the conversion of the land tenure rights into ownership.

b. The order in (a) above is made retrospective to the 27 April 1994.

c. The order in (a) above is suspended for a period of 18 months to allow Parliament the opportunity to introduce a constitutionally permissible procedure for the determination of rights of ownership and occupation of land to cure the constitutional invalidity of the provisions of section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991.

d. The first respondent is interdicted from passing ownership, selling, or encumbering the property known as Stand 2328 Block B, Mabopane, in any manner whatsoever, until such a time as Parliament has complied with the order in (a) above.

e. The third respondent is ordered to pay the costs of the applicant, including the costs of two counsel.

HEARD ON: 10 October 2016 and 14 February 2017

DATE OF JUDGEMENT: 26 September 2017

APPEARANCES:

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| FOR THE APPLICANT: | Adv. A. de Vos S.C. (appearing with Adv. M Maropa) |
| INSTRUCTED BY: | Lawyers for Human Rights, Pretoria |

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| FOR THE FIRST RESPONDENT | Adv. N. L. Skibi |
| INSTRUCTED BY: | Legal Aid South Africa, Pretoria |

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| FOR THE THIRD RESPONDENT | Adv. M. J. Gumbi |
| INSTRUCTED BY: | State Attorney Mahikeng, Mmabatho |