Viewing Land Through a Social-Justice Lens: Why Land Reform is Imperative to Social Justice

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SUMMARY

South Africa has aligned itself with the United Nations Global Sustainable Development Goals (SDGs), which seek to reach certain goals by 2030. It is important to ask whether these goals are truly attainable, especially in the context of poverty and land inequality. In this article, the authors place poverty and land inequality in South Africa in the spotlight – under a social-justice lens. The article focuses on the extent to which land can, and should, play a role in reducing poverty levels. It is crucial to reflect on the land issue through the lens of social justice by specifically considering the land-reform project and its role in ensuring (or inhibiting) more equitable access to land. Land-reform programmes and policies still have major implementation issues and, in particular suffer a lack of political will, and blanket approaches to land reform that do not necessarily take into account the realities of those affected. It is thus clear that South Africa still has much progress to make to achieve the goals set out in the SDGs and to achieve social justice in the context of land reform.

KEYWORDS: poverty, land inequality, social justice, land reform, SDGs

1 INTRODUCTION

In 2018, the World Bank, Statistics South Africa and the Department of Planning, Monitoring and Evaluation released a report on the drivers, constraints and opportunities in the quest to overcome poverty and inequality in South Africa.[1] The study shows that many aspects impact the challenge of poverty and inequality in South Africa.[2] It is clear in the report that South Africa is one of the most unequal countries in the world[3] – despite having aligned itself with the United Nations Global Sustainable Development Goals (SDGs).[4] The first goal is to end all forms of poverty in South Africa by 2030 – a deadline creeping ever closer. Goal 10 seeks to reduce inequalities, and to narrow the gap between rich and poor. This goal should be achieved by adopting policies that create opportunities for everyone. Goal 11, in turn, provides for sustainable cities and communities and emphasises the particular need to ensure that they are made more inclusive, safe, resilient and sustainable. The focus of Goal 11 is to eliminate extreme poverty in city centres and to make these areas, where many choose to live, more affordable by providing public housing. This goal potentially incorporates upgrading urban slums and ensuring that a broader range of people are involved in decisions about urban planning. Goals 1, 10 and 11 are important from the perspective of land reform. These goals will arguably not be reached if the policies, programmes and legislation geared towards land reform are ineffective and mostly unsuccessful.

In this article, the authors intend to place the national reality, policies and priorities in South Africa in the spotlight – under a social-justice lens – insofar as they relate to land. The point is not simply to paint a bleak picture of how little progress the country has made in using land as a mechanism to reduce poverty, but rather to identify some challenges of the reality that we face in the hope of advancing towards a more equal society.[5] In *Port*

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1 Sulla and Zikhali *Overcoming Poverty and Inequality in South Africa: An Assessment of Drivers, Constraints and Opportunities* (2018) 1–113.

2 For instance, lack of access to basic services and utilities, poor housing conditions, lack of access to education, health and assets, and food insecurity and malnutrition. See Sulla and Zikhali *Overcoming Poverty and Inequality in South Africa* ch 2.

3 Sulla and Zikhali *Overcoming Poverty and Inequality in South Africa* 42. Statistics South Africa has estimated that roughly 49,2% of the adult population in South Africa lives below the upper-bound poverty line. The General Household Survey has found that housing projects are failing to reduce the percentage of households in informal dwellings, and that 13,1% of all households still live in informal dwellings. See Statistics South Africa *Statistical Release P0318: General Household Survey* (2019) ix; Modiri "The Grey Line In-Between the Rainbow: (Re)thinking and (Re)talking Critical Race Theory in Post-Apartheid Legal and Social Discourse" 2011 26 *Southern African Public Law* 177 183.

4 The UN Sustainable Development Goals (the SDGs) were set up at the 70th Session of the United Nations General Assembly, during the United Nations Summit on Sustainable Development in 2015, when leaders from 193 countries (including South Africa) came together to think about the future. The 17 SDGs were specifically set up to address some of the biggest problems facing all countries in the world.

5 See De Wet "Land Reform in South Africa: A Vehicle for Justice, or a Source of Further Inequality and Conflict" 1997 14 *Development Southern Africa* 355 356. De Wet makes the point that "there is tension between the somewhat Utopian vision that many people developed around the 1994 elections – reinforced by the speeches of leading politicians – and the political realities of implementation".

Elizabeth Municipality v Various Occupiers,[6] Sachs J highlighted that owing to the legacy of racial discrimination in the past, South Africa is still battling to eliminate the unequal distribution of land.[7] The article focuses on the extent to which land can, and should, play a role in reducing poverty levels. More specifically, it is crucial to reflect on land issues through a social-justice lens by considering specifically the land-reform project and its role in ensuring (or inhibiting) more equitable access to land. It is important to consider how far we have come (by recognising some of the challenges that are present) and where we should be going (with a specific focus on the potential opportunities that exist in land reform).

The issue of *land* inequality is central to the issue of general inequality in South Africa.[8] In this regard, the Constitution of the Republic of South Africa, 1996 (the Constitution) approaches land reform through the lens of social justice, human development and spatial transformation.[9] The issue of land reform has come to require attention with increasing urgency; South Africans have expressed impatience with the slow pace of land reform.[10] This article is particularly interested in the extent to which land reform has met social-justice goals, which refer to the just, fair and equitable distribution of all opportunities, resources, privileges and burdens in society or the equal enjoyment of all rights and freedoms.[11] Crucial to the concept of social justice are the values of human dignity, equality, freedom and humanity.[12] Social justice aims to ensure that no individual, group or community experiences disproportionate difficulty in accessing life opportunities and basic rights such as education, access to justice and housing.[13] Laws, policies and programmes taking a blanket approach to issues without looking at specific contexts in which issues arise often perpetuate social *in*justice. Thus, to achieve social justice, there is a need to develop laws, policies and programmes that respond to the realities of those affected. This article thus evaluates the land-reform sub-programmes in order to establish how far South Africa has come in its endeavour to effect land reform in the ultimate quest for social justice.

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6 2005 (1) SA 217 (CC).

7 *PE Municipality v Various Occupiers supra* par 16. Dugard aptly points out that unreflective moves towards amending section 25 of the Constitution to make expropriation without compensation possible, "however politically motivated and as yet undefined, have occurred against *the devastating reality of widening, and persistently racialized, socio-economic inequality, including unequal access to property, especially rural land*" (own emphasis). See Dugard "Unpacking Section 25: What, If Any, Are the Legal Barriers to Transformative Land Reform?" 2019 9 *CCR* 135 137 (footnotes omitted).

8 Advisory Panel on Land Reform and Agriculture "Final Report of the Presidential Advisory Panel on Land Reform and Agriculture" (2019) https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000 (accessed 2024-02-29) iv.

9 *Ibid*.

10 *Ibid*.

11 United Nations Department of Economic and Social Affairs *Social Justice in an Open World: The Role of the United Nations* (2006) 62.

12 UN Department of Economic and Social Affairs *Social Justice in an Open World* 13.

13 UN Department of Economic and Social Affairs *Social Justice in an Open World* 84.

2 SETTING THE SCENE: WHY IS LAND REFORM IMPERATIVE TO THE PROJECT OF POVERTY ALLEVIATION?

2 1 Introduction

In the majority of developing countries, land is a crucial component for, *inter alia*, income-earning, investments and wealth accumulation, as well as for inheritance.[14] In light of the important role that land plays, the manner in which land rights are defined and can be obtained has extensive social and economic effects.[15] As such, there is a need to ensure that impoverished and vulnerable groups have access to land, and that they are able to use land effectively to reduce poverty and for their empowerment. In this regard, land reform is vital.[16]

Land reform is entrenched in the property clause in the Constitution.[17] Pienaar explains that the phrase "land reform" may have different meanings depending on the context and jurisdiction in which the phrase is employed.[18] However, despite the context- and location-specific nature of land reform, any definition of the phrase must be flexible and adaptable so that it is possible for land reform to undergo different phases at different times. In South Africa, the land-reform programme had to be tailored to reflect (or, more importantly, correct) the race-based land measures applicable in the pre-constitutional era (and their impact on South Africa). When South Africa became a democratic state in 1994, the transformation from the discriminatory and oppressive system of apartheid to a system of rule by the majority in a new constitutional dispensation required wholesale changes to land policies and legislation.[19] At the core of the issues surrounding transformation was the proposed rectification of the dispossession of many Black South Africans of their property, which occurred in order to fulfil the

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14 Deininger *Land Policies for Growth and Poverty Reduction* (2004) xx.

15 *Ibid*.

16 *Ibid*.

17 See s 25(5)–(9) of the Constitution.

18 Pienaar *Land Reform* (2014) 12; Pienaar "Reflections on the South African Land Reform Programme: Characteristics, Dichotomies and Tensions (Part 1)" 2014 *TSAR* 425 426.

19 See Kloppers and Pienaar "The Historical Context of Land Reform in South Africa and Early Policies" 2014 17 *PELJ* 677. This article provides an overview of the most prominent legislation that provides the framework for the policy of racially based territorial segregation that applied for most of the twentieth century. It further discusses the legislative measures and policies instituted during the period from 1991 to 1997 that were aimed at abolishing race-based laws and practices related to land, and which eventually provided the basis for the current land-reform programme in South Africa. Interestingly, Beinart and Delius survey the historical background and realities of the Native Land Act and argue that despite how racist and segregationist the Act was, its immediate purpose was not to dislodge Africans from land, but to maintain and solidify the *status quo* of land possession and ownership until government commissions could find more lasting solutions entailing segregation and land distribution. They make this argument to point out that land dispossession is an injustice that started long before 1913. See Beinart and Delius "The Natives Land Act of 1913: A Template but Not a Turning Point" in Cousins and Walker (eds) *Land Divided, Land Restored: Land Reform in South Africa for the 21st Century* (2015) 24 25.

vision of segregation policies. Of the major changes following the transition to democracy, land was one of the contentious issues that the drafters of the new constitution sought to address.[20]

A historical account of the dispossession of land in South Africa is essential in order to answer the question why land reform is necessary and, therefore, an integral part of the property clause.[21] From the history of land dispossession in South Africa,[22] of which many accounts have been given,[23] it is immediately clear why a property clause was necessary in the new constitutional dispensation. Cousins and Walker provide a valuable timeline setting out the legislative and policy developments in South Africa's history of land dispossession and reform from 1910–2014.[24] During the apartheid period, dispossession was engineered by the simultaneous processes of restricting Black urbanisation and proletarianisation of Black people.[25] Black subsistence farmers and community members from all over the Union and Republic were drawn to the cities by work opportunities and pushed away from the hinterland owing to diminishing ownership of indigenous land. Influx control and pass laws further regulated Black people's movement during apartheid. The joint push-and-pull effect of these processes meant that dispossessed Black Africans hovered between an urban and rural existence.[26]

"Bantustans" or "native reserves" were areas of land in rural South Africa designated by the apartheid government as separate spaces for Black Africans, who were relocated to these spaces after a series of violent dispossessions following the passing of the Native Land Act of 1913 and its various descendants. Before the formal creation of the Bantustans, reserves were allocated to Africans in the Cape Colony era and the subsequent Union of South Africa. No effort was made to uplift the dispossessed as a class of self-supporting farmers.[27] Instead, the Bantustans served as "labour reserves" or reservoirs supplying cheap, migratory labour to the mining-based capitalist economy.[28] Claassens sets out the legal and executive consolidation of Bantustans and describes how the South African Development Trust was deployed after the election of the National Party in

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20 Van Wyk "Feasibility of Restoration as a Factor in Land Restitution Claims" 2010 25 *SAPL* 590 591.

21 Pienaar *Land Reform* 9 11.

22 This section does not purport to provide a complete or overall picture of the history of land dispossession in South Africa. The point of the section is to highlight key aspects of land dispossession in order to show the important context within which the need for section 25 developed.

23 To view some of the accounts, see generally the contributions in Cousins and Walker *Land Divided, Land Restored*; Ngcukaitobi *The Land is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism* (2018); Pienaar *Land Reform* ch 3.

24 Cousins and Walker "Land Divided, Land Restored: Introduction" in Cousins and Walker *Land Divided, Land Restored* 1 17–21.

25 Hendricks, Ntsebeza and Helliker "Land Questions in South Africa" in Hendricks, Ntsebeza and Helliker (eds) *The Promise of Land: Undoing a Century of Dispossession in South Africa* (2013) 1 3–4.

26 Hendricks *et al* in Hendricks *et al* (eds) *The Promise of Land* 1 9.

27 *Ibid*.

28 *Ibid*.

1948 to execute forced removals and define areas for Blacks-only and Whites-only occupation.[29] This is the essence of the background to the need for a land-reform programme to address the unequal treatment of Black South Africans in the context of land in the apartheid era.

Pienaar explains that during the race-based land-control system in South Africa, "common-law ownership was mainly reserved for white persons, with lesser rights reserved for black persons (and other non-whites)".[30] Various pieces of apartheid legislation were promulgated to ensure enforcement of this system.[31] Thus, broadly speaking, two tenure forms existed under apartheid and continue to shape the landscape in the democratic era. On the one hand, common-law ownership and rights and on the other, customary-law rights and communal tenure. In the latter case, land has been held in trust on behalf of Black communities while simultaneously allowing for various permit-based interests to be operational.[32] The land-administration system in South Africa has largely developed in line with private individual ownership.[33] On this basis, Pienaar asserts:

> "Land reform is one critically important sector within the arena of property law that is integral to reversing the inequitable legacy and instrumental in transforming society at large. However, land reform alone is not enough to effect all the changes that are needed. For this, systemic and institutional reforms – that have nothing to do with transfer of land as such – are required. Hand-in-hand, the restructuring of property law (systemic and institutional) and land reform measures and designs may bring about the changes so desperately needed".[34]

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[29] Claassens "Law, Land and Custom, 1913–2014: What Is at Stake Today?" in Cousins and Walker *Land Divided, Land Restored* 68 70–72.

[30] Pienaar *Land Reform* 6.

[31] See Kloppers and Pienaar 2014 17 *PELJ* 677–706.

[32] Pienaar *Land Reform* 6.

[33] Pienaar *Land Reform* 7.

[34] Pienaar 2014 *TSAR* 425 430 (footnotes omitted). This begs a bigger question of transforming the law in line with the imperative of justice. Property law as a system may need to be changed (or transformed) to ensure true reform. Transformation of the law, specifically, and transformation of society generally, is imperative and must be prioritised. However, it is challenging to envision such a transformation. Should the transformation of the law be centred on the notion of justice? If so, what does justice and/or transformation mean? If not centred on justice, what should the transformation of the law look like? What part of the law *should* be kept and what part must go, and why? In addition, and very crucially, have we seen transformation take place in line with the ethos of the Constitution? See, for instance, Froneman "Legal Reasoning and Legal Culture: Our 'Vision' of Law" 2005 1 *Stell LR* 3–20; Zitzke "A Decolonial Critique of Private Law Human Rights" 2018 34 *SAJHR* 492–516; Davis "Is the South African Constitution an Obstacle to a Democratic Post-Colonial State?" 2018 34 *SAJHR* 359–374; Albertyn "Contested Substantive Equality in the South African Constitution: Beyond Social Inclusion Towards Systemic Justice" 2018 34 *SAJHR* 441–468. Transformation is a difficult concept to unpack. As difficult as transformation is to understand, so too is the notion of justice especially complex. See, for instance, Minow "Forgiveness, Law and Justice" 2015 103 *California LR* 1615–1646; Boudreaux "Land Reform as Social Justice: The Case of South Africa" 2010 *Institute of Economic Affairs* 13–20; Van der Walt "Property, Social Justice and Citizenship: Property Law in the Post-Apartheid South Africa" 2008 19 *Stell LR* 325–346; Arbour "Economic and Social Justice for Societies in Transition 2007 40 *New York University Journal of Law and Politics* 1–28; Mostert "Land Restitution, Social Justice and Development in South Africa" 2002 119 *SALJ* 400–428. See further, Kennedy "From and Substance in Private Law Adjudication" 1976 *Harvard LR* 1713–1724; Botha "Democracy and Rights: Constitutional

2 2 Linking land reform to poverty alleviation

Land reform is clearly one way in which fairness and equality in property distribution in South Africa can be achieved.[35] The notion of land reform is often defined in the context of broadening access to (agricultural) land – in the sense of redistribution of property.[36] However, as is evident from the three sub-programmes in South Africa, land reform is a wider notion than mere land redistribution. A broader, more all-encompassing land-reform programme is needed in South Africa.[37] It could, therefore, be not simply about the redistribution of mostly agricultural land. It also should be about the restoration of land that was previously dispossessed, and about making sure that insecure rights (including customary land rights) are made (more) secure.

Land-reform goals are usually aligned with the methods used to achieve those goals. However, Hall notes:

> "Disagreement continues over the object of land reform – what it should do: whether this is the expansion of rural settlement options and diversification of livelihoods, the creation in commercial farming areas of a small-scale farming class, the racialisation of the large commercial farming sector, or some combination of these."[38]

Pienaar argues that the question of what land reform is and how it is achieved is directly linked to why it is necessary to have land reform in the first place. On this basis, she defines land reform as

> "initiatives, embodied in legislative, policy and other measures, constituting actions and mechanisms aimed at broadening access to land, improving the security of tenure and restoring land or rights in land – all of which have become necessary because of the historic racial and inequitable approach to land in South Africa."[39]

Land reform is therefore inextricably linked to the alleviation of poverty.

The Preamble of the Constitution states unequivocally that the people of South Africa recognise the injustices of our past and strive towards a society

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Interpretation in a Postrealist World" 2000 63 *THRHR* 567; Van der Walt "Legal History, Legal Culture and Transformation in a Constitutional Democracy" 2006 *Fundamina* 1–47. For a recent account of the potential barriers to interpreting section 25 in a transformative manner, see Dugard 2019 *CCR* 135–160.

35 Horn, Knobel and Wiese explain that "[p]roperty relationships were disturbed and skewed fundamentally during the apartheid era. Rectifying the situation and establishing a measure of normality and fairness as far as property is concerned is time-consuming and dependent on a measure of political activism is avoidable. An important aspect of the processes through which greater normality and fairness regarding property distribution are promoted is land reform". See Horn, Knobel and Wiese *Introduction to the Law of Property* 8ed (2021) 394.

36 Pienaar *Land Reform* 14.

37 Pienaar "Approaching Systemic Failure? A Brief Overview of Recent Land Reform Case Law" 2020 *TSAR* 536–546.

38 Hall "Who, What, Where, How, Why? The Many Disagreements About Land Redistribution in South Africa" in Cousins and Walker *Land Divided, Land Restored* 127 140.

39 Pienaar *Land Reform* 15. See also Hall in Cousins and Walker *Land Divided, Land Restored* 140–141.

based on democratic values, social justice and fundamental human rights.[40] In the context of land, we are mostly still fighting the after-effects of a colonial and/or apartheid system that has ensured a legacy of oppression, inequality, injustice, poverty and marginalisation. While South Africa has constitutional provisions and laws enacted to give effect to those provisions, which may arguably be described as progressive, these laws or constitutional provisions remain only ideals if they do not speak to a particular reality. In this regard, it needs to be established why there is a disconnect between the law and reality when it comes to using property (or, more specifically, land) as a mechanism to alleviate poverty. One aspect that arguably makes it difficult to alleviate poverty (or at least reduce it drastically) is that there is a disconnect or gap between laws that are in place to protect marginalised groups and implementation of those laws. Despite adequate laws being in place, implementation may simply be absent. Another problem that could occur is a failure of existing laws to respond to the realities of marginalised groups in South Africa.

It is argued that it is important to be honest about the fact that the landless and homeless in South Africa have been woefully disappointed by the imperative of land reform to address more substantial land equality. There have been a number of pronouncements by justices in various courts that highlight the disconnect between the ideals of the Constitution and reality, especially in the context of the appropriateness and implementation of some pieces of legislation, policies and by-laws. For instance, the words of Yacoob J in *Government of the Republic of South Africa v Grootboom*[41] remind us:

> "The Constitution will be worth infinitely less than its paper if the [conduct of the state] concerned with housing is determined without regard to the fundamental constitutional value of human dignity … In short, I emphasise that human beings are required to be treated as human beings. This is the backdrop against which the conduct of the [state] towards the [landless] must be seen."[42]

In *PE Municipality v Various Occupiers*,[43] Sachs J went further and pointed out:

> "It is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation. The integrity of the rights-based vision of the Constitution is punctured when governmental action augments rather than reduces denial of the claims of the desperately poor to the basic elements of a decent existence."[44]

Two other recent land-reform judgments are also important when reflecting on land reform as a potential mechanism to ensure a more equal distribution

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40 The Preamble of the Constitution.

41 2001 (1) SA 46 (CC).

42 *Government of the RSA v Grootboom supra* par 83.

43 *Supra*.

44 *PE Municipality v Various Occupiers supra* par 18. See also Sachs *The Strange Alchemy of Life and Law* (2009) 105.

of land. The case of *District Six Committee v Minister of Rural Development & Land Reform*[45] involved an application relating to attempts by the former residents of District Six to resolve and to bring to finality their claims to restitution, which arose out of the forced dispossession of their homes and properties in District Six. The court held:

> "[S]ection 237 of the Constitution provides that all constitutional obligations must be performed diligently and without delay. Delays by the government can also render the rights in the Constitution illusory, thus undermining the spirit, purport and object of the Constitution."[46]

Similarly, Davis J in *Rakgase v Minister of Rural Development*[47] remarked that "[s]ince the birth of democracy in our country in 1994, land reform, despite it being a Constitutional imperative, has been slow and frustratingly so".[48]

When considering the slow pace of land reform, it is impossible to ignore the fact that identifying where the problem lies is complex. One needs to be mindful of the deep-rooted inequality that still plagues South Africa. Furthermore, non-implementation of laws is arguably only one aspect of the problem, which is complex. It needs to be determined why the laws are not being implemented. In part, it may be that the laws cannot always be implemented as honourably as intended as they simply do not respond to a particular reality. One needs to take into account the complexity associated with non-implementation of existing laws aimed at protecting and safeguarding certain rights in the context of land reform. In this regard, Aliber makes the argument that it is important for the government to consider that there are "significant gaps in our knowledge about the incidence and causes of poverty, and even greater gaps in our knowledge of what practical measures work".[49] This may mean that government could potentially waste resources if it seeks to intervene to eradicate poverty without having a clear understanding of the distinction between the chronically poor and the episodically poor. Any anti-poverty initiatives (including land-reform initiatives) that government seeks to implement should arguably be mindful of this distinction.[50]

With this background in mind, this article continues to reflect upon possible challenges to reducing poverty (and attaining SDGs 1, 10 and 11) in the context of land. More specifically, the sections of the article that follow consider some problems encountered in each of the land-reform sub-programmes, with a specific focus on the extent to which the sub-

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45 2019 (5) SA 164 (LCC).

46 *District Six Committee v Minister of Rural Development & Land Reform supra* par 104.

47 2020 (1) SA 605 (GP).

48 *Rakgase v Minister of Rural Development supra* par 5.4.1.

49 Aliber "Chronic Poverty in South Africa: Incidence, Causes and Policies" 2003 31 *World Development* 473 473.

50 Aliber 2003 *World Development* 484. In an interesting paper by Aliber and Cousins, the authors highlight the importance of ensuring that models and frameworks of redistribution are tailor-made for the needs of beneficiaries who will eventually benefit from the land-reform programme. See Aliber and Cousins "Livelihoods after Land Reform in South Africa" 2013 12 *Journal of Agrarian Change* 140.

programmes purport to assist in addressing the grossly unequal distribution of land in South Africa.[51]

3 REDISTRIBUTION

Land redistribution ordinarily entails putting mechanisms (legislative, policy and other measures) in place to ensure broader access to land. The question that immediately becomes important in light of the aim of this article is the extent to which land redistribution can be used as a mechanism to eradicate poverty. Land redistribution should, at the very least, ensure that people have access to land, and, at best, should work towards altering land ownership patterns to ensure a more equitable distribution of land. Therefore, it seems very plausible that this sub-programme of land reform could be seen as a tool towards reaching the first SDG, as highlighted above. However, it seems that land redistribution may be riddled with challenges that potentially stand in the way of ensuring that this land-reform tool is implemented effectively.

Section 25(5) of the Constitution provides the impetus to ensure that land is redistributed in South Africa. In this regard, "government has a facilitative role to play by providing financial support where necessary, acquiring land on the basis of the willing-buyer-willing-seller principle and waiting for potential beneficiaries to approach government and indicate their needs and demands".[52] In terms of the policies and legislation that are geared towards land redistribution, both Pienaar and Hall pick up on the shift in focus from 1990 to date of the policies for redistribution in South Africa and the impact that this shift has had on the overall success of the project of land redistribution.[53] Pienaar notes:

> "Whereas initial redistribution endeavours centred on the poorest of the poor [in an attempt to ensure poverty alleviation], a gradual shift occurred in favour of more resourced and more competent beneficiaries, with the aim of enabling commercial farming with greater emphasis on efficiency."[54]

Similarly, Hall points out that the redistribution programme in South Africa has undergone substantial changes, especially regarding who should benefit

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51 The sections of the article dealing with the three sub-programmes of land reform do not purport to provide a comprehensive analysis of land reform generally or the sub-programmes more specifically. The purpose of this investigation is to highlight some of the challenges with the respective sub-programmes with the aim of showing that this may inhibit effective links between land reform and social justice.

52 Pienaar 2014 *TSAR* 439.

53 Pienaar 2014 *TSAR* 439–440; Cousins and Walker *Land Divided, Land Restored* 127–144. See also Pienaar *Land Reform* 193, 203. Pienaar analyses the South African land-reform policy framework, starting with the Department of Land Affairs *White Paper on South Africa Land Policy* (1997) http://www.ruraldevelopment.gov.za/phocadownload/White-Papers/whitepaperlandreform.pdf (accessed 2024-02-29), and including both the *Green Paper on Land Reform* (2011) and *Policy Framework for Land Acquisition and Land Valuation in a Land Reform Context* (2012). For an outline of the legislation, policies and programmes in the land-redistribution context, see Kotzé *The Regulation of Agricultural Land in South Africa: A Legal Comparative Perspective* (doctoral thesis, Stellenbosch University) 2020 169–171.

54 Pienaar 2014 *TSAR* 440.

from the reform and where the focus of the programme should fall.[55] In this respect, she identifies a myriad problems with the government's land-redistribution policies and legislation.[56] In the first place, there are missing links in what land reform generally (and more specifically land redistribution) should achieve, how to achieve it and where (rural or urban land) to prioritise the strategy of land redistribution.[57] In Hall's view, the agrarian policy was not designed to address the realities of rural South Africa.[58] This misalignment of policies was again highlighted very recently by Pienaar in light of *Rakgase v Minister of Rural Development and Land Reform*.[59] Reflecting on the scenario in *Rakgase*, it is clear that this case presented a wonderful opportunity to showcase land redistribution as a mechanism to empower an existing tenant and to change existing patterns of land ownership in South Africa. However, it turned out to be a missed opportunity to ensure a more equitable distribution of land. Pienaar commented: "The judgment underscored the haphazard manner in which Rakgase's case was dealt with. The misalignment of policy documents, tools and mechanisms and the lacklustre and disorganised conduct of officials came to the fore in particular."[60] Kotzé and Pienaar assert that the new Beneficiary Selection and Land Allocation Policy[61] that was introduced in January 2020 is certainly a "step in the right direction" for redistribution of land in South Africa, especially insofar as the policy seeks to bring some clarity regarding various aspects of land redistribution in South Africa.[62] The lack of policy coherence is clearly one dimension of the problem in land redistribution and a potential hindrance to ensuring social justice in the context of land.

Aliber points out another difficulty with land redistribution as a tool for poverty alleviation. He argues that in the context of agricultural land redistribution, simply giving small-scale commercial farms to Black emerging farmers does not necessarily solve rural unemployment or eradicate poverty.[63] This is because the losses of farm workers concomitant to such redistribution and the disruption to their employment outweigh the gains.[64]

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55 Hall in Cousins and Walker *Land Divided, Land Restored* 128. See also Hall "Two Cycles of Land Policy in South Africa: Tracing the Contours" in Anseeuw and Alden (eds) *The Struggle Over Land in Africa: Conflicts, Politics and Change* (2010) 175–192.

56 Hall in Cousins and Walker *Land Divided, Land Restored* 128.

57 Hall in Cousins and Walker *Land Divided, Land Restored* 141.

58 See Hall in Cousins and Walker *Land Divided, Land Restored* 143–144, where Hall makes a number of suggestions on ways in which the policies of land redistribution should be approached.

59 *Rakgase v Minister of Rural Development supra*. See also Pienaar's discussion of *Rakgase* in Pienaar 2020 *TSAR* 538.

60 Pienaar 2020 *TSAR* 538.

61 Department of Rural Development and Land Reform *National Policy for Beneficiary Selection and Land Allocation* GN 2 in *GG* 42939 of 2020-01-03.

62 Kotzé and Pienaar "Reconceptualising Redistribution of Land in South Africa: A Possible Legal Framework Going Forward' 2021 138 *SALJ* 287.

63 Aliber 2003 *World Development* 486, where Aliber points out that "[l]ack of financing, training, and market access are among the problems faced by smallholders".

64 Aliber 2003 *World Development* 487. In this regard, it is impossible to ignore the fact that unemployment is on the increase in South Africa, and this drastically impacts poverty levels, which were also impacted by the COVID-19 pandemic. Reflecting on the intervention of government in the context of land, one should also be mindful of the fact that unemployment

Aliber's point simply is that if government is to introduce new policies and programmes in the context of land redistribution, it should do so with cognisance of different types of poverty so that the programmes can be effective in reducing poverty levels. This is something for government to take into account when (re)considering the legislative and policy framework for redistribution going forward. This may ensure that land redistribution is used as an effective tool in ensuring social justice in the framework regulating land.

4 RESTITUTION

Atuahene explains:

> "When a state takes an individual or community's property [as is evident from South Africa's colonial and apartheid-era land dispossessions], the appropriate remedy is to return the property or to provide just compensation, which is most commonly calculated based on the market value of the property rights confiscated. But, under certain circumstances, the state has done more than confiscate property – it has denied the dispossessed their dignity."[65]

Given the dispossession of land in South Africa, the country embarked on restitution as a sub-programme of land reform. Land restitution, as a part of the promised transformation at the advent of democracy, is primarily underpinned by the Constitution.[66] Section 25(7) of the Constitution provides:

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

The Restitution of Land Rights Act[67] was promulgated to give effect to section 25(7). The primary aim of the restitution programme was to restore land (or provide other (equitable) redress) for those who were dispossessed of land unfairly as a result of racially discriminatory laws or practices after 1913.[68] In *Land Access Movement of South Africa v Chairperson of the National Council of Provinces*,[69] the Constitutional Court pointed out that "[t]he continuing post-apartheid realities of land dispossession are more so

figures in South Africa even before COVID-19 were not great; we have seen a gradual increase in unemployment since 2008 from 22.43% to 29.1% in the first quarter of 2019.

65 Atuahene *We Want What's Ours* (2014) 3.

66 See s 25(7) of the Constitution. See also Van Wyk 2010 *SAPL* 591.

67 22 of 1994.

68 This is in line with s 25(7) of the Constitution. The Preamble of the Restitution of Land Rights Act 22 of 1994 states that the aim of the Act is to provide for the restitution of rights in land in respect of which persons or communities were dispossessed under or for the purpose of furthering the objects of any racially based discriminatory law; to establish a Commission on Restitution of Land Rights and a Land Claims Court; and to provide for matters connected therewith.

69 *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 (5) SA 635 (CC).

in the case of those who are not yet to enjoy the fruits of restitution or equitable redress in terms of the Restitution".[70]

While the focus of the restitution programme was initially on rural land, it was clear that the impact of the Group Areas Act of 1950 on urban land dispossession required the initial vision of restitution to be wider than only agrarian reform.[71] In contrast, land redistribution (as outlined above) is essentially a wider programme that was undertaken to provide for the needs of landless people more generally, especially those who did not qualify for more specific claims identified under the restitution programme. Therefore, "[w]hile the land redistribution programme is discretionary, restitution is a rights-based programme in that eligible claimants have the right to restoration of, or compensation for, land of which they were dispossessed".[72] However, it should be remembered that both the restitution and redistribution programmes resulted from a negotiated settlement, which meant that in the process of navigating the rationale of both these programmes a variety of interests were taken into account. This is evident from the initial incorporation of the willing-buyer-willing-seller principle that resulted in a market-based approach in both programmes.[73]

South Africa followed a unique approach when it came to the restitution of land. The approach was based on restorative justice while at the same time being conducted within the constraints of the rule of law and endorsing the sanctity of property rights.[74] This had certain visible implications for the South African restitution programme. South Africa's undergoing a peaceful transition to democracy and conclusion of a negotiated settlement resulted in a limited restitution programme in scope and time.[75] Thus, colonial dispossessions were excluded from the restitution programme, and only those that occurred after 1913 were subject to restitution claims in terms of the programme. South Africa's approach to restitution is also distinct in that existing land rights essentially remain intact, and restitution claims are lodged against the State, involving no liability for landowners.[76]

Hall warns that when considering the successes or failures of the land restitution programme in South Africa, there are numerous variables to take into account.[77] For instance, it is hard to determine whether the restitution programme was (or is) successful because there are different types of claim that can be lodged; there is the danger of comparing apples with pears.[78] In this regard, one would essentially be comparing

> "those involving individual households with those involving entire communities; those pertaining to small urban plots with those applying to large

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70 *Land Access Movement of SA v Chairperson of the NCOP supra* par 1–2.

71 Hall "Land Restitution in South Africa: Rights, Development, and the Restrained State" 2014 38 *Canadian Journal of African Studies* 654 656.

72 Hall 2014 *Canadian Journal of African Studies* 656.

73 Pienaar 2014 *TSAR* 429; Hall in Anseeuw and Alden *The Struggle Over Land in Africa* 190.

74 Pienaar 2020 *TSAR* 536–546.

75 *Ibid*.

76 Pienaar *Land Reform* 521.

77 Hall 2014 *Canadian Journal of African Studies* 659.

78 *Ibid*.

> swathes of high-value agricultural land; those involving cash compensation as recognition of loss and suffering with those involving the restoration of land and related resources".[79]

It is thus important to determine whether success will be measured in each individual case or collectively, the latter of which is arguably not preferable. One should also be mindful of the multiple ways in which rural claims are counted, which often results in essentially unreliable statistics relating to restitution claims. Moreover, the implementation of restitution claims is made difficult because the negotiated settlement resulting in the constitutional protection of property rights very often makes the sale of the land subject to market-related prices. In instances other than expropriation of property, restitution is costly and reliant on the cooperation of landowners.[80] Hall notes that "[t]he process provides owners with substantial price-setting powers and, in the absence of expropriation, an effective veto on the restoration of land to claimants".[81] Hall further argues that the constraints on land restitution will remain unless the State uses its power to expropriate land in this context.[82] Current debates around amending section 25 of the Constitution to allow for expropriation without compensation become relevant. Given the poor track record of implementation of the State's power to expropriate land in this context, it remains questionable whether there is the political will to expropriate property or compensate for expropriation, and it must be asked whether this is standing in the way of expropriation for land-restitution purposes.[83] This is even more important and relevant given current discussions around amendment of section 25 of the Constitution and the latest Expropriation Bill.[84] All of the concerns highlighted above point

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79 Hall 2014 *Canadian Journal of African Studies* 659.

80 Hall 2014 *Canadian Journal of African Studies* 660.

81 *Ibid*. Note that the 1994 Restitution Act was later amended by the Restitution of Land Rights Amendment Act 15 of 2014, which modified section 42A of the 1994 Act to allow the Minister of Rural Development and Land Reform to expropriate property for purposes of restitution. The Amendment Act has subsequently been declared unconstitutional in *Land Access Movement of SA v Chairperson of the NCOP supra*.

82 Hall 2014 *Canadian Journal of African Studies* 660. Hall also argues that the Growth, Employment and Redistribution (GEAR) policies of the State impacted directly on the fact that the State is restrained in the context of land redistribution. See specifically Hall 2014 *Canadian Journal of African Studies* 660–664.

83 Interestingly, in this regard, Dugard makes the point that South Africa has the legal framework in place to ensure much-needed land reform and "s 25 provides a permissive – and even mandatory – template to pursue transformative land reform". See Dugard 2019 *CCR* 135 158. See also Boggenpoel "Politics or Principle? Making Sense of the Expropriation Without Compensation Debate" in Zenker, Walker and Boggenpoel (eds) *Beyond Expropriation Without Compensation: Law, Land Reform and Redistributive Justice in South Africa* (2024) 35–54; Lubbe and Du Plessis "Compensation for Expropriation in South Africa, and International Law: The Leeway and the Limits" 2021 11 *CCR* 79.

84 South Africa has been in serious deliberations for the last roughly 6 years about the potential amendment of section 25 of the Constitution. These discussions began in 2018, when a parliamentary member (and leader of the Economic Freedom Fighters), Mr Julius Malema, tabled a motion in Parliament for the amendment of section 25 of the Constitution to allow for expropriation without compensation because expropriation in its current form is purportedly standing in the way of land reform. Various developments took place after the discussions (including publication of the Final Report of the Presidential Advisory Panel on Land Reform and Agriculture – see https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000). The process eventually

towards ineffective implementation of land restitution, which has a direct impact on its role in ensuring social justice.

Pienaar notes that a big factor severely shackling restitution relates to the inherent dichotomies and conflicting aims and objectives in the programme.[85] She notes the dichotomy that, while unjust dispossessions had to be addressed specifically, persons who had acquired their rights from dispossessions or had benefited from such dispossessions would not be affected at all.[86] Conversely, while *unjust dispossession* of land was attended to, *unjust acquisition* thereof was ignored.[87] As mentioned above, this approach is directly linked to the fact that the restitution programme resulted from a negotiated process that underlined the protection of private property rights, irrespective of how such rights had vested.

There are also conflicting expectations of what the restitution programme aims to achieve, which results in critical tensions.[88] Initially, the restitution programme was *not* specifically aimed at promoting development or sustainability; the overarching objective was restorative justice.[89] Giving back that which was taken away had clear political and symbolic resonance, but it did not always coincide with modern needs for development and livelihoods.[90] Therefore, it gradually became clear that productive, sustainable use of land is, in fact, integral to the restitution programme's overall success. Therefore, it appears that, at the theoretical or conceptual level, a shift is taking place in the restitution. However, the underlying support and approach to achieving the new objectives of development and sustainability are not clearly aligned. Consequently, theoretically and practically, we begin to see a disconnect between the aims of the sub-

culminated in the Draft Constitution Eighteenth Amendment Bill 18-2021, which sought to provide the authority for zero or nil compensation to be paid in instances where property is expropriated to ensure land reform. This Bill was rejected by the National Assembly on 7 December 2021. Despite the failure to amend the Constitution, the broader legislative reform agenda has continued, especially the long-standing imperative to replace the Expropriation Act 63 of 1975, which predates the Constitution and does not adequately reflect the values and framework established in section 25. Over the past three decades, numerous Expropriation Bills have been introduced. This reform effort culminated in the enactment of the new Expropriation Act 13 of 2024, which formally repeals the 1975 legislation. Significantly, the Act includes provisions that permit expropriation at nil compensation in certain specified circumstances, such as where land is abandoned or held for speculative purposes, without requiring a constitutional amendment. These provisions are grounded in the existing interpretive flexibility of section 25(3) of the Constitution, which allows for less than market-value compensation, including potentially nil compensation, where appropriate. The new Expropriation Act marks a significant development in South African property law and the land reform agenda. It represents the first comprehensive attempt to harmonise expropriation law with the constitutional imperative of redress, while also safeguarding property rights in accordance with the rule of law and administrative justice. While implementation and potential constitutional challenges may still arise, the new Act provides a more constitutionally coherent foundation for state-led land reform and public-interest expropriation.

85 Pienaar 2020 *TSAR* 536–546.

86 Pienaar *Land Reform* 511.

87 Pienaar *Land Reform* 519.

88 Pienaar 2020 *TSAR* 536–546.

89 Pienaar *Land Reform* 517–519.

90 Pienaar *Land Reform* 517.

programme and what it can achieve. The Restitution of Land Rights Act, in its present format, still does not provide a sufficient comprehensive legislative and institutional framework for addressing the demands of sustainable settlement.[91] Even if the Act were amended and support services extended further, it seems that these additional dimensions to restitution are experienced as foreign and interfering.[92] It is therefore absolutely integral to the restitution process that additional effort go into making the developmental processes understood in order to fit comfortably into existing structures and real-life implementation. These considerations will determine the ultimate efficacy of the restitution programme, and specifically whether current role-players can achieve the aims of the restitution programme as conceptualised and within the current legislative framework in place in South Africa. Without necessary support, legislative amendment and addressing of the concerns with the restitution programme generally as outlined above, it seems unlikely that the sub-programme can be an effective tool in the quest for social justice.

5 TENURE REFORM

One of the main issues when looking at land inequality is tenure insecurity, which leads to the economic exclusion of the majority of South Africans.[93] While the abolition of racially discriminatory measures and the introduction of restitution and redistribution programmes have assisted in remedying the unequal distribution of land and injustices related thereto, the issue of insecure tenure is still largely problematic.[94] Over 60 per cent of people in South Africa do not have their own land or property rights recorded or registered.[95] In addition, 17 million South Africans are still living in former homelands with insecure and informal rights to land.[96]

In an attempt to deal with tenure insecurity, section 25(6) read with section 25(9) of the Constitution makes provision for tenure security and states that if a person or community has insecure tenure stemming from previous racially discriminatory laws or practices, they are entitled to secure tenure or comparable redress. Tenure security is a particularly complex matter given that, as mentioned earlier, South Africa inherited a diversified land-tenure system because of the "fragmented, race-based approach" under apartheid.[97] This resulted in different approaches to tenure based on

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91 Pienaar *Land Reform* 518–519.

92 Pienaar 2020 *TSAR* 536–546.

93 Advisory Panel on Land Reform and Agriculture https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000 v.

94 Muller, Brits, Pienaar and Boggenpoel *Silberberg and Schoeman's The Law of Property* 6ed (2019) 699.

95 Advisory Panel on Land Reform and Agriculture https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000 v.

96 High-Level Panel "Report of the High-Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change" (2017) https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf 33 (accessed 2024-02-29) 258.

97 Muller *et al The Law of Property* 699; Pienaar *Land Reform* 378–379.

race, region, and the various pieces of legislation applicable in each case.[98] In this respect, tenure reform aims to amend and reform different types of landholding.[99] Specifically, it aims to move away from a permit-based approach to a rights-based approach to allow beneficiaries to choose a tenure form that suits them and to recognise and protect *de facto* tenure rights.[100] The goal of tenure reform is, therefore, primarily to ensure that those affected by colonial and apartheid legislation have secure tenure. Secure tenure relates to the duration, breadth and certainty of legal rights.[101] Tenure security also deals with how land and property are held, who has control over land and property, the extent of such control, and whether land or property is held individually or communally.[102] Tenure security also has broader implications for inclusion, democracy and power dynamics.[103] It overlaps with redistribution and restitution, as beneficiaries of these programmes will often receive some form of land rights and tenure security.[104] The sub-programmes of land reform are, therefore, interrelated, and the ultimate goal is to assist with poverty alleviation through the facilitation of equitable distribution of land.[105]

Despite the constitutional imperatives, tenure insecurity is still extremely prevalent in South Africa.[106] This is particularly the case for residents in informal settlements, backyard dwellers and those occupying inner-city buildings, farms and communal areas who have experienced major challenges given that they are seen to have "weak, informal and 'un-registerable' tenure rights in law and in practice".[107] These challenges stem from governance failures.[108] Very often, these issues have also arisen in the context of beneficiaries of restitution and redistribution programmes, which shows the interplay between the three legs of land reform as alluded to earlier.[109]

It is important to note that there are different approaches to tenure reform; context, as well as the realities of those impacted, is extremely important. South Africa has a dual tenure system consisting of the Western approaches to tenure reform and the customary approaches to tenure reform.[110] However, in practice, a combination of the two systems is often used in an attempt to respond to the needs in each context. Effective implementation of tenure programmes in this regard has posed a major challenge. While

98 Muller *et al The Law of Property* 699; Pienaar *Land Reform* 379.
99 Pienaar *Land Reform* 384.
100 Muller *et al The Law of Property* 699.
101 Pienaar *Land Reform* 384.
102 Pienaar *Land Reform* 385.
103 *Ibid*.
104 High-Level Panel https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf 201–202.
105 Boudreaux 2010 *Institute of Economic Affairs* 14.
106 Advisory Panel on Land Reform and Agriculture https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000 20.
107 *Ibid*.
108 *Ibid*.
109 *Ibid*.
110 Pienaar *Land Reform* 379 385–386.

various pieces of legislation have been enacted to give effect to tenure reform, there is still uncertainty surrounding the competing philosophies relating to land tenure.[111] The Western conception of individual and private-property rights is often seen as the more acceptable approach.[112] However, the customary understanding of communalism is central to many communities' lived experiences and requires a different approach to land tenure.[113] As such, the Western approaches to tenure reform, which generally involve individual titling, may not be suited to the needs of communities that follow a customary or communal approach to tenure.[114] The tensions that stem from these two approaches pose a challenge. The tensions *relate*, *inter* alia, to the concept of tenure, the process of tenure reform, the parties included, and the form of tenure applicable.[115]

Apart from issues relating to the nature and content of customary land rights, the question of the meaning and significance of land under customary law is also important.[116] Policy often fails to understand that land is more than property in the African cultural context.[117] Land also relates to "spirituality, ancestral connectedness, family solidarity, identity and dignity".[118] If these interests and/or rights are not recognised, customary land rights such as "shelter, grazing, food, burial spaces, firewood, thatch, water and medicines" are undermined.[119] Policy discussions often tend to focus on economics, productivity and markets, which results in concepts such as the meaning of land under customary law being ignored or sidelined.[120] These aspects once again point towards the need to understand the realities of those affected in order to ensure that legislative interventions are effective.[121] In this regard, participatory approaches to tenure security hold great value in ensuring that the policies and programmes developed address the needs of those affected. This is important given that a one-size-fits-all approach often perpetuates social injustice.

There is also the issue of monitoring and evaluating tenure security, given that some rights may still be in the process of being upgraded or may even have been secured and transferred but then lost again.[122] This complicates the ability to measure the success of tenure-reform programmes and to

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111 Advisory Panel on Land Reform and Agriculture https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000 37.

112 *Ibid*.

113 *Ibid*.

114 Pienaar *Land Reform* 385–386.

115 Pienaar *Land Reform* 386.

116 High-Level Panel https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf 468.

117 High-Level Panel https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf 468. See also *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Ltd* 2019 (2) SA 1 (CC) par 2; *Daniels v Scribante* 2017 (4) SA 341 (CC) par 1–2.

118 High-Level Panel https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf 468.

119 *Ibid*.

120 *Ibid*.

121 *Ibid*.

122 Pienaar *Land Reform* 380.

assess progress. There have also been problems where tenure may have been secured, but the tenure form does not suit the realities of those affected.[123] Cousins and Hall have emphasised the role that structural poverty plays in weakening the substantive content of rights and thus limiting the impact of law as well as policy.[124] This is especially the case when looking at tenure rights, which are often affected by socio-economic, cultural and relational factors.[125] The interrelation between tenure security and other factors needs to be taken into account in order to ensure that tenure-reform programmes are properly able to tackle poverty and inequality.

Given that the majority of South Africans hold informal rights on land, the Interim Protection of Informal Rights Act[126] (IPILRA) was promulgated in an attempt to give recognition to these informal rights and to delineate the circumstances in which people may be deprived of their rights.[127] IPILRA was initially intended to be an interim measure to be used while waiting for the promulgation of a comprehensive law. However, this law has never materialised, and as such, IPILRA has been renewed annually.[128] This is concerning, given the need for permanent legislation to protect informal rights and ensure that they are recognised as real rights. The courts have attempted to emphasise the importance of recognising informal rights, as seen in *Baleni v Minister of Mineral Resources*.[129] The issue in this case was whether the Minister of Mineral Resources required the consent of landowners before granting a mining right in terms of section 23 of the Mineral of Petroleum Resources Development Act[130] (MPRDA).[131] In considering this question, the court had to determine whether IPILRA carries the same weight as the MPRDA or whether it overrides the MPRDA, which allows the Department of Mineral Resources to grant mining rights over land without the landowner's consent. The court found that the Department of Mineral Resources required "free, prior and informed consent" from the affected community before the mining rights could be granted.[132] This judgment thus emphasised the importance of informal rights under IPILRA as well as the need to ensure that affected communities are given a voice and an opportunity to participate in decisions that affect them.[133] However, the government has still failed to promulgate comprehensive and permanent legislation aimed at protecting informal rights.[134] One of the results of such

123 *Ibid*.

124 Cousins and Hall "Rights Without Illusions: The Potentials and Limits of Rights-Based Approaches to Securing Land Tenure in Rural Areas" (2011) *Working Paper 18* PLAAS 14; Pienaar *Land Reform* 380.

125 *Ibid*.

126 31 of 1996.

127 Advisory Panel on Land Reform and Agriculture https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000 28.

128 *Ibid*.

129 [2019] (1) All SA 358 (GP).

130 28 of 2002.

131 *Baleni v Minister of Mineral Resources supra* par 24–28.

132 *Baleni v Minister of Mineral Resources supra* par 79.

133 Advisory Panel on Land Reform and Agriculture https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000 30.

134 *Ibid*.

failure is that powerful actors such as mining companies, foreign investors, traditional leaders and commercial farmers are able to take advantage of this gap and exploit vulnerable communities, as was the case in the *Baleni v Minister of Mineral Resources* case.[135] This widens the inequality gap and hinders the progress of poverty alleviation.

Another concern is that the government does not enforce the protections delineated in IPILRA, thus putting the focus on issues of implementation and potential impacts on tenure insecurity.[136] When looking at redistribution and restitution beneficiaries, very few in fact receive secure rights to the land they acquire.[137] Instead, government retains ownership, and beneficiaries obtain leases or "conditional use rights".[138] In practice, beneficiaries often get no recorded rights to the land at all, which poses major difficulties for the development of the land and protection of the rights thereto.[139] This gap shows the problem with implementation of current policies and programmes and the need to ensure that there is political will to give effect to the aspirations of tenure reform to address poverty and inequalities in South Africa.

Given the above-mentioned challenges, tenure-reform beneficiaries should be allowed to choose their preferred land-rights system as well as the system of land-rights governance. In order for tenure reform to be effective, Western approaches need to be combined with customary-law approaches.[140] One system should not be viewed as superior to the other. Instead, the context and needs of those affected should be assessed in order to determine which approach would be most applicable. Participation is important to ensure that the form of tenure is suited to the realities of the beneficiaries.[141] In addition, informal rights held by millions of South Africans need to be properly protected through permanent legislation, which is currently not in place.[142] Once again, those affected should be afforded a choice as to the form of tenure they eventually receive. This would ensure the approach taken to tenure reform is tailored to the realities of the beneficiaries as opposed to being a blanket approach, which often perpetuates inequalities and social injustice.[143]

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135 High-Level Panel https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf 266.

136 High-Level Panel https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf 203.

137 *Ibid*.

138 High-Level Panel https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf 204.

139 *Ibid*.

140 Pienaar *Land Reform* 393.

141 High-Level Panel https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf 231.

142 High-Level Panel https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf 227.

143 *Ibid*.

6 EVICTION AND UNLAWFUL OCCUPATION OF LAND

Eviction and unlawful occupation are also central issues to land reform as they signal the failure of the land-reform programme to respond to housing needs at an acceptable speed.[144] A particularly important development is the inclusion of a participatory approach to unlawful occupation and evictions. This has been achieved through the incorporation of meaningful engagement in the context of evictions[145] as well as by enabling participation when upgrading informal settlements.[146] Participation in this context is important, especially given that informal settlements resulted from colonial and apartheid planning laws that were imposed in a top-down fashion on the Black population of South Africa.[147] Those affected had no say as to where they would be forcibly relocated. As such, incorporating participation in eviction and upgrading-informal-settlement processes is important to ensure that those affected are involved in the process and are not simply relocated again without any say or regard for their human dignity.[148] While participation in the context of evictions and unlawful occupation is much needed, there have been various issues raised in relation to the practicalities of employing a participatory approach in this context.

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144 Muller *et al The Law of Property* 751; Pienaar *Land Reform* 660. See also Van der Walt *Property in the Margins* (2009) 24 53–76 159; Wilson *Human Rights and the Transformation of Property* (2021) 12–13.

145 See generally, *Government of the RSA v Grootboom supra*; *PE Municipality v Various Occupiers supra*; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC); *Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC); *Head of Department of Education v Welkom High School* 2013 (9) BCLR (CC). See also, for example, Liebenberg "Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of Meaningful Engagement" 2012 12 *South African Human Rights Law Journal* 1–29; Liebenberg "Remedial Principles and Meaningful Engagement in Education Rights Disputes" 2016 19 *Potchefstroom Electronic Law Journal* 1–43; Liebenberg "The Participatory Democratic Turn in South Africa's Social Rights Jurisprudence" in Young (ed) *The Future of Economic and Social Rights* (2019) 187–211; Muller "Conceptualising 'Meaningful Engagement' as a Deliberative Democratic Partnership" 2011 22 *Stell LR* 742; Chenwi "'Meaningful Engagement' in the Realisation of Socio-Economic Rights: The South African Experience" 2011 26 *Southern African Public Law* 128–56; Chenwi and Tissington *Engaging Meaningfully With Government on Socio-Economic Rights: A Focus on the Right to Housing* (2010) 4–31; Chenwi "Putting Flesh on the Skeleton: South African Judicial Enforcement of the Right to Adequate Housing of Those Subject to Evictions" 2008 8 *Human Rights Law Review* 105–137; Mahomedy *The Potential of Meaningful Engagement in Realising Socio-Economic Rights: Addressing Quality Concerns* (LLM thesis, Stellenbosch University) 2019 ch 3.

146 Department of Human Settlements "Upgrading Informal Settlements" *The National Housing Code Part 3* (2009); Department of Housing *Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements* (2004). See Mahomedy *Investigating the Role of Participation in the Upgrading of Informal Settlements: Identifying Challenges and Opportunities* (LLD dissertation, Stellenbosch University) 2022 ch 4.

147 Pienaar *Land Reform* 660; Mahomedy *Investigating the Role of Participation in the Upgrading of Informal Settlements* ch 2.

148 S 10 of the Constitution; Mahomedy *Investigating the Role of Participation in the Upgrading of Informal Settlements* 295.

In the context of evictions, the Constitutional Court has developed the innovative remedy of meaningful engagement in various cases relating to evictions, as well as in school governance and access to adequate education.[149] However, meaningful engagement is not only a remedy but can also function as a constitutional review standard. As the court noted in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg*, section 26(2) of the Constitution places a duty on the State to engage with potential evictees in order to fulfil the section's reasonableness requirement.[150] Thus, courts have to consider whether the State engaged with potential evictees to determine whether the section 26(2) obligations have been fulfilled.[151] Meaningful engagement holds great potential as it ensures that those affected by evictions are involved in decisions that affect them, which assists in remedying the past approach to evictions, where people were forcibly relocated without any regard for their human dignity.[152] It also allows for decisions that better suit the realities of those affected, which increases their efficacy and legitimacy.[153]

The court in *Port Elizabeth Municipality v Various Occupiers* underscored the importance of meaningful engagement in realising the human dignity of potential evictees against the backdrop of pre-democratic evictions conducted under the Prevention of Illegal Squatting Act[154] (PISA), where illegal squatting was a criminal offence.[155] Sachs J highlighted the role that PISA played in dispossessing Black people of land and thus creating residential segregation as well as spatial apartheid.[156] He also emphasised that these evictions impaired the human dignity of Black people.[157] It is against this backdrop that the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE) was adopted with the purpose of rectifying the above-mentioned abuses and ensuring that future evictions took place in line with the values of the Constitution.[158] Specifically, people facing eviction have to be treated with human dignity and respect. Thus, what was previously a depersonalised process that ignored the

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149 Liebenberg in Young (ed) *The Future of Economic and Social Rights* 187–211. See also, e.g., *Government of the RSA v Grootboom supra* par 87; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg supra* par 14–15; *Juma Musjid Primary School v Essay NO supra* par 75 and *Head of Department of Education v Welkom High School supra*.

150 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg supra* par 17.

151 *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg supra* par 18.

152 *Doctors for Life v The Speaker of the National Assembly* 2006 (6) SA 416 (CC) par 115.

153 Liebenberg "Participatory Justice in Social Rights Adjudication" 2018 18 *Human Rights Law Review* 623 630. See also Gaventa and Barrett "So What Difference Does It Make? Mapping the Outcomes of Citizen Engagement" *IDS Working Paper 347* 1 13.

154 52 of 1951.

155 *PE Municipality v Various Occupiers supra* par 8.

156 *PE Municipality v Various Occupiers supra* par 9 and 10.

157 *PE Municipality v Various Occupiers supra* par 10.

158 *PE Municipality v Various Occupiers supra* par 11.

circumstances of those being evicted has now been replaced with humanised processes that emphasise fairness.[159]

Of utmost importance in these processes is ensuring that participants are treated with human dignity and that the processes of meaningful engagement are in fact dignified. This may be achieved by ensuring that the engagement process allows for individualised treatment of those being evicted and special consideration for vulnerable groups.[160] Allowing for individualised treatment allows those affected to reclaim their human dignity and be part of decisions that affect their lives. It also illustrates how important meaningful engagement is in the South African context, given the history of division and hostility, as it may allow parties to relate to each other in pragmatic and sensible ways, building up prospects of respectful good neighbourliness for the future.[161] This approach is important in light of the "intensely emotional and historically charged problems" that were brought to the surface by PIE.[162] The approach to evictions under apartheid sought to foster and perpetuate inequalities and social injustice.[163] It is thus crucial that the constitutional approach be based on the concept of social justice and values associated with this concept, such as human dignity, equality and freedom.

While meaningful engagement holds great potential to resolve disputes by taking both parties into consideration, there have been problems, *inter alia,* relating to tokenistic engagement and a lack of political will to engage.[164] For example, tokenistic engagement was seen in *Port Elizabeth Municipality*.[165] This case dealt with the eviction of 68 unlawful occupiers (including 23 children) by the municipality from private property known as Lorraine.[166] This application was based on section 6[167] of PIE.[168] The majority of the unlawful occupiers had relocated to Lorraine after being evicted from other properties and stayed there for periods ranging from two to eight years.[169] The unlawful occupiers were willing to relocate provided that reasonable notice was given and that alternative accommodation was made available.[170] The municipality proposed Walmer Township[171] as a site of alternative accommodation, but this was rejected by the unlawful occupiers owing to high crime rates,

159 *PE Municipality v Various Occupiers supra* par 12.
160 *PE Municipality v Various Occupiers supra* par 13.
161 *PE Municipality v Various Occupiers supra* par 37.
162 *PE Municipality v Various Occupiers supra* par 43.
163 *PE Municipality v Various Occupiers supra* par 10.
164 Mahomedy *The Potential of Meaningful Engagement* 38–41, 43–47, 54–59, 61–63, 65–66.
165 *PE Municipality v Various Occupiers supra* par 39.
166 *PE Municipality v Various Occupiers supra* par 1. For a detailed summary of the case, see Chenwi 2011 26 *South African Public Law* 128 139–140.
167 This section allows eviction proceedings to be instituted by organs of state against unlawful occupiers within the said organ of state's jurisdiction.
168 *PE Municipality v Various Occupiers supra* par 1–2.
169 *PE Municipality v Various Occupiers supra* par 2.
170 *Ibid*.
171 At the time of the proceedings, it was unclear which government department owned this area of land.

overcrowding and the fear of being once again vulnerable to eviction without any security of occupation.[172]

The engagement occurred prior to the court case and was very minimal. It was evident that the municipality had not attempted to engage with the unlawful occupiers, even though there were only 68 people.[173] No attempts were made to ascertain the individual circumstances or needs of each unlawful occupier.[174] The municipality did not address the unlawful occupiers' suggestions of Seaview and Fairview as potentially suitable alternative land, and instead, stated that they did not have any duty to provide suitable alternative accommodation above and beyond the housing programme they developed.[175] They asserted that the unlawful occupiers should register for the said programme, even though it could take years for houses to be provided to them.[176] Furthermore, the unlawful occupiers had stayed on the land in question for years before any action was taken by the municipality, and only superficial attempts were made to determine the circumstances of the unlawful occupiers.[177] The municipality also refused to negotiate with the unlawful occupiers unless an eviction order was granted.[178] It may be concluded that the quality of engagement that took place prior to the case was weak and ineffective, which is indicative of the government's lack of political will to properly engage with those affected as required by PIE.[179] Generally speaking, weak engagement often results in attaining either no solutions to the issues at hand or solutions that are ill-suited to the realities of the evictees, both of which are inconsistent with the goals of reducing poverty and inequality. In contrast, proper participatory processes may assist in achieving social justice by allowing evictees to be part of decision-making processes that affect them and thus create an opportunity for them to reclaim their human dignity. Although courts have certainly done much to ensure that inroads are made in furthering the narrative of meaningful engagement to reduce the inequality of unlawful occupiers, it is certainly true that more can be done to improve participatory processes in this regard.

Another example of the lack of political will to implement participatory processes in the eviction context was evident in *Pheko v Ekurhuleni Metropolitan Municipality*.[180] This case concerned the lawfulness of the removal of the applicants and the demolition of their homes after the area in which they stayed was declared a disaster area under the Disaster Management Act[181] owing to the presence of sinkholes.[182] The applicants were the former residents of the Bapsfontein informal settlement, and the

[172] *PE Municipality v Various Occupiers supra* par 2.
[173] *PE Municipality v Various Occupiers supra* par 52.
[174] *Ibid*.
[175] *PE Municipality v Various Occupiers supra* par 54.
[176] *PE Municipality v Various Occupiers supra* par 55.
[177] *PE Municipality v Various Occupiers supra* par 57.
[178] *PE Municipality v Various Occupiers supra* par 46.
[179] *Ibid*.
[180] 2012 (2) SA 598 (CC).
[181] 57 of 2002.
[182] *Pheko v Ekurhuleni Metropolitan Municipality supra* par 1.

respondent was the Ekurhuleni Metropolitan Municipality.[183] The Constitutional Court held that the removal of the applicants was unlawful and that the municipality was obliged to provide the applicants with temporary accommodation.[184] An order was made for the municipality to engage meaningfully with the applicants in identifying suitable alternative accommodation.[185] However, there were various issues with the government's failure to execute the engagement order, which resulted in two subsequent cases, *Pheko v Ekurhuleni Metropolitan Municipality (No 2)*[186] and *Pheko v Ekurhuleni Metropolitan Municipality (No 3)*.[187]

One of the main elements of the first order was that the parties should meaningfully engage in finding alternative accommodation and that both parties should submit reports to the court detailing their progress.[188] In line with this, the municipality consulted with the applicants who were organised in two groups, namely the N12 Community and the Mayfield Community.[189] However, there were issues with the engagement process and in particular, the municipality did not respond to concerns raised by the residents, nor did they file the necessary reports delineating the progress of the relocations.[190] This was once again indicative of a lack of political will to implement procedures that have been developed in an attempt to facilitate land reform and remedy the injustices of the past. What is even more concerning is that these cases spanned almost five years, from 2011 to 2016. Thus, the applicants were living in uncertainty for many years.[191]

In the context of upgrading informal settlements, the Upgrading of Informal Settlements Programme (UISP) provides the processes and procedures for the upgrading of informal settlements. One prominent element that should feature throughout these processes and procedures is community participation.[192] This is confirmed by the fact that one of the main policy objectives of the UISP is community empowerment.[193] This includes combating socio-economic exclusion through participatory processes.[194] The aim of these participative processes is to gain insight into the communities' broader needs so that they can be addressed.[195] This links to the reasons for requiring participation, which include *inter alia*, mitigating the exclusionary

183 *Pheko v Ekurhuleni Metropolitan Municipality supra* par 4.

184 *Pheko v Ekurhuleni Metropolitan Municipality supra* par 9.

185 *Pheko v Ekurhuleni Metropolitan Municipality supra* par 53.

186 2015 (5) SA 600 (CC).

187 2016 (10) BCLR 1308 (CC).

188 *Pheko v Ekurhuleni Metropolitan Municipality (No 2) supra* par 7.

189 *Pheko v Ekurhuleni Metropolitan Municipality (No 2) supra* par 8.

190 *Pheko v Ekurhuleni Metropolitan Municipality (No 2) supra* par 8–15.

191 Of course, many cases can be used to prove this point. For the sake of not belabouring the point and for brevity, the discussion is limited in this regard. It is believed that the point can be made with the cases discussed. For more, see *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC); *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC). See also the literature cited in footnote 143 above.

192 Department of Human Settlements *The National Housing Code Part 3* 15, 25.

193 Department of Human Settlements *The National Housing Code Part 3* 13.

194 *Ibid*.

195 *Ibid*.

patterns created by colonialism and apartheid and achieving more responsive solutions that correspond with the needs and realities of those affected. However, similar issues have been seen in relation to tokenistic participation and an unwillingness on the government's part to facilitate proper participatory processes in line with the guiding principles contained in the legislation. Instead, it appears that the government views participation as ceremonial and uses weaker, top-down forms of participation, such as informing residents of decisions already taken.

An interesting case that highlights the intersection between evictions and upgrading informal settlements is *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*,[196] which deals with an eviction order sought by the government to make way for an upgrading project. A crucial issue in this case was whether or not an *in situ* upgrade was feasible. The residents argued that an *in situ* upgrade was feasible, which would make the need for an eviction unnecessary.[197] However, the City of Cape Town contended that an *in situ* upgrade was not feasible.

One of the main questions the court dealt with was whether the respondents engaged with the applicants sufficiently in relation to implementation of the project.[198] One difficulty in this case was the large number of residents affected as well as the high number and range of decisions that needed to be made at various levels of government.[199] The respondents acknowledged that the process of participation was inadequate and incoherent and that this should be abhorred.[200] This illustrates the need for participatory processes to be structured. A top-down and unilateral approach to engagement was often employed in the sequence of events in this case. This approach involved informing residents about decisions that had already been made as opposed to involving them as equals in the decision-making process.[201] Without structured and quality engagement processes, the value of participation in creating solutions that are tailor-made to the realities of residents is lost. This increases the risk of one-size-fits-all solutions, which perpetuates social injustice and hinders attempts at poverty alleviation and reduction of inequality in South Africa.

The court in *Joe Slovo* found that the city was better placed to decide whether relocation was needed and granted the eviction order.[202] However, the court ordered the respondents to enter into a continuous process of engagement with the residents in relation to the relocation process.[203]

A subsequent case, *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (Joe Slovo 2)*,[204] dealt with an application to have the eviction and supervisory order in the earlier *Joe Slovo* case discharged on

196 *Supra*.
197 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes supra* par 253.
198 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes supra* par 297.
199 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes supra* par 298.
200 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes supra* par 301.
201 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes supra* par 378 384.
202 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes supra* par 403.
203 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes supra* par 5.
204 2011 (7) BCLR 723 (CC).

the basis that circumstances had changed. This case was heard 21 months after the initial order was granted. One of the main concerns raised by the city related to the financial and social impact of an eviction on the Joe Slovo residents compared to an *in situ* upgrade.[205] It stated that an *in situ* upgrade had been suggested, and the idea was received positively by the residents.[206] Furthermore, the reports stated that workshops and consultations with the Joe Slovo community would be conducted.[207] This led to the decision that an *in situ* upgrade should be implemented using an intensive process of engagement. This is essentially what the residents asked of the court in *Joe Slovo* approximately a year and a half prior to this second Joe Slovo case. Had engagement been properly conducted on the possibility of the *in situ* upgrade, the need for the proposed eviction and costly and time-consuming litigation could have been circumvented.[208] Instead, the various parties could have invested their time and money in the project.[209] The court discharged the order made in the first *Joe Slovo* case, barring one paragraph that related to costs.[210]

The *Joe Slovo* cases are particularly interesting because they deal with eviction, although the reason for eviction stems from the need to relocate residents in order to complete an upgrade project under the UISP. Therefore, participatory processes came into play because of the need to engage in the details of relocations under the UISP and because of the need to engage meaningfully under the eviction law. The outcome of *Joe Slovo 2* suggests that, had the engagement been conducted in good faith from the beginning, it could have circumvented the need for litigation. This signals the importance of participation in attaining solutions that speak to the realities of those affected. It also once again speaks to government's failure to implement mechanisms that have been developed to give effect to land reform. This is concerning because the broader goals of poverty alleviation and reducing inequality cannot be reached in these circumstances. Thus, regardless of progressive, well-drafted statutes, policies and programmes that are tailored to the realities of those affected, progress is hindered because of government's failure properly to implement the relevant legislation, policies and programmes.

7 CONCLUSION

When looking at land reform, the post-apartheid government faced the challenge of not only repealing the race-based laws that created the unequal distribution of land, but also of remedying this unequal distribution and the

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205 *Joe Slovo 2 supra* par 6.

206 *Joe Slovo 2 supra* par 11.

207 *Ibid*.

208 Liebenberg 2012 *African Human Rights Law Journal* 24.

209 *Ibid*.

210 *Joe Slovo 2 supra* par 37. This was based on the large number of people affected and the fact that the government had failed to execute the eviction order under the first judgment. Furthermore, the government did not seem intent on continuing with the eviction. The order also could not be fulfilled as mentioned above and the circumstances that resulted in the eviction order being granted no longer existed.

inadequate manner in which property relations had been conducted. While numerous measures have been enacted in an attempt to comply with the Constitution's vision of attaining social justice for all, various challenges remain, as highlighted in this article. This leads to the question of why these measures have failed to bring about the highly sought-after transformation of land issues in South Africa.[211] This article has shown that land reform is intricate, time-consuming and essentially ongoing.[212] Pienaar warns that if we are to avert systemic failure in the context of land reform, a concerted effort needs to be made to ensure that the programme is "pursued conscientiously and meticulously".[213]

In the context of land restitution, and redistribution more specifically, it seems that some of the goals and aims are contradictory, and this has impacted the kind and content of policy drafted for these sub-programmes. This undoubtedly impacted (and continues to impact) the ultimate efficacy of the programmes, especially insofar as these land-reform sub-programmes may potentially be effective tools in reducing poverty. Moreover, the endeavour to effect an all-encompassing land reform has not always proved effective. For instance, the focus in both sub-programmes seems ultimately to be skewed heavily in favour of agrarian reform and, even in this context, government seems to be shooting at a moving target. Although reform (from the perspective of redistribution and restitution) in the context of rural land is obviously important, there is an increasing need for land reform in urban and peri-urban areas as well.[214] The transition from vastly unequal land distribution, effected by years of colonial and apartheid separation mechanisms, towards more equitable land access and more equal land-ownership patterns (if ownership transfer is indeed the goal) will need to be facilitated (and prioritised) by the State in the laws that it enacts.

When looking at tenure reform, the article has argued that tenure-reform beneficiaries should be allowed to choose their preferred land-rights system as well as the system of land-rights governance. Customary forms of land tenure should also be given the same recognition as Western forms of tenure. In addition, there is a need for government to promulgate legislation that properly protects informal rights, especially given that the majority of the population currently has informal rights that are insecure. In the context of tenure reform and unlawful occupation, participation is important for promoting social-justice values such as human dignity. Participation will also ensure that policy interventions consider the realities of those affected, and not have unintended consequences, especially given the complexity of these issues.[215] Solutions and interventions also generally have more legitimacy and acceptance when those affected are included in the decision-making process.

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[211] High Level Panel https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/HLP_Report/HLP_report.pdf 468.

[212] Pienaar 2014 *TSAR* 428.

[213] Pienaar 2020 *TSAR* 546.

[214] Pienaar 2014 *TSAR* 433.

[215] Deininger *Land Policies for Growth and Poverty Reduction* xvii, xxiii.

To ensure that social justice is attained and that land reform is achieved in South Africa, political will is needed to implement existing policies and programmes in a manner that benefits those affected.[216] Overall, this article has highlighted that there is still an alarming number of individuals, groups and communities experiencing disproportionate difficulty in accessing life opportunities, and that this is directly linked to their difficulty in accessing land and secure tenure. Land-reform programmes and policies still have major implementation issues. Lack of political will and problems relating to blanket approaches to land reform are particularly problematic. Blanket approaches to land reform do not necessarily take into account the realities of those affected and have consequently proved challenging. It is thus clear that South Africa still has much progress to make to achieve the goals set out in the SDGs and to achieve social justice in the context of land reform.

[216] Advisory Panel on Land Reform and Agriculture https://www.gov.za/documents/final-report-presidential-advisory-panel-land-reform-and-agriculture-28-jul-2019-0000 v.