IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case Number: CCT/319/2017

In the matter between

MATSHABELLE MARY RAHUBE	Applicant
and	
HENDSRINE RAHUBE	First Respondent
MEC FOR HOUSING AND LAND AFFAIRS, NORTH WEST PROVINCE	Second Respondent
MINISTER OF RURAL DEVELOPMENT & LAND REFORM	Third Respondent
REGISTRAR OF DEEDS, PRETORIA	Fourth Respondent
REGISTRAR OF DEEDS, MAFIKENG	Fifth Respondent
THE CITY OF TSHWANE METROPOLITAN MUNICIPALITY	Sixth Respondent

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APPLICANT'S HEADS OF ARGUMENT

INTRODUCTION

The essence of this application

1. This application concerns the constitutional validity of section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 ("the Upgrading Act), which essentially provides for the automatic conversion of a deed of grant into full ownership and vests exclusive ownership on the person registered as the head of the household in the deed of grant, in that it fails to protect – or even to notify and consult with – the occupants of property who are not registered on the deed of grant.

2. The applicant challenges section 2(1) of the Upgrading Act on the following grounds:

   2.1. The conversion process was intended to protect and promote tenure which is legally secure. To the extent that section 2 fails to protect occupants of property who are not registered on a deed of grant at all, it fails to fulfill its mandate and is therefore irrational.

   2.2. It fails to foster conditions that enable citizens to gain access to land on an equitable basis (as required by Section 25(5) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution")) and is accordingly unreasonable.

2.3. It unjustifiably limits the applicant's and all those similarly situated, the constitutional rights to:

2.3.1. be protected against arbitrary deprivation of property (entrenched in Section 25(1) of the Constitution);

2.3.2. be protected with tenure which is legally secure or to comparable redress (entrenched in Section 25(6) of the Constitution); and

2.3.3. administrative action which is reasonable and procedurally fair (protected in Section 33 of the Constitution).

2.4. It constitutes indirect unfair discrimination on the listed grounds of race and gender because its effects are predominantly felt by black woman who could not previously be registered as the holders of land tenure rights.

2.5. If the applicant had been living in an urban township (as opposed to a township under Proclamation R293[1]), land tenure in the house would have been dealt with under the Conversion of Certain Rights into Leasehold Act, which mandates an inquiry into who putatively holds the right of ownership. Similarly, if the appli-

[1] Proclamation R293 issued under Government Gazette 373, 16 November 1962.

cant's family had been provided with a tenure right in Schedule 2 (instead of Schedule 1), an inquiry would have taken place in terms of the Upgrading Act. The failure to provide for an inquiry to take place in respect of deeds of grants registered under Proclamation R293 is irrational and amounts to unfair discrimination on the basis of geographical location.

3. These heads of argument address the following issues in turn hereunder:

3.1. The proceedings in the court *a quo;*

3.2. The facts;

3.3. The foundations of Section 2(1) of the Upgrading Act;

3.3.1. Property and household arrangements prior to Upgrading Act

3.3.2. Section 2(1) of the Upgrading Act

3.4. The Constitutional rights implicated;

3.4.1. Section 25(1), (5) and (6) of the Constitution

3.4.2. Section 9(3) and 10 of the Constitution

3.4.3. Section 33 of the Constitution

3.5. Justification;

3.6. Remedy; and

3.7. Retrospectivity

THE PROCEEDINGS IN THE COURT A QUO

4. In the court a quo, the applicant sought an order in the following terms

> 1. *An order declaring the Applicant as the owner of the property situated as 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 Prayers 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 property who are not registered on a deed or grant from 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 acceptable 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 the land tenure rights over the property, and to provide that applicant with an opportunity to be heard at such an inquiry.*

10. *Costs to be awarded jointly and severally against respondents that oppose the application.*

5. The application was opposed by the First, Second and Third Respondents, with the Seventh Respondent abiding by the decision of the court.

6. The matter served before Kollapen J and judgment was handed down on 26 September 2017 in the following terms:

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 of 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 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."*[2]

7. The applicant now, under the auspices of Rule 16(4) of the Rules of this court, seeks confirmation of the High Court's declaration that Section 2(1) of the Upgrading Act is inconsistent with the Constitution. The applicant also seeks, *inter alia*, that the third re-

[2] Judgment Vol 1, 1 – 38.

spondent pays the costs of this application including the costs occasioned by the employment of two counsel. For the sake of convenience, we shall refer to the third respondent as the Minister.

THE FACTS

8. The application has its source in an eviction application brought against the applicant together with her children from her home in or around August 2009, by the first respondent. The applicant and the first respondent are siblings. As a result of the said eviction proceeds, the applicant became aware for the first time that the first respondent had obtained legal title to the family home.[3]

9. The applicant and the respondent, together with other members of their family moved onto the property described as Stand 2328 Block B, Mabopane ("the property") in about 1970 following their removal from the area known as Lady Selbourne. At the time, eight people lived in the house: the applicant's grandmother, her uncle, her three brothers (including the first respondent), the applicant herself and her two children. The applicant's uncle, Mishack Matjila was the head of the household.[4]

[3] Vol 1, p 44, pp 3
[4] Vol 1, p 44, pp 5.

10. The applicant moved out of the property in 1973 and returned in 1977 and has lived there ever since without interruption. During the period of her absence her children remained on the property. They have lived there continuously without interruption.[5]

11. The applicant's grandmother died in 1978 and her two brothers, save for the first respondent, moved away from the property during 1982 or 1983 but retained the right to return to the family home. The first respondent left the property permanently in 1991 or 1992.[6] Applicant's uncle Mishack Matjila moved out of the house permanently in 2000 and although the inhabitants of the property varied over time, the applicant has remained on the property continuously without interruption since her return in 1977. She lives on the property with her children and at least two of her grandchildren who have lived there since their birth.[7]

12. The eviction proceedings brought by the first respondent, as mentioned above, brought to the applicant's attention the first respondent's claim of ownership title over the property for the first time. He premised his claim of ownership 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 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]

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[5] Vol 1, p 45, pp 5.1.
[6] Vol 1, p 45, pp 5.2. – 5.4.
[7] Vol 1, p 45, pp 5.5 – 5.6.
[8] Vol 1, p 46, pp 7 – 8.

13. The first respondent then became the registered owner of the property following a conversion of the land rights contained in the Deed of Grant he held in his favour, into full ownership in terms of the provisions of section 2(1) of the Upgrading Act. This was despite the fact that the first respondent had not lived on the property since 1992.[9]

14. In this regard the applicant contends that the first respondent was issued with a certificate of occupation and later a deed of grant in a nominal capacity and ought not to have been recognized as the sole owner of the house.[10] The direct consequence of this conversion was the loss of the applicant's rights to assert any claim or interest over the property with the concomitant result that she and her family endure undeserved vulnerability to the risk of eviction and homelessness. We deal with this more elaborately below.

15. The applicant submits that she is in effect the current head of the household and has always been solely responsible for the expenses relating to the upkeep and maintenance of the property since her uncle, Mishack Matjila, moved out of the property in 2000. To this end she has made improvements on the property including the installation of security bars and fences.[11]

16. The applicant contends that whilst the Upgrading Act was intended to promote security of land tenure for the poor and vulnerable, it does not go the distance. Instead it perpet-

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[9] Vol 1, p 47, pp 9.
[10] Vol 1, p 56-7, pp37.
[11] Vol 1, p 56-7, pp 37.

uates the prejudices endured by the poor, especially women, all of whom it was intended to protect and secure. We deal with this below.

THE FOUNDATIONS OF THE UPGRADING ACT

17. In understanding the Upgrading Act and the applicant's complaints pertaining to the Act, Proclamation R293 serves as a pertinent starting point. This is an apartheid era legislation which was issued in terms of the Native Administration Act, 38 of 1927. It provided for the establishment of special kinds of townships by the Minister of Bantu Administration and Development for African citizens in areas of land held by the South African Native Trust, which in turn was established by the Native Trust and Land Act, 18 of 1936. These special kinds of townships were akin to that in which the property is located.

18. It was on the strength and in the ambit of these statutes, including the Natives Land Act, 27 of 1913, that Black and African people, particularly in South Africa, were placed in a precarious position regarding ownership and tenure of land which still endures and needs to be addressed and righted.

19. In ***DVB Behuising***[12], Ngcobo J makes the following observation:

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

"Even a cursory reading of the Proclamation conveys the demeaning and racist nature of the system of which it was a part. Provision was made for the "Ethnic Character of [the] Population of Township[s]". Limited forms of tenure were created by way of "deeds of grant" and "certificate[s] of occupation of a letting unit for residential purposes". The tenure was a precarious one and could be cancelled by the township "manager", in the event, amongst others, of the holder of the right "ceasing to be in the opinion of the manager a fit and proper person to reside in the township". The proclamation also made provision for the establishment of special deeds registries and for the registration of deeds of grant. There were detailed provisions relating to trading and other activities in the township and for their control..... There can be no doubt that its terms were in conflict with a number of provisions in the Bill of Rights in the interim Constitution and the 1996 Constitution (the Constitution) and on account of that unconstitutional."[13]

20. In 1991, Parliament passed the Upgrading Act. As the name suggests and indeed the applicant submits, its purpose was to provide for the conversion into full ownership of the more tenuous land rights which had been granted to black and African people during the apartheid era.

21. It can be gleaned from the provisions of the Upgrading Act that Parliament had, since 1991, adopted a policy to ensure that any title that conferred a limited form of ownership was to be upgraded to full ownership.

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[13] See *DVB Behuising* para [2] et paras [41] – [45]. This has since been recognized by this Court as the legislative history.

22. It is to this policy, partly fleshed out in section 2(1) of the Upgrading Act and its consequences, which the applicant contends Parliament gave either insufficient or no thought at all, thus leaving her and her family and all those similarly placed in a position of enduring vulnerability. The Parliamentary response to the Proclamation fails to appreciate the history of property and household arrangements for women and men, and pays too little attention to changing values concerning gender roles in society.

Property and household arrangements prior to the Upgrading Act

23. Various apartheid era legislations made it impossible for African people, including the applicant's family, to own land and prevented land tenure rights from being registered in a woman's name. As a result, black people were forced to register certain classes of land tenure rights in the name of a male, irrespective of who the responsible person or primary inhabitant of the property was.[14]

24. Families would be issued with a Certificate of Occupation of a Letting Unit for Residential Purposes under Proclamation R293 and these could subsequently be elevated to a deed of grant which was issued on the condition that the head of the family (who would be male), would hold title.

[14] Id *DVB Behuising*, n 12.

25. Although referenced in a customary law context, translating and entrenching these customary laws into a western system left out the social subtleties which recognised the power and position of women in society and left them with very little status and very few rights at all. Professor Nhlapho observes:

> *"Although African customary law and custom had [a] patriarchal bias, the colonial period saw it exaggerated and entrenched through a distortion of custom and practice which, in many cases, had been either relatively egalitarian or mitigated by checks and balances in favour of women and the young.....Enthroning the male head of the household as the only true person in law, sole holder of family property and civic status, rendered wives, children and unmarried sons and daughters invisible in a social and legal sense.*
>
> *The identification of the male head of the household as the only person with property-holding capacity, without acknowledging the strong rights of wives to security of tenure and use of land, for example, was a major distortion. Similarly, enacting the so-called perpetual minority of women as positive law when, in the pre-colonial context, everybody under the household head was minor (including unmarried sons and even married sons who had not yet established a separate residence), had a profound and deleterious effect on the lives of African women. They were deprived of the opportunity to manipulate the rules to their advantage through the subtle interplay of social norms, and, at the same time, denied the protections of the formal legal order. Women became 'outlaws'."*[15]

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[15] Nhlapho "African customary law in the Interim Constitution" in Leibenberg (ed) *The Constitution of South Africa from a Gender perspective* (Community Law Centre, University of the Western Cape in association with David Phillip, Cape Town 1995) 162. Cited with approval in *Bhe and Others v Khayelitsha Magistrate and Others* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (Bhe) at paras 89

26. It is in this context of perpetual prejudice that the first respondent came to hold nominal title of the property on behalf of the family which was subsequently converted to full ownership in his name. It is important to note that the Black Administration Act in section 11 (3) (b) provided that:

"*a native woman who is a partner in a customary union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian*"

This principle was carried out in the application of property rights, and was only repealed in 2005 by the Black Administration Act and Amendment of Certain Laws Act 28 of 2005.

Section 2(1) of the Upgrading Act

27. The relevant provision of the Upgrading Act with which we are concerned is Section 2(1) and it provides:

> *"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 has survived 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 rights registered in terms of a provision of any law, was the holder of that land tenure right immediately before the conversion."*

28. Regard being had to section 1 of Schedule 1 of the Upgrading Act, it appears clear that the Deed of Grant issued to the first respondent, in terms of Proclamation R293, is one such land tenure rights specifically contemplated, with the value to activate the provision of section 2(1) of the Upgrading Act.

29. The activation of the provisions of Section 2(1) issues an automatic conversion of the Deed of Grant to full ownership without further ado, in particular without the need for any notification, application, inquiry or investigation.

30. From this, 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 CONSTITUTIONAL RIGHTS IMPLICATED

31. The applicant submits that the effect of section 2(1) of the Upgrading Act by automatically converting a deed of grant into full ownership and vesting exclusive ownership in the person registered as the head of the household in the deed of grant, violates her property rights in terms of section 25(1), (5) and (6); her rights against discrimination in section 9(3), her right to have her dignity respected and protected in section 10 as well as her right to be heard before a decision that impacts adversely against her is taken in section 33 of the Constitution. We deal with these Constitutional provisions below in turn.

Violation of Section 25(1), (5) and (6) of the Constitution

32. Section 25 reads:

> *"(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*
>
> *(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 ex-*

tent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress."

33. Before dealing with the provisions of section 25, the applicant contends that once the deed of grant was converted to full ownership and the first respondent was vested with exclusive ownership of the house, the applicant lost any opportunity to assert her own rights to ownership and was therefore deprived of security of tenure of the property.

34. In order to establish an infringement of section 25(1) the applicant must show that:

    34.1. The law is a law of general application;

    34.2. The ownership of his home amounts to "property" within the meaning of section 25;

    34.3. The automatic conversion of the property to the exclusive ownership of the first respondent results in a deprivation of property; and

    34.4. The deprivation is arbitrary.

35. The first two issues can readily be disposed of. The Upgrading Act is national legislation and indeed a law of general application.

36. Secondly, although the definition of the term *"property"* in constitutional property clauses is not without difficulties, ownership of land is central to the constitutional concept of property.[16]

37. Section 25 distinguishes between expropriations and deprivations. The former is more is grave and entails acquisition by a public authority for a public purpose, while a deprivation is a lesser infringement and horizontal in application.

38. The Constitutional Court has held that in a certain sense "*any interference with the use, enjoyment or exploitation of property involves some deprivation.*"[17]

39. Section 2(1) of the Upgrading Act, authorizes the automatic conversion of a deed of grant into full ownership and vests exclusive ownership in the person registered as the head of the household in the deed of grant and has the effect of dispossessing the applicant and all who are similarly placed from asserting their claims of interests in the property. This bestows on the holder the right to "mortgage, alienate, or bequeath "title" to the property without the intervention or concurrence of the applicant or those similarly placed.

Arbitrariness

40. The term *"arbitrary"* in section 25 is not limited to non-rational deprivation (i.e. a deprivation in which there is no rational connection between means and end), but refers to a

[16] *First National Bank of SA Ltd t/a Wesbank v Commissioner South African Revenue Services & Another* 2002 (4) SA 768 (CC) para 51.
[17] *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC) para 57.

wider concept which is more demanding than an enquiry into mere rationality but is narrower and less intrusive than the proportionality evaluation in terms of section 36 of the Constitution.[18]

41. A law infringes section 25(1) when it provides for a deprivation of property without sufficient reason or in a manner that is procedurally unfair.[19]

42. Sufficient reason is determined with regard to the following considerations:

> "*(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.*
>
> *(a) a complexity of relationships has to be considered.*
>
> *(b) In evaluating the deprivation in question, regard must be had to the relationship between the purpose of the deprivation and the person whose property is affected.*
>
> *(c) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.*

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[18] *First National Bank of South Africa Ltd t/a Wesbank v Commissioner South African Revenue Services and Another* 2002 (4) SA 768 (CC) para 51.
[19] Id

(d) *Generally speaking, where the property in question is ownership of land or corporeal movables, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when property is something different, and the property right something less extensive. This judgment is not concerned at all with incorporeal property.*

(e) *Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.*

(f) *Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in other words this might only be established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.*

(g) *Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with "arbitrary" in relation to the deprivation of property under section 25."*[20]

43. It is the applicant's contention that whilst section 2(1) is directed at secure land tenure, it deprives those who may lay legitimate claim to and assert interests over the property of

[20] Ib n 18 para [100]

their rights. This includes the applicant who has lived on the property for an uninterrupted period of at least 32 years. The section permits this discrimination in a manner which is procedurally unfair.

44. The effective consequence of section 2(1) neglects the history of property and household arrangements perpetuated by apartheid legislation and the gender disparities inherent therein, it fails to foster conditions which enable citizens to gain access to land on an equitable basis in violation of section 25(5) of the Constitution.

45. It cannot be gainsaid that the applicant has endured and continues to endure legally insecure tenure of land as a result of past discriminatory laws and its remnants. Section 2(1) falls short of its ultimate purpose and target in violation of section 25(6) of the Constitution.

The right to equality and the prohibition of discrimination (Section 9 of the Constitution)

46. Section 9 provides that:

> *"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.*

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

47. To the extent that the Upgrading Act fails to sufficiently and creatively extend its protection to women, the applicant contends that the Native Administration Act and other statutes served to prevent members of the African community from owning immovable property in most of South Africa. Proclamation R293 issued under that Act authorized that black people could hold certificates of occupation or deeds of grant, each of which

provided for a limited form of land tenure. Of relevant significance is that the certificates of occupation and deeds of grant were granted for registration in the name of the head of the family who had to be male. These laws effectively and cumulatively relegated women to the position of perpetual minors who could not hold title in their own right. There is effectively no rational basis for the differentiation in treatment meted out to women, other than the simple fact that they are women, who, in the eyes of the state apparently do not deserve the same respect and consideration as that granted to men with regards to ownership of land.

48. The applicant further contends that the automatic conversion process was in marked contrast to the conversion process governing other land tenure rights including those recognised by the Conversion of Certain Rights into Leasehold Act 81 of 1988. Before these rights could be converted, an administrative inquiry had to take place that would ensure that the appropriate person was registered as the owner and that occupants of the affected property were notified and heard. This would be so in respect of urban townships as opposed to a township under Proclamation R293. Similarly, the applicant contends, had her family been provided with a tenure right listed in Schedule 2 (instead of Schedule 1, as is the case with her), an inquiry would have taken place in terms of section 3 of the Upgrading Act.

49. Langa DCJ in *Bhe*, observes as follows with regards to equality and non-discrimination"

"The importance of the right to equality has frequently been emphasized in the judgments of this Court. In ***Fraser v Children's Court, Pretoria North, and Others****, Mahomed DP had the following to say:*

> *"There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised. In the very first paragraph of the preamble it is declared that there is a '...need to create a new order....in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms'."*(footnotes omitted)

50. Langa DCJ continues as follows:

> *"The centrality of equality is underscored by references to it in various provisions of the Constitution and in many judgments of this Court. Not only is the achievement of equality one of the founding values of the Constitution, section 9 of the Constitution also guarantees the achievement of substantive equality to ensure that the opportunity to enjoy the benefits of an egalitarian and non-sexist society is available to all, including those who have been subjected to unfair discrimination in the past. Thus section 9(3) of the Constitution prohibits unfair discrimination by the state "directly or indirectly against anyone" or grounds which include race, gender and sex."*[21]

51. The importance of the promotion and protection of equality and the fight against unfair discrimination enjoys ever increasing international recognition and application in the ju-

[21] See Bhe above n 15, [49] – [50]

risprudence of numerous open and democratic societies. South Africa is party[22] to a number of international instruments that underscore the need to protect the rights of women and members of our society that have historically been and often, as in this case, continue to be disadvantaged in society.[23]

52. As contended above, there appears to be no rational basis for the difference in the treatment meted out to women viz-a-viz men. There is no substantial ground on which women should be accorded less respect or consideration than men. Section 9(5) provides that "*discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.*"

53. There is equally no basis for according due process to the conversion process in respect of urban townships as opposed to a town under Proclamation R293, where the applicant finds herself and her family. The difference in treatment is irrational and amounts to unfair discrimination on the basis of geographical location.

Human dignity (section 10 of the Constitution)

54. Section 10 of the Constitution provides:

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[22] South Africa became party to the Convention on the Elimination of All Forms of Discrimination against Women on 14 January 1996; to the International Convention on the Elimination of All Forms of Racial Discrimination on 9 January 1999; to the African [Banjul] Charter on Human and Peoples' Rights on 9 July 1996; and to the Protocol to the African [Banjul] Charter on Human and Peoples' Rights on the Rights of Women in Africa on 16 March 2004.
[23] See Bhe above n 15, [51].

"[e]veryone has inherent dignity and the right to have their dignity respected and protected."

55. Langa DCJ had this to say about the right to dignity in *Bhe*:

> *"....This Court has repeatedly emphasized the importance of human dignity in our constitutional order. In S v Makwanyane Chaskalson P state that the right to human dignity was, together with the right to life, the source of all other rights. Elsewhere, Ackerman J stated that "the constitutional protection of dignity requires us to acknowledge the value and worth of all individuals as members of our society." As a value, Kriegler J referred to human dignity as one of three "conjoined, reciprocal and covalent values" which are foundational to this country. In Dawood and Another v Minister of Home Affairs and Others, the Court Asserted:*
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> > *"The value of dignity in our Constitutional framework cannot therefore be doubted. The Constitution asserts dignity to contradict our past in which human dignity for Black South African was routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the intrinsic worth of all human beings. Human dignity therefore informs constitutional adjudication and interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights. This Court has already acknowledged the importance of the constitutional value of dignity in interpreting rights such as the right to equality, the right not to be punished in a cruel, inhuman or degrading way, and the right to life. Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected."*

The opportunity to be heard (Audi alteram partem and Section 33 of the Constitution)

56. Section 33 of the Constitution provides:

> *"(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.*
>
> *(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons."*

57. In this regard, the applicant submits that the automatic conversion of deeds of grant on the authority of the Upgrading Act, without any administrative inquiry having taken place that would ensure that the appropriate person was registered as the owner of the property and that occupants of the affected property were notified and heard, is in direct violation of section 33 of the Constitution.

58. The applicant submits that she became aware of the conversion in August 2009 when her brother, the first respondent, instituted eviction proceedings against her and the other occupants of the property. She further states that "*neither I nor the other occupants of the house had been notified of any change to the land tenure right in the house nor were*

we given opportunity to make submissions on our relationship to the property or our claim to title.'[24]

59. Section 33 inspires a minimum standard of mandatory procedure for ensuring that individuals likely to be affected by administrative action have received notification and an opportunity to be heard, a clear statement of the administrative action and notice of rights to review of appeal and to request reasons for a decision.

60. At common law, natural justice was applied on a case by case basis. In relation to *audi alteram partem*, the instances of administrative action that required a prior hearing and the procedures that were sufficient to satisfy the requirement of a hearing in a given case, depended on the circumstances of that case.[25] As to content, the common law courts repeatedly held that, in the absence of any express legislative provision on the point, as long as the 'principles of fair play' were satisfied, a hearing could take a variety of forms.[26] As a rule of thumb, the more serious the matter and its consequences for those affected, the more that was required to satisfy the demands of fairness. The consequences of the decision also determined the applicability of the *audi* rule. If a decision

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[24] Vol 1, p 55, pp 33.
[25] Baxter *Administrative Law* 541; *Van Huyssteen NO v Minister of Environmental Affairs and Tourism* 1996 (1) SA 283 (C); *Premier, Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools: Eastern Transvaal* 1999 (2) SA 91 (CC) [39]; *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 (3) SA 265 (CC) [97].
[26] Ibid, Baxter 542 – 3.

would impact on the rights or legitimate expectation of a person, fairness demanded they were heard before the decision was taken.[27]

The Constitutional Court's treatment of the right to procedural fairness

61. This court has dealt extensively with the right to procedural fairness, but for brevity we highlight two as follows:

    i) The right to procedurally fair administrative action is not a right to substantively fair administrative action; it controls the procedures by which decisions are made and not the content of decisions.[28]

    ii) In cases involving individual rights, fairness will usually require notice of the impending action and an opportunity to make representations prior to a final decision being taken.[29]

62. The applicant submits that insufficient thought or regard was accorded to the need for an administratively fair procedure that would ensure that the property interests of those in the position of the applicant or in occupation of properties similarly placed, within the ambit of the Proclamation, are protected.

63. This is in violation of the applicant's right to fair administrative action under the Constitution.

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[27] *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A).
[28] *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 (3) SA 265 (CC) [87] – [88]
[29] *Bel Porto* (Ibid) [13]; *Janse van Rensburg v Minister of Trade and Industry* 2001 (1) SA 29 (CC) [24]; *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) [100].

JUSTIFICATION

64. We have established and submit that section 2(1) of the Upgrading Act:

64.1. Having been intended to protect and promote property tenure which is legally secure, in fact perpetuates the vulnerability of the applicant and others in a similar position, to insecure tenure against the provision of section 25(5) of the Constitution;

64.2. Arbitrarily exposes the applicant, her family and those similarly placed to the risk of eviction at the hands of the exclusive holders of converted rights of ownership over those properties, in · olation of sections 25(1) and (6) of the Constitution;

64.3. Permits the automatic conversion of deeds of grant into full ownership thereby vesting exclusive rights of ownership in the holders thereof, without regard to the interests and claims of the applicant and her family and those occupying properties similarly placed and without an administratively fair process that would ensure that the applicant and occupiers of similar properties receive notification and are afforded an opportunity to be heard. This is in violation of section 33 of the Constitution; and

64.4. Fails to recognise the disproportionate and discriminatory impact of automatic conversion on women who were not permitted to be registered holders of the land tenure rights in question, and arbitrarily distinguishes people living in former homelands and given deeds of grant over property, from those who lived in urban

townships and/or obtained lesser titles over their property in violation of section 9 of the Constitution.

65. To the question as to whether section 36[30] of the Constitution has justifiably been shown to exist for the violation of the rights to (i) property; (ii) dignity and equality; and (iii) just administrative action, the Minister's response in defense of section 2(1) submitted that the applicant's remedy lies in section 24D of the Upgrading act which provides for the procedure regarding the updating and compilation of registers of land rights. It does so as follows:

> *"(1) If the Minister is of the opinion that the register of land rights in respect of which land tenure rights mentioned in schedule 1 or 2 have been granted in erven or other pieces of land has not been written up or properly written up, there is an incorrect entry therein or that it reflects the names of persons who are not the putative holders of the relevant land tenure right, he or she may designate any person to investigate and compile a register of land rights for the area or to update the existing register and to rectify errors or supplement omissions.*

[30] Section 36 provides:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity equality and freedom, taking into account all relevant factors, including –
   (a) the nature of the right;
   (b) the importance of the purpose of the limitation;
   (c) the nature and extent of the limitation;
   (d) the relationship between the limitation and its purpose; and
   (e) less restrictive means to achieve the purpose

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

.....

(4) Any register of land rights compiled or updated under subsection (1) or (2) shall, ...be compiled or updated in accordance with the legal and administrative requirements applicable to a township or other relevant register.

(5) any person designated under subsection (1) or (2) shall in the compilation or updating of a register of land rights –

.....

(b) ascertain the identity of the person who at the relevant time is the de jure holder of the land tenure right in the are as well as the identity of any putative holder of the relevant land tenure right in each such erf or piece of land;

(c) consider any representations made by him or her either orally or in writing by any person who lays claim to be registered in the register as the holder of a land tenure right;

(d) take reasonable steps to ensure that persons affected or likely to be affected by the investigation of compilation receive effective notice of investigation, are given opportunity of making representations with regard thereto and are informed of the result thereof;

(e) if it is just and equitable, make a recommendation to the Minister regarding such arrangements as are appropriate and necessary to protect other rights and interests, if any, in that erf or piece of land, including the rights and interests of putative holders,

(6) In order to gather information which is necessary or expedient in compiling or updating the register of land rights for the area concerned, any person designated under subsection (1) or (2) may –

(a) subject to any law governing privilege, question any person who in his or her opinion may have any relevant information available;

(b) subject to any law governing privilege require any person to deliver to him or her forthwith, or to submit to him or her at such time and place as may be determined by him or her, any register, permit, certificate, title of land right or other document in the possession or under the control of any such person any which in his or her opinion contains relevant information.

(c) examine any such register, permit or certificate, title of land right or document or make an extract therefrom or a copy thereof.

(d) if it is necessary for the purposes of paragraph (a), (b) or (c), at any relevant time, on the authority of a warrant issued by a magistrate or judge having jurisdiction, enter upon any erf or other land in the area concerned.

(7) If any person refuses to answer a question put to him or her under subsection (6)(a) or to deliver or submit anything required under subsection (6)(b), the person acting under subsection (6)(a) or (b), may apply to the magistrate's court for the district in which the erf or piece of land in question is situated for an order compelling the former person to answer the question or deliver the thing and the court may make such order as it deems fair and just under the circumstances, including an order of costs,

having regard to the public interest and the right of privacy of the respondent.

(8) Any person designated under subsection (1) or (2) may in the performance of his or her function be accompanied by any such person as he or she under the circumstances of any particular case may deem necessary.

(9) The Minister shall issue to a person designated under subsection (1) or (2) proof in writing of his or her designation and such person shall in the performance of his or her functions under this section produce, at such request of any person affected by such functions, such proof to the latter person.

(10) (a) Any person aggrieved by an entry made by a person designated under subsection (1) or (2) in a register of land rights, may within 30 days after she or she became aware of the entry, but not more than a year after entry was made, appeal in writing against such entry to the Minister.

(b) The Minister may, after he or she has considered the grounds of the appeal and the reasons of the person designated under subsection (1) or (2) for such entry –

(i) either in whole or in part, allow the appeal, and

(aa) direct such person to alter such entry or to substitute for it any other entry which such person in the Minister's opinion ought to have made; or

(bb) order that such arrangements be made as are appropriate and necessary to protect the rights and interests of the appellant as well ass other rights and interests, if any, in that erf or piece of land; or

(ii) dismiss the appeal.

(c) The Minister shall cause a person who lodged an appeal with him or her to be notified in writing of his or her decision on the appeal.

.....

(13) This section shall apply throughout the Republic."

67. The Minister's reliance on section 24D of the Upgrading Act falls short of the justification hoped for on the following non-exhaustive reasons which, we submit, render section 24D wholly inadequate:

a) The period within which one is permitted to lodge the complaint/grievance has lapsed in respect of all legally possible complaints contemplated by the section and so has the appeal;

b) It does not endow the Minister or his delegate with the power or discretion to condone complaints or grievances lodged outside the prescribed timeframe;

c) Even if an application for condonation could be obtained, a person who appears as the owner on the register of land rights is vested with the concomitant right to mortgage, alienate and bequeath "title" to the property. Accordingly, no subsequent changes to a register of land rights in terms of section

24D can alter these real rights. There is no opportunity for the putative holder to be notified or make representations prior to the automatic upgrade. Section 24D offers ex post facto recourse to an aggrieved party who must then rely on the Minister's discretion regarding their rights.

68. The respondents could offer no rational justification for the violations of the applicant's rights discussed above, neither could we imagine any. It is no surprise that it is so, simply because no justification compatible with the spirit, purport and object of the Bill of Rights is available.

REMEDY

69. In respect of an appropriate remedy, Langa DCJ expressed that a few salutary principles be kept in mind when devising an appropriate remedy. He did so as follows:

> *"This Court in **S v Bulwana; S v Gwadiso** expressed two importance principles, namely that:*
>
> > *"[c]entral to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek....In principle, too, litigants before the Court should not be singled out for the grant of relief, but relief should*

be afforded to all people who are in the same situation as the litigants."(footnotes omitted)

Factors relevant to any order made by this Court include speed, practicality, clarity and the mitigation any potential damage resulting from the relief of a temporary nature which this Court may give. Further, as was suggested in the second National Coalition case, the Court should not shy away from forging innovative remedies should this be required by the circumstances of the case."[31]

70. 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."*

71. The High Court upheld the applicant's contention that Section 2(1) of the Upgrading Act is inconsistent with the Constitution as it provides for the automatic conversion of a deed

[31] See *Bhe*, n 15, [101] – [102]

of grant into full ownership and vests exclusive ownership in the person registered as the head of the household in the deed of grant. It fails to protect – or even notify and consult with – the occupants of property who are not registered on the deed of grant.

72. The High Court also held that it would be just and equitable to allow the order of invalidity to operate retrospectively.

73. In this court the applicant seeks an order confirming the order of the High Court in paragraph 6 above.

RETROSPECTIVE APPLICATION OF THE ORDER OF INVALIDITY

74. The first respondent argued in the court *a quo* that if the court is inclined to find any invalidity then it should be minded to order it's retrospective operation to 27 April 1994, being the operative date of the Interim Constitution[32] and the effective date from whence the applicant could legitimately lay claim to a violation of her constitutional right.

75. The Minister argued against retrospective application, citing concerns for annulment of purchasers' title deeds, banks and/or estate agents, susceptible to claims for proceeds of the finalized sales and the risk of disrupting the operation of the Ministry of Rural Development and Land Reform which all run contrary to the stated aim of section 2(1) of

[32] The Constitution of the Republic of South Africa Act 200 of 1993

the Upgrading Act, which is to "create legal certainty (to confer) ownership", which is well intentioned.

76. Whilst these claims may be legitimate to some degree, the court must bear in mind the judgement of Madala J, in a minority judgment in ***DVB Behuising :***

> *"It is against this backdrop that one must consider the Proclamation. That it is a piece of obnoxious legislation not befitting a democratic society based on human dignity, equality and freedoms admit no doubt. This is acknowledged by my colleagues"*

77. Seen in this light, an order that renders a prospective declaration of invalidity is at odds with what the Constitutional Court acknowledged in ***DVB Behuising***. It would leave un-regarded and unamended the lingering consequences of an unfair, unjust, and sexist system of ownership, wholly inconsistent with the spirit and tenor of the constitution. It would deny the applicant the relief she seeks: the substantive meaning of which lies in the retrospectivity of the order of invalidity.

Retrospective timeframe

78. Whilst the Upgrading Act found its effective force in 1998, the springboard for any claims of constitutional invalidity, the Interim Constitution, came into operation on 27 April 1994. Accordingly, the applicant submits that the court *a quo* was correct in its finding that the

order of retrospectivity should stretch back to the date on which the interim Constitution came into force.

Suspension of the order of invalidity

79. The court *a quo* said the following in this regard:

> *"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 an opportunity to consider the order on 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.*
>
> .....
>
> *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.*
>
> ...
>
> *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 accompanying the Constitution"*

80. The court a quo ordered that the order of invalidity be suspended for 18 months. Should Parliament fail to cure the defect in the Upgrading act within this period of suspension, the parties could refer the matter back to a competent court to dispense further just and equitable relief.

CONCLUSION

81. The applicant submits that the Constitution requires, in relation to ownership of property and household arrangements that:

    81.1. Tenure which is legally secure must be protected and promoted;

    81.2. Relevant legislation must foster conditions that enable citizens to gain access to land on an equitable basis;

    81.3. Ensure the protection against arbitrary deprivation of property;

    81.4. Ensure the promotion of equal respect and concern for women and men alike; and

    81.5. Ensure administrative action that is procedurally fair.

82. It is submitted that the impugned provisions of the Upgrading Act are inconsistent with the Constitution, and must therefore be declared invalid.

83. The applicant seeks confirmation of the order made by the High Court, as well as orders for costs.

A DE VOS SC

MP MOROPA

Counsel for the Applicant

Chambers, George

05 April 2018

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: CCT 319/2017

Ex CASE : 101250/2015

In the matter between:

MANTSHABELLE MARRY RAHUBE	Applicant
and	
HENDSRINE RAHUBE	First Respondent
MEC FOR HOUSING AND LAND AFFAIRS, NORTH WEST PROVINCE	Second Respondent
MINISTER FOR RURAL DEVELOPMENT & LAND REFORM	Third Respondent
REGISTRAR OF DEEDS, PRETORIA	Fourth Respondent
REGISTRAR OF DEEDS, VRYBURG	Fifth Respondent
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	Sixth Respondent
MEC FOR HUMAN SETLEMENTS, GAUTENG PROVINCE	Seventh Respondent

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FIRST RESPONDENT'S WRITTEN SUBMISSIONS

A. Introduction

1. On 23 October 2009 the first respondent brought an eviction application[1] at Gara-nkuwa

[1] In terms of Section 4 (1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE)

Magistrate's Court (Case No.2567/2009) seeking the relief from court to order the applicant to vacate the House at 2328 Unit B, Mabopane[2].

2. The applicant opposed the said application and amongst other things she raised a constitutional issue, ie the constitutional validity of Section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 (hereinafter referred Upgrading Act).

3. As a result of the Constitutional issue which was raised by the lawyers of the applicant, the eviction application proceedings were stopped and left in abeyance pending the outcome of the application which were to be brought by the applicant to the High Court[3] challenging the constitutionality of the said section.

4. The applicant brought an application seeking an Order in the following terms:

4.1 Declaring that the applicant is the owner of the property situated at Stand 2328 Block B, Mabopane (the property).

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[2] Vol. 1 page 64 to 69

[3] The matter was first instituted in the North West High Court Case No: 772/2010 and in November 2015 was transferred to North Gauteng High Court under case No: 101250/2015

4.2 Alternatively, declaring that the applicant is entitled to have the property registered in her name.

4.3 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 of the Notice of Motion (4.1 to 4.3)

4.4 Declaring the first respondent holds title to the property on behalf of and for the benefit of the applicant and her descendants.

Alternatively to Prayers 1 and 4 referred to above (4.1 to 4.4)

4.5 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 from claiming ownership of the property.

4.6 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 the occupants of property is subject to a 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.

4.7 Ordering that the declaratory relief in Prayers as stated in paragraph 4.6 and 4.7 (or Prayers 5 & 6 as stated in the Notice of Motion) shall operate retrospectively.

Alternatively to Prayers 7 as stated in the Notice of Motion (4.7 above):

4.8 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.

4.9 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 the land tenure rights over the property, and to provide the applicant with an opportunity to be heard at such inquiry.

5. On 26 September 2017 judgment was delivered granting an order which declare the provisions of section 2(1) of the Upgrading Act constitutionally invalid[4]. This Honourable Court is entrusted with the duty to decide on the confirmation of the order by the court *a quo.*

B.. Factual background (timeline)

[4] Rahube v Rahube and Others 2018 (1) SA 638 (GP) at page 656 to 657

6. The applicant and the first respondent are siblings. In 1970, the family of the applicant moved to Stand 2328 Block B Mabopane (the property) in question from Lady Selbourne and were a family of 8 in total. It is common cause that the house in Mabopane belonged to the applicant and the first respondent's grandmother[5].

7. In 1978: their grandmother passed on. Shortly after this, the family nominated the first respondent as the holder of the certificate of occupation[6]. In the certificate the applicant and the siblings are listed as people entitled to occupy the property.

8. The first respondent's argument is that shortly thereafter, he applied at Bophuthatswana Building Society (BBS) bank to fund the loan for the purchase of the said property[7]. This has not been challenged by the Applicant as she chose not to file a reply affidavit disputing this allegation.

9. In 1988 the first respondent was given a deed of grant by the Bophuthatswana

[5] Vol. 4 page 376 para 2.1
[6] Vol. 4 page 376 para 2.3
[7] Vol.4 page 385 to 387

department of Interior.

10. In 1997, the first respondent left the parental home after he got married. This was after the applicant had returned home after her divorce. The first respondent argues that when he left this property there was an oral agreement between himself and the applicant that the latter will occupy the property and upon receipt of the municipal account the applicant to settle same.

11. From 2000 the Applicant was left alone in the house after the Mr Matjila had left.

12. In 2009 the first respondent requested his sister, the applicant herein to vacate the property as he returned to the house after having divorced his wife[8]. The applicant refused to vacate the property and the first respondent approached the office of the Legal Aid South Africa Gara-nkuwa office for legal recourse[9].

His then lawyers sent correspondence to the applicant requesting her to vacate the property. This request was resisted by the applicant.

[8] Volume 1 page 80
[9] Vol. 1 page 80

12.1 An application for eviction[10] was instituted at Gara-nkuwa Magistrates court's the applicant went to the same Legal Aid Office but was not assisted to avoid a possible conflict of interest. She was referred to the office of the Lawyers for Human Rights. The first respondent's eviction application was opposed at Gara-nkuwa magistrates court.

12.2 The applicant's lawyers approached North West High Court seeking an order to declare the provisions of the Act as constitutionally invalid. By agreement between the parties the matter was transferred to the North Gauteng High Court. The North Gauteng High Court granted an order declaring the provisions of section 2(1) of the Act constitutionally invalid.

13. This is an application to confirm the said order in terms of Rule 16(4) of the Rules of this Honourable Court.

C.. The provisions of the Upgrading of Land Tenure Rights Act[11] (Upgrading Act) v the first respondent claim of ownership of the property in question.

14. It is common cause that the provisions of section 2(1) of the Upgrading Act came into operation on 1 September 1991 just three years before the dawn

[10] Volume 1 page 64 to 72
[11] 112 of 1991

of democracy in the Republic of South Africa.

15. On 27 April 1994 Bophuthatswana formed part of the Republic of South Africa. However, the provisions of this Act came into effect in the former Bophuthatswana (Mabopane) on 28 September 1998 by virtue of the provisions of the Land Affairs General Amendment Act[12] .

16. Based on the said timeline it will be argued that the first respondent didn't acquire the land tenure right of ownership of the property in question through the conversion clause of the Upgrading Act which came into effect only in 1998
after the first respondent having obtained a funding from the BBS to fund the purchase of the said property[13]. The conversion clause of the Upgrading Act
came into effect at about 10 years later after he bought the property.

17. In the instant case the first respondent applied and obtained funding of the house on 25 April 1988[14].

18. The provisions of the Upgrading Act in its current form cannot be said to be

[12] 61 of 1998, This Act inserted the provisions of section 25A into the Upgrading Act which reads *"As from the coming into operation of the Land Affairs General Amendment Act, 1998, the provisions of this Act, excluding section 3, 19 and 20, shall apply throughout the Republic."*
[13] Vol. 4 page 381 para 3.14
[14] Volume 4 page 385-387

constitutionally valid. However, the first respondent says that the question about the constitutional invalidity of section 2(1) of the Upgrading Act does not make an impact about his acquisition of the ownership of the property. His contention is that his right to ownership was not obtained as a result of the conversion coming into effect in Mabopane in 1998 as he acquired it about 10 years earlier before this said date.

D.. Facts as appear from both applicant and the first respondent

19. As stated above the applicant and the first respondent are siblings. There is an eviction , which has been suspended at Gara-rankuwa Magistrates court as a result of this application which was instituted by the first respondent on the basis that the property in question he bought through finance he obtained from Bophuthatswana building society.

19.1 The applicant's case is that this property is a family home and she has a direct and substantial interest on it. The applicant avers that she only became aware that the first respond's title of grant has been converted into ownership in 2009 when she was served with eviction application by the first respondent[15]. The first respondent admits that he instituted the eviction proceedings in 2009 but disputes the allegation by the applicant

[15] Vol. 1 page 44 para 3

that she only became aware that he is the owner of the property by that year[16].

20. The first respondent does not dispute that the family moved to the property in

question in 1970 and they were eight family members who occupied the property and that the belonged to their grandmother.[17] The first respondent admits that the applicant moved out of the property when she got married in 1973 and she moved out with all her children contrary to her averment that she left children in the property and have been staying there for an

uninterrupted period[18].

21. The first respondent admits that he moved out of the property in 1991 or 1992

but dispute that he left for good[19]. He says that from time to time he used to come to the property and that there was verbal agreement that the applicant will occupy the property and the dispute started when she refused to pay for municipal services[20].

22. The first respondent admits that on 13 September 1988 he obtained a deed

[16] Vol. 4 page 377 to 378
[17] Vol. 4 page 376 para 2.1
[18] Vol. 4 page 378 para 3.71
[19] Vol. 1 page 45 para 5.4.5.6
[20] Vol. 4 page 479 para 3.7.7

of grant in terms of the Proclamation R293 in terms of the Native Administration Act[21] which was renamed the Black Administration Act[22]. However, the first applicant argues that shortly after this, he approached the bank for funding so that he can purchase the property and he got funding through Bophuthatswana Building society (affectionately known as BBS) Bank[23]. Subsequent to this, he bought the property to be exclusively his.

23. The first respondent vigorous disputes the allegation that he acquired ownership of the property by virtue of the fact that he held a deed of grant in his favour and it was done through the provisions of section 2(1) of the Upgrading Act[24]. The first respondent has submitted documentary proof from

the BBS bank that he paid his hard-earned money for the property and there is no replying affidavit by the applicant disputing this averment[25].

24. It is contended by the first applicant that although he first obtain a certificate of occupation and later a deed of grant. Subsequent to this he bought property

and the applicant was well aware of this, she agreed to pay rent and the municipal bills but later she stopped paying for same alleging that she wont for this in a house which does not belong to her[26]. In the event this Honourable

[21] 38 of 1927
[22] 38 of 1927
[23] Vol 4 page 381 para 3.14.1
[24] Vol. 1 page 47 para 9
[25] Vol. 4 page 385-387

Court refer this Upgrading Act to Parliament the first respondent will challenge

his ownership of the house before a tribunal or court if this will have to be the appropriate forum.

25. The first respondent argues that he will be homeless if this property is taken away from him. At the present moment he cannot get any RDP house

because his name appears on the system as he is the owner of the property in question.

26. The applicant's case is that she was shocked when she was evicted in 2009 that the ownership of the house has been transferred to the first respondent.

26.1 She concedes that the family had tacitly agreed that the first respondent be the titleholder of the deed of grant after their grandmother had passed on.

26.2 In law, only couple married in community of property of profit and loss are legally obliged to inform and get written consent from one another if

one intends to sell or dispose of his/her immovable property of the joint estate[27]. In the case of the first respondent there was no such an obligation.

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[26] Vol. 4 page 379 para 3.7.7

[27] *Section 15 (2) Matrimonial Property Act 88 of 1984, dealing with powers of spouses: (2) Such a power shall not without the written consent of the other spouse- (a) alienate, mortgage, burden with a servitude or confer any other real right in any immovable property forming part of the joint estate; (b) enter into any contract for the alienation, mortgaging, burdening with a servitude or conferring of any other right in immovable property forming part of the joint estate; (c) alienate, cede or pledge any shares, stocks, debentures, debentures bonds, insurance policies, mortgage bonds, fixed deposits or any similar assets, or any investment by or on behalf of*

27. On the correct facts of the case the provisions of section 2 (1) as they are cannot be said to be rational in the constitutional democracy and cannot even pass the limitation clause as enshrined in section 36 of the Constitution[28]. In this case the conversion as provided in section 2(1) of the Upgrading Act is being utilised in a property which was purchased some about ten years before it came into effect. The reliance on the Proclamation is merely because it is recorded in the deed of grant, the events which occurred subsequent to that has not been considered.

E.. The foundation of the applicant's argument and the introduction of the Upgrading Act

28. The applicant argues that the historically apartheid era laws in particular the Proclamation R293 which was brought about by the Native Administration Act[29] which was later became known as the Black Administration Act[30] made it impossible for women to have property registered in their own names amongst other things. This legislation together with Native Land Act[31]

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other spouse in a financial institution, forming part of the joint estate; (d) alienate or pledge any jewellery, coins stamps, paintings or any other assets forming part of the joint estate mainly as investments;…….

[28] Section 36 of the Constitution of the Republic of South Africa, 1996

[29] 38 of 1938

[30] *Supra*

prevented Black or African people from residing in certain areas. The first respondent does not deny discrimination, prejudices and unfair practices which were brought into place by this legislation and others.

29. It is indeed, so that in an attempt to address some of the injustices of the past in particular land tenure rights or right to ownership of the property Parliament enacted the Upgrading Act which came into effect in some other parts of the Republic in 1991. Section 2 (1) of the Upgrading Act is the relevant

part of the Act which was enacted in an attempt to address some of the challenges of non recognition of the ownership of property or land tenure rights

being registered in the names of certain people.

30. On the facts of this case as illustrated by the court *a quo*, the applicant, as well

as the first respondent the property in question belonged to their grandmother.

Now if that was the case the first respondent was not nominated because of his gender as a male and he was neither the head of the family because the applicant in her own version Mr Matjila was the head of the family.

31. The first respondent contends that even though he admit that he was

[31] 27 of 1913

nominated by the family to hold the certificate in terms of the Proclamation the

circumstances changed when he obtained bond from the bank to fund the purchase of the property.

32. It is accepted that the Deed of Grant which was subsequently given to the first

respondent indeed makes a reference to Proclamation 293. It is also common

cause that section 2 (1) of the Upgrading Act provides for automatic conversion of the deed of grant to ownership. However, that being the case, at the time the effect of the provisions of the Upgrading kicked in, the first respondent had already applied to the bank and obtained funding for the purchase. It is on this basis that he contends that he did not become the owner of the property by virtue of the conversion clause of the Upgrading Act.

33. The next question will be whether the provisions of section 2 (1) of the

Upgrading Act Constitutional valid, to put it differently whether this Honourable

Court should confirm the decision of the court a quo which declared the provisions of the section in question constitutionally invalid. The answer to this will be provided below.

F. Constitutional Rights possible infringed as a result of coming into effect of the provisions of section 2(1) of the Upgrading Act

34. The applicant argues that the coming into effect of the provisions of section 2 (1) of the Upgrading Act in the case set out in her papers, automatically converted a deed of grant into full ownership to the first respondent and that violates her property rights as provided in section 25 (1) ; (5) and (6); her right against discrimination as enshrined in section 9(3); her right to have her dignity respected and protected in terms of section 10 and her right to be heard before a decision is taken has adverse effect and is offensive against the provisions of section 33 of the Constitution.

35. The provisions as set out above will not be dealt with herein verbatim from the Constitution. However, they will be dealt with in turn and on the perspective of the case of the first respondent.

36. As already stated above the property rights of the applicant[32] have not been impacted on the basis of coming into effect of the provisions of the Act as the first respondent had already bought the property when the Act came into operation.

37. On the argument that her constitutional right against discrimination in terms of

section 9(3) of the Constitution the first respondent contends she was not discriminated against on the basis of her gender as being a woman. This property used to belong their grandmother not to their grandfather or to both but in 1970 when the family took occupation of the house, it belonged to their grandmother who was a woman. When applicant got married she had a property in her own name[33].

38. From the wording of section 2 (1) of the Upgrading Act which refers to automatic conversion of the deed of grant into full ownership, this being the case means that the provisions brings exclusive ownership to the person holding a deed of grant without giving an opportunity to other/s to be heard.

39. The provisions of section 33 of the Constitution is implicated by the provisions

[32] Property right of the applicant in terms of section 25 of the Constitution
[33] Vol. 2 page 167 to 169; Vol. 4 page 379 para 3.7.4

of section 2 (1) of the Act. However, this is mitigated by the provisions of section 24D (10) of the Upgrading Act which provides a remedy to the aggrieved party. The applicant for some unknown reason she opted not to exercise her right of appeal once she became aware about the change of ownership.

40. The first respondent has direct and substantial interest like other siblings of the applicant and he claims that he bought this property. This right to ownership of this property is not found because of section 2 (1) of the Upgrading Act but on the ground that he purchased. In the event this Honourable Court confirms that there is a defect in the section and once parliament has cured the defect he will make presentation to the body, tribunal or court which will be authorised to make a determination once all the interested parties have been heard[34].

41. Section 33 (2) of the Constitution provides that *"everyone whose rights have been adversely affected by administrative action has the right to be given written reasons".* The argument by the applicant is that she was never given an opportunity to make presentation before a tribunal or any body that she has substantial interest in the property. The first respondent says that he bought

[34] *Bel Porto School Governing Body v Premier, Western Cape 2002 (3) SA 265 (CC)* at page 292 at para *[86] The fairness of a decision in itself has never been a ground for review. Something more is required. The unfairness has to be such that a degree that an inference can be drawn from it that the person who made the decision had erred in a respect that would provide grounds for review. That inference is not easily drawn.*

the property and he is the owner thereof and he didn't obtain in terms of section 2(1) of the Upgrading Act. This is a conflict which needs to be determined by an independent tribunal or forum where both parties may give *viva voce* evidence. Section 2(1) of the Upgrading Act does not provide such

a mechanism of notifying the other interested parties.

42. The applicant's contention is that she never received notification nor an opportunity in an administrative enquiry to be heard before the deed of grant was converted into full ownership. This has been disputed by the first

respondent in that all the family members were made aware about this and they agreed to it[35]. This is a disputed fact which can be ventilated in a different forum where both parties can be heard.

G. Whether the limitation clause of the Constitution justifies the violation of the rights as alleged by the applicant in her papers.

43. The applicant contends that her section 25 (1) & (6); section 9 and section 33

Constitutional rights in the Bill of Rights have been violated in that she is at risk of losing the property by being evicted by a person who merely claims a right of ownership over the property by means of conversion clause of section

[35] Vol. 4 page 381 para [3.15.1]

2(1) of the Upgrading Act. She also argues that the discriminatory impact of automatic conversion of the deed of grant to get exclusive rights of ownership of the property without having been afforded an opportunity to be heard is a violation of section 33 of the Constitution.

44. The first respondent started legal process of evicting the applicant on the belief that he is the rightful owner of the property on the basis that he purchased the property. The Upgrading Act falls short of a clause to give notice to the parties who may be adversely affected by the conversion clause.

45. The Constitutional Rights in the Bill of Rights are subject to limitation clause[36]

and in the instant case the question is whether the implicated rights as per argument of the applicant can be said to be justified in an open and democratic society based on human dignity equality and freedom taking into account the factors set out in the subsections of section 36 of the Constitution.

46. As has been submitted above, the first respondent submits that the right set

[36] Section 36 (1) (a) to (e) and (2) of the Constitution

out of section 33 has not been considered as there no mechanism for notification of the affected parties, or giving them an opportunity to be heard before a conversion of the holder of deed of grant is converted to ownership. However, this is mitigated by the provisions of section 24D of the Upgrading Act.

47. It has been argued in the court a *quo* that section 24D of the Upgrading Act may address the complaint if there is any on condition that it has been lodged within a specific time period. In this case the applicant argues that she only became aware in 2009 that the first respondent had become the owner of the property. The first respondent disputes this and say that all along she had been aware of the position as there was an agreement between the two of them that she occupy the property and will pay rent.

48. The provisions of section 24D provides that:

(10) (a) Any person aggrieved by an entry made by a person designated under subsection (1) or (2) in a register of land rights, may within 30 days <u>after he/she</u>

<u>because aware of the entry,</u> but not more than a year after the entry was made, appeal in writing against such entry to the Minister. (underlined own emphases)

(b) The Minister may, after he or she considered the grounds of appeal and the reasons of the person designated under sub-section (1) or (2) for such entry-

(i) either in whole or in part, allow the appeal, and

(aa) direct such person to alter such entry or to substitute for it any other entry which such person in the Minister's opinion ought to have been made; or

(bb) order that such arrangements be made as are appropriate and necessary to protect the rights and interests of the appellant as well as other rights and interests, if any, in that erf or piece of land; or

(ii) dismiss the appeal

49. The applicant does not say that she appealed to the Minister in 2009 after she became aware that the first respondent became the owner of the property. The applicant's argument that the time set upon which she was to note an appeal has lapsed when she didn't exercise her right to appeal provided for by section 24D(10) of the Upgrading Act. We support the argument by the Minister that there is a remedy provided to any person who feel aggrieved by the conversion of holder of the deed of grant into full ownership.

50. The first respondent's contention is that the applicant's argument that the period within which she was to exercise her right in terms of section 24D

of the Upgrading Act has long lapsed is not a justification, she became aware

yet she did not appeal.

50.1 The fact that the Upgrading Act does not provide a discretion to the relevant official to condone complaint beyond the time prescribed is of no excuse, the Act provides a window period of 30 days of becoming aware of such to take some steps by way of an appeal.

50.2 The fact that 24D of the Upgrading Act is a *post facto* recourse but it provides some assistance to the aggrieved party like the applicant who has not been notified or heard before a conversion of the holder of a deed of grant into ownership because there is a legal remedy to appeal

such a decision and the Minister when considering the appeal has the power to either allow the appeal in part or in whole.

50.3 Moreover, the Minister's decision is an administrative one which is subject to judicial control, therefore, any aggrieved party may approach the court to have the Minister's decision reviewed and set aside[37].

[37] Section 6 of the Promotion of Administrative Justice Act 3 of 2000 provides that (1) *Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action. (2) A court of tribunal has the power to judicially review an administrative action if- (a)…(b)…(c) the action was procedurally unfair; (d) the action was materially influenced by an error of law; (e) the action was taken …(vi) arbitrarily or capriciously; (f) the action itself -…(i) the action is otherwise unconstitutional or unlawful.*

50.4 Based on the above it is contended that section 24D of the Upgrading Act does not fall short of justification.

51. The first respondent submits that it is not correct that he offered no justification of the violation of the rights as set out in the applicant's papers and argument.

H. The judgment by the Court a *quo*

52. The court held that the first respondent became the registered owner of the property following a conversion of the land tenure rights, evidenced in the deed of grant held, into full ownership in term of section 2 (1) of the Upgrading[38].

53. The first respondent's argument is that yes initially he was nominated as the holder of the certificate of occupation on behalf of the family by agreement amongst the family members. However, subsequent thereto, he got a loan from BBS (Bophuthatswana building society) for a bond in the total amount of R3,360.00. Although the deed of grant was issued in terms of the Proclamation but certain events took place thereafter which involves the payment of the some of money for the property. The first respondent submits that this was not looked at by the court a *quo.*

[38] Vol. 4 page 335 para [8] The case is reported Rahube v Rahube and others 2018 (1) SA 638 (GP)

54. The court a quo remarked that the first respondent made a bald denial of the allegations by the applicant that she paid levies. The first respondent submit that the presiding judge in the court *a quo* erred on this regard. It was the first respondent's version throughout that the Invoices for municipal services were addressed to him and he is the one who paid for those services until when he was unable to do so when he applied that the municipal debt be scrapped[39].

55. The conclusion by the court *a quo* for deciding not to make a declaratory order that the applicant is the owner of the property on the basis that she failed to cite all the interested parties is welcomed by the first respondent.

56. The crux of the matter is an order declaring section 2 (1) of the Upgrading Act as constitutionally invalid insofar as it:

[39] Vol. 1 page 68 para [4.3] & Vol. 2 page 164 para [8]

(i) automatically converted the holders of land tenure rights into owners of property, without 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.

57. The applicant argues this declaration be extended to other women where the facts as set out in her case applies. In the relevant or similar facts as set out

in a person of the applicant the constitutional invalidity of the provisions of the

Upgrading Act may be confirmed by this Honourable Court. However, the case of the first respondent is that the applicant was not discriminated against

on account of her being a woman and that he (the first respondent) was at first

a nominee of the holder of certificate of occupation and he subsequently bought the property and if his right is not restored he will be homeless.

58. However, in the event this Honourable Court decide to confirm the decision of

the court *a quo* the first respondent reserves his right to make representation to an appropriately established forum once parliament has fixed the defect (if there is any) of section 2(1) of the Upgrading Act.

I. Submissions on retrospectivity application of the order of invalidity

59. 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."

60. This Honourable Court has dealt with a number of cases[40] where it had to decide on the constitutional invalidity of the legislation on whether such an order should have retrospective or prospective effect.

61. In *Bhe and others v Magistrate Khayelitsha (Commission for Gender Equality as Amicus Curiae) and others*[41] the Honourable Justice Langa J (as he then

[40] *S v Zuma & Others 1995 (2) SA 642 (CC) at page 663 para [43]* where the court held that *the ability to limit the retrospective effect of orders of invalidity can be used – to avoid the dislocation and inconvenience of undoing transactions, decisions or actions taken under the invalidated statute. The court further held that the interest of individuals must be weighed against the interest of avoiding dislocation to the administration of justice and desirability of smooth transition from the old law.* See also *S v Minister of Police and Others v Kunjana 2014 (1) SA 442 (CC)*; *Gaertner and others v Minister of Finance and others 2016 (2) SA 473 (CC) at para [34] to [38]*

[41] 2005 (1) SA 580 (CC) at para [126]; *Ramuhovhi and others v President of the Republic of South Africa & others 2018 (2) SA 1 (CC) at para [57] & [58]*

was says) "*Section 172 of the Constitution empowers this Court, upon a declaration*

of invalidity to make an order that is just and equitable, including to limit the retrospective of that invalidity. The statutory provisions and customary-law rules that have been found to be inconsistent with the Constitution are so egregious that an order that renders the declaration fully prospective cannot be justified. On the other hand, it seems to me that unqualified retrospectivity would be unfair because it could result in all transfers of ownership that have taken place over a considerably long time being reconsidered. However, an order which exempts all completed transfers from the provisions of the Constitution would also not accord with just and equity. It would make it impossible to re-open a transaction even where the heir who received transfer knew at the time that the provisions which purport to benefit him or her were to be challenged in a court". (underlined own emphases)

62. As submitted in the court a *quo* that in the event this Honourable confirming the order of constitutional invalidity, it should be retrospective with effect from

27 April 1994 and that the court should confirm the order by the court a *quo* giving parliament 18 months to cure the defect.

J.. Costs

63. In her papers filed before this Honourable Court asked the cost order against the third respondent[42]. The court a quo held that "…*The applicant should cover all her costs from the third respondent. … The first respondent's lack of*

resources should militate against a finding that he should be apportioned

[42] Vol. 4 page 311 para [1.5]

responsibility for any of the applicant's costs. The first respondent, though not

fault of his own, acquired tenure rights which he sought to protect in these proceedings."

64. It is submitted on behalf of the first respondent that there should be no order as to costs against him, in light of the well-established principle that a party raising constitutional rights in good faith should not be mulct with costs[43]. This

Honourable Court in the case of *Bothma v Els and others*[44] held that courts have departed from the general rule in civil litigation that costs follow the result

in litigation between private parties in circumstances where 'public interest litigation could be chilled by an adverse cost order'.

65. Insofar, as an order as for costs we submit that an order by the court a quo should not be departed. If the Minister is not pursuing his opposition before this Honourable Court we ask that each part pay its own costs.

K. Conclusion

66. The first respondent submits that there are disputes of facts which can be

[43] Biowatch Trust v Registrar, Genetic and others 2009 (6) SA 232 (CC) para [23]
[44] 2010 (2) SA622 (CC) paras [93] and [99]

better ventilated in a forum best suited in hearing *viva voce* evidence when all

the parties having the direct and substantial interest in the property cited or notified of such hearing.

67. The applicant was not discriminated against on the basis of her gender being a woman;

68. There may be women who might not have been notified and/or not given an opportunity to be heard before the land tenure rights to property was converted

into exclusive full ownership in terms of section 2 (1);

69. The first respondent submits that it is only on the basis that other women might

have been adversely affected by the coming into effect of section 2(1) of the Upgrading Act that this Honourable Court should refer the provisions to parliament to remedy the defect if section 24D thereof does not adequately address the complaints or grievance of the interested parties.

70. This Honourable Court should discharge the interdict order by the court *a quo*

should it decide that section 24D of the Upgrading Act adequately addresses the grievance of the affected parties by the effect of section 2(1) of the Act.

List of Authorities

1. Bhe and Others v Magistrate, Khayelitsha & others (Commission for Gender Equality (as amicus); Shibi v Sithole and Others; South African Human Rights Commission and Another v The President of the Republic of South Africa and Another 2005 (1) SA 580 (CC) above at page 631

2. Bel Porto *School Governing Body v Premier, Western Cape 2002 (3) SA 265 (CC)*

3. S v Zuma & Others 1995 (SACR 568 (CC) at para [43]
4. Rahube v Rahube and others 2018 (1) SA 638 (GP)

5. Gaertner and others v Minister of Finance and Others 2014 (1) SA 442 (CC)

6. Minister of Police and Others v Kunjana 2016 (2) SACR 473 (CC) para [34] to [38]
7. Biowatch Trust v Registrar, Genetic and Others 2009 (6) SA 232 (CC) para 23).

8. Bothma v Els and Others 2010 (2) SA 622 (CC) paras 93 and 99)
9. Ramuhovhi and others v President of the Republic of South Africa & others 2018 (2) SA 1 (CC) at para [57] & [58]

Statutes

1. Section 172 of the Constitution of the Republic, 1996
2. Section 2(1) and 24D of the Upgrading of Land Tenure Rights Act 112 of 1991
3. Promotion of Administrative Justice Act 3 of 2000
4. Native/ Black Administration Act 38 of 1927

Dated at Braamfontein on this the …….Day of ……2018

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Adv. N.L Skibi

Instr.by Mr S. Keka c/o Legal Aid South Africa