CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 319/17

In the matter between:

MATSHABELLE MARY RAHUBE	Applicant
and	
HENDSRINE RAHUBE	First Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HOUSING AND LAND AFFAIRS, NORTH WEST	Second Respondent
MINISTER FOR RURAL DEVELOPMENT AND LAND REFORM	Third Respondent
REGISTRAR OF DEEDS, PRETORIA	Fourth Respondent
REGISTRAR OF DEEDS, VRYBURG	Fifth Respondent
CITY OF TSHWANE METROPOLITAN MUNICIPALITY	Sixth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR HUMAN SETTLEMENTS, GAUTENG	Seventh Respondent

Neutral citation: *Rahube v Rahube and Others* [2018] ZACC 42

Coram: Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J

Judgment: Goliath AJ (unanimous)

Heard on: 17 May 2018

Decided on: 30 October 2018

Summary: Upgrading of Land Tenure Rights Act 112 of 1991 — constitutionality of section 2(1) — declaration of constitutional invalidity — violation of women's rights — right to equality — section 9(1)

Section 172(1)(b) of the Constitution — just and equitable relief — order limiting retrospective effect

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ORDER

On application for confirmation of an order of constitutional invalidity granted by the High Court of South Africa, Gauteng Division, Pretoria:

1. The order of constitutional invalidity made by the High Court of South Africa, Gauteng Division, Pretoria (High Court) on 26 September 2017 in respect of section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 is confirmed subject to the variations set out in paragraph 2.

2. The order of the High Court is varied to read:

   "(a) Section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 is declared constitutionally invalid insofar as it automatically converted holders of any deed of grant or any right of leasehold as defined in regulation 1 of Chapter 1 of the Regulations for the Administration and Control of Townships in Black Areas, 1962 Proc R293 *GG* 373 of 16 November 1962 (Proclamation R293) into holders of rights of ownership in violation of women's rights in terms of section 9(1) of the Constitution.

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

(c) In terms of section 172(1)(b) of the Constitution, the order in paragraph 2(a) and (b) shall not invalidate the transfer of ownership of any property which title was upgraded in terms of section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 through: finalised sales to third parties acting in good faith; inheritance by third parties in terms of finalised estates; and the upgrade to ownership of a land tenure right prior to the date of this order by a woman acting in good faith.

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

(e) The first respondent is interdicted from passing ownership, selling, or encumbering the property known as Stand 2328 Block B, Mabopane in any manner whatsoever, until such time as Parliament has complied with the order in 2(a) above.

(f) The third respondent is ordered to pay the costs of the applicant, including the costs of two counsel."

3. The third respondent is ordered to pay the costs of the applicant in this Court, including the costs of two counsel.

JUDGMENT

GOLIATH AJ:

Introduction

[1] *Batho botlhe ba tsetswe ba gololosegile le go lekalekana ka seriti le ditshwanelo.*[1] All human beings are born free and equal in dignity and rights. Whether in Setswana or in English, this extract from article one of the Universal Declaration of Human Rights is powerful because until 24 years ago it was not true for the majority of South Africans.

[2] During apartheid, the African woman was a particularly vulnerable figure in society and she suffered three-fold discrimination based on her race, her class and her gender. Reflecting upon the present, we must ask ourselves whether the African woman truly benefits from the full protection of the Constitution.[2] Moreover, we must establish whether enough has been done to eradicate the discrimination and inequality that so many women face daily. Laws and policies must seek to do more than merely regulate formalistically. The Legislature is enjoined to ensure that laws and policies promote the participation of women in social, economic and political spheres while also advancing the spirit, purport and objects of the Constitution. This is a case where a woman seeks to vindicate her right to access to housing – a right which is intrinsically linked to her dignity – by challenging a piece of legislation, which she contends perpetuates apartheid legislation that precluded her, and countless

[1] This is a translation of an extract from article 1 of the Universal Declaration of Human Rights from English into Setswana. Universal Declaration of Human Rights, 10 December 1948.

[2] Constitution of the Republic of South Africa, 1996.

African women like her, from holding land tenure rights, simply because of her race and gender.

[3] This case involves this Court exercising its section 167(5) powers,[3] to confirm the order of the High Court of South Africa, Gauteng Division, Pretoria[4] (High Court), that declared section 2(1) of the Upgrading of Land Tenure Rights Act[5] (Upgrading Act) constitutionally invalid, to the extent that it automatically converts holders of land tenure rights into owners of property, without providing other occupants or affected parties an opportunity to make submissions. We are required to deal with three questions. First, whether the High Court order should be confirmed. Second, if the order is confirmed, what remedy would be most just and equitable. Last, how this Court should handle the issue of costs.

Parties

[4] The applicant, Ms Matshabelle Mary Rahube, brings the application in her own interest in terms of section 38(a) of the Constitution, as well as in terms of

[3] Section 167(5) of the Constitution reads:

> "The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force."

[4] *Rahube v Rahube* 2018 (1) SA 638 (GP) (High Court judgment).

[5] 112 of 1991. Section 2(1) of the Upgrading Act reads:

> "Any land tenure right mentioned in Schedule 1 and which was granted in respect of—
>
> (a) any erf or any other piece of land in a formalised township for which a township register was already opened at the commencement of this Act, shall at such commencement be converted into ownership;
>
> (b) any erf or any other piece of land in a formalised township for which a township register is opened after the commencement of this Act, shall at the opening of the township register be converted into ownership;
>
> (c) any piece of land which is surveyed under a provision of any law and does not form part of a township, shall at the commencement of this Act be converted into ownership,
>
> and as from such conversion the ownership of such erf or piece of land shall vest exclusively in the person who, according to the register of land rights in which that land tenure right was registered in terms of a provision of any law, was the holder of that land tenure right immediately before the conversion."

section 38(c) of the Constitution, in the interests of other women who have been deprived of title to their homes by operation of apartheid laws and section 2(1) of the Upgrading Act. The applicant also brings this application in the public interest in terms of section 38(d) of the Constitution.[6]

[5] The first respondent is Mr Hendsrine Rahube, the applicant's brother. The second, third and seventh respondents (state respondents) are the state parties responsible for administering land reform and did not participate in the proceedings before us until this Court issued directions requesting them to make written submissions. These submissions were filed and support the legal arguments advanced by the applicant.

Background

[6] The applicant and the first respondent are siblings who, with other members of their family, moved into a property located at Stand 2328 Block B, Mabopane, North West Province (property) in the 1970s. At the time, the applicant, her grandmother, uncle, three brothers (including the first respondent) and two children all lived at the property. It is common cause that the grandmother was the "owner" of the property until she passed away in 1978. There is no documentary proof of her ownership. It may have been that the grandmother was simply the de facto owner, but the correctness of referring to her as the "owner" is neither here nor there given that the legal regime, as discussed below, made it clear that African women could not obtain formal rights in land because of gender discrimination.

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[6] Section 38 of the Constitution reads:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (a) anyone acting in their own interest;
>
> . . .
>
> (c) anyone acting as a member of, or in the interests of, a group or a class of persons;
>
> (d) anyone acting in the public interest."

[7] The applicant moved out of the property in 1973 to live with her husband. She moved back to the property in 1977 after her marriage dissolved and has lived there ever since with her children and grandchildren. The applicant's brothers moved out of the property between the 1980s and 1990s and her uncle moved out in 2000.

[8] In 1987, the first respondent was nominated by the family to be the holder of a certificate of occupation (certificate) with respect to the property. In 1988, by virtue of his earlier nomination, the first respondent was issued a deed of grant. The deed of grant was issued in terms of Proclamation R293[7] (Proclamation), which was promulgated in terms of the Native Administration Act,[8] that was later renamed the Black Administration Act.[9]

[9] The Upgrading Act was enacted in 1991 but took effect in the former Republic of Bophuthatswana territory, which now forms part of the North West Province, on 28 September 1998 when the Land Affairs General Amendment Act[10] was signed into law. The Upgrading Act automatically converted rights in property, such as deeds of grant, to ownership rights. This meant that the first respondent, as the holder of the deed of grant, automatically became the owner of the property in terms of section 2(1), irrespective of whether he was residing at or using the property.

Litigation History

Magistrate's Court

[10] In August 2009, the first respondent instituted eviction proceedings against the applicant and other occupants of the property in the Garankuwa Magistrate's Court.

[7] Regulations for the Administration and Control of Townships in Black Areas, GN R293 *GG* 373, 16 November 1962.

[8] 38 of 1927.

[9] Africans were initially referred to in statutes as "Natives". This term was later changed to "Bantu", and eventually to "Blacks". The short titles of the statutes reflect the name used to refer to Africans at the time the statute was promulgated.

[10] 61 of 1998.

The applicant alleges that it was during this period that she became aware that the deed of grant registered in the first respondent's name had been converted into a full right to ownership in terms of section 2(1) of the Upgrading Act.

[11] The applicant raised the constitutional invalidity of section 2(1) in opposition to the eviction proceedings. Consequently, the proceedings were suspended pending the outcome of an application in the High Court challenging the constitutionality of section 2(1) of the Upgrading Act.

High Court

[12] The application to the High Court was opposed by the first and third respondents. The second and seventh respondents indicated that they would abide by the decision of the court.

[13] The applicant made a number of claims, including that she was the owner of the property in terms of the Restitution of Land Rights Act.[11] The High Court did not order any relief except for that relating to the constitutional invalidity of section 2(1) of the Upgrading Act.[12] This was because other relief, such as an order declaring the applicant the owner of the property, may still be available to the applicant and other family members after the finalisation of the constitutionality challenge.

[14] The High Court upheld the applicant's constitutional challenge to section 2(1) of the Upgrading Act insofar as it provides for the automatic conversion of land tenure rights into ownership without any procedures to hear and consider competing claims.[13] The High Court reasoned that people who were not holders of certificates or deeds of grant were prevented from acquiring ownership of properties in which they had a substantial interest. This exclusion was inherently gendered because, in terms of the

[11] 22 of 1994.

[12] High Court judgment above n 4 at paras 18 and 96.

[13] Id at para 96.

Proclamation, women could not be the head of a family, and thus, could not have a certificate or deed of grant registered in their name.[14]

[15] The High Court remarked that the Proclamation is characterised by language which is racist and sexist.[15] The Upgrading Act thus recognised and converted rights that had been acquired through a discriminatory legislative scheme. This injustice was compounded by the fact that upgrading was automatic and no review mechanism was created by the Act. The state respondents argued that section 24D of the Upgrading Act provided for an appeal procedure.[16] The High Court found that this section was lacking and did not save section 2(1) of the Upgrading Act from constitutional invalidity.[17]

[16] The High Court therefore held that section 2(1) of the Upgrading Act is inconsistent with sections 9[18] and 34[19] of the Constitution as it fails to protect, notify

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[14] Id at paras 26-7.

[15] Id at para 50.

[16] Section 24D(10)(a) reads:

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

[17] High Court judgment above n 4 at para 54.

[18] Section 9 of the Constitution reads:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
>
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
>
> (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
>
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
>
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[19] Section 34 of the Constitution reads:

and consult with the occupants of a property who do not have a certificate or a deed of grant registered in their name.[20]

[17] The High Court ordered that the declaration of invalidity should apply retrospectively to 27 April 1994. Although in its reasoning the High Court limited the application of this declaration in cases where the property in question has been sold to a third party and where the property has been inherited by a third party in terms of the laws of succession, this limitation was not included in the order.[21] The declaration was suspended for 18 months to allow Parliament time to cure the defect. In the interim, the first respondent was precluded from transferring or otherwise encumbering the property. The Court ordered that the third respondent was to pay the applicant's costs, including the costs of two counsel.

Confirmation

[18] This Court is requested to confirm the order declaring section 2(1) of the Upgrading Act to be constitutionally invalid. In terms of section 167(5) of the Constitution, orders of the High Court and the Supreme Court of Appeal that declare Acts of Parliament constitutionally invalid have no force unless confirmed by this Court. Before confirming such an order, this Court must be satisfied that the impugned provision of the Act is indeed inconsistent with the Constitution.

[19] The applicant argued that this Court should confirm the order of invalidity because the impugned provision of the Upgrading Act violates her right to equality, on the basis of gender and sex,[22] contained in section 9 of the Constitution, her right to

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> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[20] High Court judgment above n 4 at para 62.

[21] Id at para 81.

[22] For the purposes of this judgment references to the word "sex" refer to the biological characteristics that define humans as female, male or intersex. This is usually assigned at birth and differentiation between people is made on the basis of external genitalia, chromosomes, hormones and the reproductive system. References to "gender" are references to an identity that can change over time, and that differs from one culture or society to

property contained in section 25 of the Constitution and her section 33 right to just administrative action. The reliance on section 33 is a departure from the High Court's findings which were based on section 34 of the Constitution. The first respondent opposed the confirmation proceedings but levelled arguments that, for the most part, spoke to the factual issue of ownership of the contested property rather than the constitutional invalidity of section 2(1) of the Upgrading Act.

Interpretation of the Proclamation

[20] The Proclamation was put into force in Bophuthatswana in 1962. It is alleged that the Proclamation only made provision for men to be heads of the family. As a result, the first respondent obtained a deed of grant that was later converted into a right of ownership over the property. During the hearing it was unclear whether the

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another. Gender is both a social construct and a personal identity. In social terms gender refers to the socially created roles, personality traits, attitudes, behaviours and values attributed to and acceptable for men and women as well as the relative power and influence of each. In individual terms gender refers to the specific gender group with which an individual identifies regardless of their sex. For these definitions see Valdes "Deconstructing the Conflation of 'Sex', 'Gender' and 'Sexual Orientation' in Euro-American Law and Society" (1995) 83 *California Law Review* 1 at 20 read with fn 46 and 22 read with fn 51. See also Rubin "Notes on the Political Economy of Sex" in Reiter *Toward an Anthropology of Women* (Monthly Review Press, New York 1975) at 159 for an examination of the way that society transforms biological sex into products of human activity.

The distinction between these terms is recognised by our Constitution. "Gender" and "sex" are treated as two separate and distinct grounds in section 9 of the Constitution. In *Woolworths (Pty) Ltd v Whitehead* [2000] ZALAC 4, (2000) 21 ILJ 571 (LAC) at paras 73 and 110, differentiation on the basis of pregnancy was deemed to amount to differentiation on the basis of sex, rather than gender. This is because child-bearing relates to the biological make-up of the female sex. In the minority judgment of *S v Jordan (Sex Workers Education and Advocacy Task Force as Amici Curiae)* [2002] ZACC 22; 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC) at paras 64-5, it was held that legislation that criminalised provision of sex work is unconstitutional because it discriminates on the basis of gender. There was no distinction made between sex workers who are biologically male or female and so this is not about sex-based discrimination. Rather the criminalisation overwhelmingly affects women because societal norms and patriarchal practices mean that women are more often than not the sellers of sex and not the buyers.

The recognition of the distinction between sex and gender is relatively recent. This judgment recognises that the basis for the impugned legislation was discrimination based on a conflation of both biology and the sociological view of women. Usually attribution of gender roles flows from biological classifications of male or female. The exclusion of women from being the head of the family is based on the social perception of what women can do and how they should behave. This is a sociological phenomenon, not a biological one. For these reasons, this judgment examines the provision using both the grounds of sex and gender in the Constitution but reference will be made predominantly to gender because the overwhelming effect of the impugned provision is to reinforce social rather than biological characteristics attributed to women.

factual situation in areas governed by the Proclamation (TBVC states)[23] was that African women were excluded from holding formal interests in property. This raised a question whether the Upgrading Act has had a genuine discriminatory impact on women. After the hearing, the Court deemed it necessary to direct the parties to file further written submissions on the effects that the Proclamation had on women.

[21] In their submissions, the applicant and the state respondents agreed that women had indeed been excluded from holding the position of head of the family that was a prerequisite for formal titles in land. The first respondent baldly alleges that this was not the case and that the applicant had held the titles to other properties during her marriage. There is no evidence of this. However, the applicant before us claims that she was legally unable to register her interests in the property because only men could be the head of the family. To test this submission, it is necessary to interpret the Proclamation contextually and then establish whether the Upgrading Act, which relies on the position created by the Proclamation, unfairly discriminates against African women.

Historical context

[22] The historical context within which a particular provision operated, or in response to which it was enacted, has been used as an interpretative tool by this Court on a number of occasions.[24] In *Brink*, this Court recognised that the interpretation of section 8 of the Interim Constitution[25] – now the section 9 right to equality – involved a historical enquiry. This Court held:

[23] "TBVC states" is the common way of referring to Transkei, Bophuthatswana, Venda and Ciskei, which were areas reserved for African people during apartheid and were awarded veiled independence in terms of the Promotion of Bantu Self-Governance Act 45 of 1959 and the Black Homelands Citizenship Act 26 of 1970.

[24] *Executive Council, Western Cape v Minister of Provincial Affairs and Constitutional Development; Executive Council, KwaZulu-Natal v President of the Republic of South Africa* [1999] ZACC 13; 2000 (1) SA 661 (CC); 1999 (12) BCLR 1360 (CC) at para 44; *Prinsloo v Van der Linde* [1997] ZACC 5; 1997 (3) SA 1012 (CC); 1997 (6) BCLR 759 (CC) at para 31; *Du Plessis v De Klerk* [1996] ZACC 10; 1996 (3) SA 850 (CC); 1996 (5) BCLR 658 (CC) at para 126; *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at paras 39 and 322-3.

[25] Constitution of the Republic of South Africa Act 200 of 1993.

> "As in other national constitutions, section 8 is the product of our own particular history. Perhaps more than any of the other provisions in chapter 3, its interpretation must be based on the specific language of section 8, as well as our own constitutional context. Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life. . . . The deep scars of this appalling programme are still visible in our society. It is in the light of that history and the enduring legacy that it bequeathed that the equality clause needs to be interpreted."[26]

[23] African women under apartheid were systemically disenfranchised in a number of ways. It is important to recognise that the pervasive effects of patriarchy meant that women were often excluded even from seemingly gender-neutral spaces. The perception of women as the lesser gender was, and may still be, a widely-held societal view that meant that even where legislation did not demand the subjugation of women, the practices of officials and family members were still tainted by a bias towards men. The prioritisation of men is particularly prevalent in spheres of life that are seen as stereotypically masculine, such as labour, property, and legal affairs.

[24] This Court has recognised the cloaked but ubiquitous nature of patriarchy in the past. In *Volks* it held:

> "This Court has on numerous occasions stressed the importance of recognising patterns of systematic disadvantage in our society when endeavouring to achieve substantive and not just formal equality. The need to take account of this context is as important in the area of gender as it is in connection with race, and it is frequently more difficult to do so because of its hidden nature. For all the subtle masks that racism may don, it can usually be exposed more easily than sexism and patriarchy, which are so ancient, all-pervasive and incorporated into the practices of daily life as to appear socially and culturally normal and legally invisible. The constitutional quest for the achievement of substantive equality therefore requires that patterns of gender inequality reinforced by the law be not viewed simply as part of an

[26] *Brink v Kitshoff N.O.* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 40.

> unfortunate yet legally neutral background. They are intrinsic, not extraneous, to the interpretive enquiry."[27] (Footnotes omitted.)

[25] O'Regan J remarked in *Brink* that:

> "Although in our society discrimination on grounds of sex has not been as visible, nor as widely condemned, as discrimination on grounds of race, it has nevertheless resulted in deep patterns of disadvantage. These patterns of disadvantage are particularly acute in the case of black women, as race and gender discrimination overlap. That all such discrimination needs to be eradicated from our society is a key message of the Constitution. The preamble states the need to create a new order in 'which there is equality between men and women' as well as equality between 'people of all races'."[28]

[26] Under apartheid, the effects of patriarchy were compounded by legislation that codified the position of African women as subservient to their husbands and male relatives. This context has been acknowledged by this Court on many occasions.

[27] In *Gumede*, Moseneke DCJ relying on the expert evidence of Professor Nhlapo,[29] stated that:

> "Legislating these misconstructions of African life had the effect of placing women 'outside the law'. The identification of the male head of the household as the only person with property-holding capacity, without acknowledging the strong rights of wives to security of tenure and use of land, for example, was a major distortion. Similarly, enacting the so-called perpetual minority of women as positive law when, in the pre-colonial context, everybody under the household head was a minor (including unmarried sons and even married sons who had not yet established a

[27] *Volks v Robinson* [2005] ZACC 2; 2009 JDR 1018 (CC); 2005 (5) BCLR 446 (CC) at para 163.

[28] *Brink* above n 26 at para 44.

[29] Professor Thandabantu Nhlapo is an Emeritus Professor at the University of Cape Town. He was the Chair of the Commission on Traditional Leadership Disputes and Claims, and the Chair of the Project Committee on Customary Law which assisted in the drafting of legislation such as the Recognition of Customary Marriages Act 120 of 1998.

> separate residence), had a profound and deleterious effect on the lives of African women."[30]

[28] Later in that judgment, Moseneke DCJ also relied on the evidence of Dr Claassens,[31] which had been compiled by reviewing authorities and ethnographic material, to demonstrate the manner in which property rights held by African people were distorted in favour of men under apartheid. This evidence advised that—

> "[t]here is a range of historical and ethnographic accounts that indicate that women, as producers, previously had primary rights to arable land, strong rights to the property of their married houses within the extended family, and that women, including single women, could be and were allocated land in their own right. Furthermore there are accounts of women inheriting land in their own right. However, Native Commissioners applying racially based laws such as the Black Land Areas Regulations and betterment regulations issued in terms of the South African Development Trust and Land Act repeatedly intervened in land allocation processes to prohibit land being allocated to women."[32] (Footnotes omitted.)

In both *Gumede*[33] and the later case of *Ramuhovhi* this Court noted that the matrimonial property systems that were applied to women in the TBVC states dispossessed them of property rights in favour of the male head of the family.[34] This illustrates two things: a legislative inclination in favour of male property rights holders, and an acknowledgment by this Court that, generally at least, only men were considered to be the head of the family.

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[30] *Gumede v President of the Republic of South Africa* [2008] ZACC 23; 2009 (3) SA 152 (CC); 2009 (3) BCLR 243 (CC) at para 17.

[31] Dr Aninka Claassens is the Director of the Land and Accountability Research Centre at the University of Cape Town. Her overarching research focus is on the nature and content of customary law in the South African constitutional dispensation and she has researched extensively the ability of women, particularly unmarried women, to access land in communal areas.

[32] *Gumede* above n 30 at para 18.

[33] Id at paras 17-8.

[34] *Ramuhovhi v President of the Republic of South Africa* [2017] ZACC 41; 2018 (2) SA 1 (CC); 2018 (2) BCLR 217 (CC) at para 62 read with fn 50.

Textual reading of the Proclamation

[29] Read in light of the context above, the Proclamation definitely had discriminatory effects on African women. The Proclamation defines "family" in the following way:

> "'Family' in relation to a person, means—
>
> (a) the wife (including a partner in a customary union) and all unmarried children of such person;
>
> (b) all widowed daughters of such person and their unmarried children residing with the said person;
>
> (c) any parent or grandparent of such person, or of the wife of such person, who by reason of old age, infirmity or other disability is dependent on such person; and
>
> (d) any other person, who in the opinion of the manager is bona fide dependent on such person."

[30] This definition is crafted in gendered terms in that no provision is made for a husband, brother or non-dependent man to be a member of a family, and describes the family only in relation to the head of the family. The Proclamation does not define "head of the family" however, all references to the "head" are made using masculine pronouns. Section 8(1) of Chapter 2 of the Proclamation states:

> "Any person who is the head of a family and is desirous of taking up *his* residence in the township and of leasing and occupying for residential purposes, together with the members of *his* family, a dwelling erected by or belonging to the Trust, shall apply for a certificate in respect of such dwelling and of the site on which such dwelling stands." (Emphasis added.)

[31] Similarly, section 9(1) of Chapter 2 of the Proclamation provides:

> "Any person who is the head of a family and desires to purchase from the Trust a site in the township on which *he* is to erect *his* own dwelling, or on which a dwelling has been erected by or belonging to the Trust, for occupation by *him* and members of *his*

family for residential purposes, shall apply for a deed of grant in respect of such site." (Emphasis added.)

[32] On a plain reading of these sections of the Proclamation, it is obvious that it envisages a situation where only men could be the head of the family, with women relatives and unmarried sons falling under their control. It may be argued that the masculine pronouns used in the section should have been read as referring to both men and women.[35] This is not, however, a tenable suggestion.

[33] When the Proclamation is read in the context of the multiple discriminatory statutes that aimed to limit the autonomy of women at the time, it seems unlikely that the Legislature intended that the masculine pronouns should be read to be gender-neutral. Moreover, an examination of the treatment of statutes by the courts illustrates that Judges, in times gone by, even interpreted the seemingly neutral word "persons" to exclude women from its purview.[36] Beyond this context, it is unlikely that male relatives and township officials, operating within a system of patriarchy, which prioritised male interests in spheres such as property, would interpret the Proclamation in favour of African women.

[34] When faced with a challenge to the constitutional validity of a provision in an Act, the Court examining the challenge should ascertain whether it is reasonably possible to interpret the section in a manner that conforms with the Constitution.[37] In this case that would involve reading the Proclamation to have gender-neutral provisions so that section 2(1) of the Upgrading Act, which is based on the Proclamation, is saved from constitutional invalidity. This is not reasonably possible.

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[35] Section 6(a) of the Interpretation Act 33 of 1957 states:

"In every law, unless the contrary intention appears—

(a) words importing the masculine gender include females."

[36] See *Rex v Detody* 1926 AD 198 at 211 and *Incorporated Law Society v Wookey* 1912 AD 623.

[37] *Govender v Minister of Safety and Security* [2001] ZASCA 80; 2001 (4) SA 273 (SCA) at para 11.

This interpretation would be unduly strained[38] because it is simply not plausible that the Proclamation was applied in a gender-neutral way during apartheid. To read it as gender-neutral now would not cure the discrimination that occurred previously and, since the Upgrading Act is based on the position as it was during apartheid, would not render the Act constitutionally compliant.

Upgrading Act as a violation of section 9 of the Constitution

[35] The applicant relies on the violation of three distinct rights in her constitutional challenge: equality contained in section 9, property in terms of section 25 and just administrative action in terms of section 33. Because of this there are a few approaches that could be taken in evaluating her claim. We choose to focus the discussion of the invalidity of section 2(1) of the Upgrading Act on its violation of section 9. Section 9 in our Constitution not only entitles everyone to equal protection before, and benefit of, the law[39] but also stipulates that the state may take legislative and other measures to protect and advance the rights of disadvantaged persons.[40] Vitally, it further prohibits both direct and indirect unfair discrimination against people on the basis of, inter alia, their gender and sex.[41] Equality, as a cornerstone of the Constitution, best encapsulates the applicant's major concern with the impugned section. Equality also underlies the reliance on the other rights in sections 25 and 33 of the Constitution.

Section 9(1)

[36] Following the test established in *Harksen*, it must first be held that differentiation between groups has occurred without any rational connection to a

[38] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24.

[39] Section 9(1) of the Constitution.

[40] Section 9(2) of the Constitution.

[41] Section 9(3) of the Constitution.

legitimate governmental purpose.[42] In this case, the Upgrading Act differentiates between people who were the holders of land tenure rights under apartheid and those who were not, but occupied the property. The practical effect is a differentiation between African men, who could be the head of a family and thus the holder of a certificate or deed of grant, and African women who could not. The state respondents, in their written submissions pursuant to directions from this Court asking for their view on the constitutionality of the impugned provision, agree that section 2(1) of the Upgrading Act is a violation of section 9 of the Constitution, and cannot have a legitimate governmental purpose.

[37] A provision in a statute that differentiates between groups of people but does so without a legitimate governmental purpose will be irrational and unconstitutional due to its inconsistency with section 9(1). This Court has held:

> "In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner. This has been said to promote the need for governmental action to relate to a defensible vision of the public good, as well as to enhance the coherence and integrity of legislation."[43] (Footnotes omitted.)

[38] That section 2(1) of the Upgrading Act was not enacted with a legitimate governmental purpose, is underscored by the fact that it also contradicts the overall purpose for which the Upgrading Act was enacted. This Court has held that the purpose of the Upgrading Act was "to provide for the conversion into full ownership of the more tenuous land rights which had been granted during the apartheid era to

[42] *Harksen v Lane N.O.* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 43.

[43] *Prinsloo* above n 24 at para 25.

Africans".[44] The Upgrading Act was part of a scheme of legislation that was enacted to redress the injustices caused by the colonial and apartheid regimes. Land reform was one of the key focus areas of this scheme because the systemic deprivation of the African majority's rights in land and property was a main feature of the apartheid system.

[39] The Upgrading Act relies on the legal position created by the Proclamation in order to establish which rights warrant upgrading. In *DVB Behuising*, this Court stated with regard to the Proclamation:

> "One is dealing here with legislation that is admittedly racist and sexist and that constituted a key element in the edifice of apartheid. In characterising the proclamation we cannot ignore its history, what it was intended to achieve, and what it actually did achieve."[45]

[40] Similarly, in *Moseneke*, this Court stated:

> "Subordinate legislation made under [the Black Administration Act] has been referred to as part of a demeaning and racist system, as obnoxious and as not befitting a democratic society based on human dignity, equality and freedom."[46] (Footnotes omitted.)

[41] The Proclamation is subordinate legislation of the kind described above which created land insecurity and made it difficult for people to protect their land, whether from confiscation or from invasion.[47] The Proclamation gave some limited, subservient rights to certain African people, but because of the wording, African women were not included in that group. This position, as the cases above reveal, would certainly be in conflict with the values of the Constitution, like human dignity,

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[44] *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government* [2000] ZACC 2; 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) (*DVB Behuising*) at para 8.

[45] Id at para 40.

[46] *Moseneke v The Master* [2000] ZACC 27; 2001 (2) SA 18 (CC); 2001 (2) BCLR 103 (CC) at para 20.

[47] *DVB Behuising* above n 44 at para 92.

equality and freedom, if it was still in force today. Surely a piece of existing legislation that was designed to counteract the effects of the Proclamation but fails will be similarly inconsistent.

[42] In *Mabaso* this Court was asked to deal with whether the continued differentiation between attorneys enrolled in South Africa and those enrolled in the former TBVC states was justified.[48] The Court found:

> "Ten years into our new constitutional order, citizens are entitled to have any unfairly discriminatory differentiation between the different legislative schemes removed from the statute books. Where it remains on the statute books, victims of the unfair discrimination are entitled to seek and obtain relief."[49]

[43] The Upgrading Act relies, in section 2(1), on the legal position created by an unjust Act. This highlights the distinct lack of a legitimate governmental purpose in the section. Section 2(1) of the Upgrading Act automatically upgraded titles, such as certificates and deeds of grant, into ownership rights. In doing this, it reinforced the position created by the Proclamation. During apartheid African women were not entitled to hold land tenure rights and under the Upgrading Act's dispensation their vulnerability was compounded as they did not have the opportunity to register their interests in a property before the title was automatically upgraded in favour of the male head of the family.

[44] This lack of a legitimate governmental purpose for the provisions of section 2(1) of the Upgrading Act is thus irrational. The section is constitutionally invalid due to its inconsistency with section 9(1) of the Constitution. The section does not pass this lowest threshold of constitutional scrutiny.[50]

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[48] *Mabaso v Law Society, Northern Provinces* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at para 2.

[49] Id at para 42.

[50] See *Pharmaceutical Manufacturers Association of SA: In re ex parte President of the Republic of South Africa* [2000] ZACC 1; 2000 (2) SA 674 (CC); 2000 (3) BCLR 241 (CC) at para 90.

[45] In view of this it is unnecessary to delve much deeper into the alleged violation of other rights, but it will be helpful to explain that this discriminatory irrationality would have been even more difficult to overcome where the threshold constitutional standard is higher than mere rationality.

Section 9(2) and 9(3)

[46] Section 9(2) states that legislative and other measures may be taken to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination.

[47] The automatic upgrading of land tenure rights amounts to indirect differentiation by the state between men, who could hold these titles and women, who could not. In terms of *Harksen*, because the differentiation takes place on two specified grounds – gender and sex – it will amount to discrimination.[51] Similarly, it will be presumed to be unfair.[52] There has been no evidence to the contrary presented and the presumption of unfairness is further bolstered by the vulnerable position that African women have occupied for generations. Thus, section 9(3) has also been infringed.

[48] The Upgrading Act was a legislative measure taken in terms of section 9(2) of the Constitution to advance the rights of persons disadvantaged by unfair discrimination.

[49] Section 25(5) of the Constitution provides that "the state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis". The quest to enable citizens equitably to access land must include attempts to strengthen rights in land that were previously held, such as the informal right that the applicant holds

[51] *Harksen* above n 42 at para 48.

[52] Id.

through her lengthy occupation of the property in question. The Upgrading Act, which took effect in Bophuthatswana in 1998, is a piece of legislation which speaks to the fulfilment of the state's section 25(5) obligation. Parliament failed, however, to act positively to ensure that the gender discrimination perpetuated by the Proclamation did not taint the equitable provision of property. Moreover, it only recognised and strengthened rights that were formally held, neglecting the countless holders of informal rights or interests in property.

[50] Section 25(5) creates a justiciable socio-economic right to gain access to land on an equitable basis. The Upgrading Act amounts to a step taken by Parliament in an attempt to foster the realisation of that right. It is a well-established principle of this Court that when evaluating the measures taken by the state in relation to socio-economic rights, those measures must pass the constitutional standard of reasonableness.[53] In *Khosa*, this Court held that the context of each case is vital in determining the reasonableness of a measure taken. This, the Court established, was best achieved by looking at the purpose for which the measure was pursued.[54]

[51] The mischief that the Act was created to rectify was to provide for recognition and security of rights that had previously been ignored or systemically devalued.[55] A reasonable step to ensure equitable access to land must do something to counteract pre-existing inequitable access. Otherwise, as in this case, it leaves intact inequity. The automatic upgrading of land tenure rights does not achieve this purpose because it excludes African women from the benefit of legal protection. If anything, entrenching an apartheid position would be the exact opposite of what the legislature sought to

[53] See *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at paras 138 and 161; *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) at paras 67-8; *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at paras 41-4.

[54] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) at para 49.

[55] See [41] and [43].

achieve with the Act rendering it an unreasonable legislative measure in terms of section 9(2).

Review procedures

[52] The applicant alleges that the failure to provide a forum for review of the various putative rights that may exist in a property before upgrading takes place renders section 2(1) constitutionally non-compliant. The High Court upheld this challenge by stating that this failure violated the applicant's right of access to courts in terms of section 34 of the Constitution. It further held:

> "[T]he lack of notice of the conversion, and the absence of a procedure for raising issues with the conversion of land rights into ownership, defies the *audi alteram partem* principle (that all parties be given the opportunity to respond to evidence)."[56]

[53] Before this Court, the applicant abandoned the section 34 challenge and instead based her final constitutional challenge to the Act on section 33 of the Constitution, which enshrines the right to just administrative action.

[54] We are not convinced that section 2(1) of the Upgrading Act violates section 33 of the Constitution. It is clear that the upgrading takes place automatically and therefore by operation of law. Thus, no decision is taken by an administrator and no administrative action has occurred. The legislative functions of Parliament are explicitly excluded from the definition of administrative action by section 1(b)(dd) of the Promotion of Administrative Justice Act[57] (PAJA).

[55] It is not necessary, however, for this Court to determine whether there has been a violation of either section 33 or 34 given that section 2(1) has already been impugned using section 9 of the Constitution. However, an examination of the review

[56] High Court judgment above n 4 at para 59.

[57] 3 of 2000.

mechanisms, or lack thereof, for section 2(1) automatic upgrades also lends itself to the conclusion that the section 9 discrimination perpetuated against women is unfair and not rationally connected to any legitimate governmental purpose.

[56] Unlike other provisions in the Act, section 2(1) does not contain an internal review mechanism. While section 3(1)(a)(i) provides that land tenure rights in Schedule 2 of the Act will not be converted to a right of ownership unless the Minister is satisfied that the interests and rights of putative holders are protected,[58] the applicant in this case is left with only section 24D to protect her rights.

[57] The first respondent alleges that this section safeguards the rights of putative holders and thus, saves the Act from constitutional invalidity. However, section 24D does not adequately protect the applicant's rights or those of women in a similar position. In terms of section 24D(10)(a) any person who is aggrieved by an entry made in a register of land rights (which constitutes the formal recognition of the ownership right) may appeal to the Minister within 30 days of becoming aware of the entry, but not more than one year after the entry was made.[59]

[58] It is not uncommon for pieces of legislation that allow for the review of decisions or procedures to contain time-bar clauses such as this one.[60] Section 24D

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[58] Section 3(1)(a)(i) states:

> "Where the State is the owner of an erf or piece of land situated outside a formalised township, the relevant land tenure right need not be converted into ownership, and a deed of transfer shall not be submitted unless—
>
> (i) the Minister is satisfied, on the basis of a report by a person assigned or appointed by him or her, that the rights or interests of putative holders are being protected."

[59] See above n 16.

[60] See for example section 7(1) of PAJA which states:

> "Any proceedings for judicial review in terms of section 6(1) must be instituted without unreasonable delay and not later than 180 days after the date—
>
> (a) subject to subsection (2)(c), on which any proceedings instituted in terms of internal remedies as contemplated in subsection (2)(a) have been concluded; or
>
> (b) where no such remedies exist, on which the person concerned was informed of the administrative action, became aware of the action and the reasons for

does not, however, allow for the condonation of the late filing of an appeal. This initial injustice is compounded by the fact that the section does not establish any procedure by which affected parties are notified of the automatic upgrading of the right. Resultantly, parties who have interests in property may only discover years later that the ownership of that property has been registered in the name of the holder of a deed of grant. As is evident in the case before us, these parties cannot then rely on section 24D to protect their rights because they are barred from bringing appeals more than a year after the right was registered.

[59] It is further worth noting that section 24D only makes provision for an appeal after the right has been registered in the applicable registry. In the case before us counsel for the applicant stated that there was no evidence that the right had been registered. However, registration is not a prerequisite upon which the validity of the right to ownership is premised. Instead, in terms of section 2(2) of the Upgrading Act, registration simply gives effect to the right that was automatically created by section 2(1). It seems likely that there may be cases like this one, in which the registration of the right cannot be located in the registry. Here, the "protections" in section 24D would be of little assistance as the appeal procedure is only against an entry made in a register, and not against the automatic upgrading of the initial right.

Just and equitable relief

[60] In terms of section 172(1)(b) of the Constitution, once a declaration of invalidity is made, a Court may make any just and equitable order.[61] This includes

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it or might reasonably have been expected to have become aware of the action and the reasons."

[61] Section 172(1)(b) states:

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

. . .

(b) may make any order that is just and equitable."

making an order limiting the retrospective effect of the order or suspending the declaration of invalidity to allow Parliament to rectify the inconsistency.[62]

Retrospective effect

[61] The High Court held that the order of invalidity should apply retrospectively to the date of the enactment of the Interim Constitution – 27 April 1994. In the High Court the applicant argued that it should instead be declared invalid from the date that the Upgrading Act was enacted in 1991. In this Court, however, the applicant abandons this argument in favour of the High Court's determination. In confirming the order of the High Court, it is important to recognise that the retrospective effect of this order is crucial to the effective protection of women's rights.

[62] A prospective order would not protect the rights of the applicant before us, nor would it provide relief to women in her position. Moreover, this Court cannot condone more than 20 years of discrimination brought about by the legislation by relying only on a prospective order of invalidity. With this principle in mind, one might ask how we can condone the nearly three years of discrimination that persisted between the enactment of the Act and the coming into operation of the Interim Constitution. This is certainly an issue that troubled Kollapen J in the High Court. However, the impugned provisions of the Upgrading Act only became constitutionally inconsistent, and therefore invalid, when the Interim Constitution came into force.[63] It would not, therefore, be just and equitable, nor indeed sensible, to extend the effect of the declaration of invalidity beyond 27 April 1994. The order of retrospectivity made by the High Court should thus be confirmed.

[62] Section 172(1)(b) states that a just and equitable order includes:

> "(i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[63] *Ramuhovhi* above n 34 at para 57.

Limited retrospectivity

[63] This aspect is not without its difficulties. More than 20 years have elapsed since the enactment of the Upgrading Act and in that time the advancement and protection of women's rights have made significant strides. This means that in some instances property ownership which was obtained through the operation of section 2(1) of the Upgrading Act may have ended up under the legal control of African women. This could be for a number of reasons, including because of judicial intervention which prevents gender discrimination in intestate succession as in *Bhe*,[64] or indeed through the financial empowerment of women that has allowed them to purchase property in their own name.

[64] This Court must be cautious not to create new and different injustices in our attempt to remedy the one perpetrated by section 2(1) of the Upgrading Act. This Court is, therefore, empowered under section 172(1) of the Constitution to make an order limiting retrospectivity. In *Ramuhovhi*, this Court held that one of the factors that must be considered when limiting retrospectivity is the disruptive effect that unlimited retrospectivity would have. It further stated:

> "Limiting retrospectivity helps 'avoid the dislocation and inconvenience of undoing transactions, decisions or actions taken under [the invalidated] statute'. Currie and De Waal state that the disruptive effects of an order of retrospective invalidity must be balanced against the need to give effective relief to the applicant and similarly placed people."[65]

[65] All the parties before us agree that certain disruptions would occur if the order of retrospectivity is unlimited. The High Court identified two groups of people who should be excluded from the effect of retrospectivity. Those people were third parties who had, in good faith, purchased property which title had been upgraded in terms of

[64] *Bhe v Magistrate, Khayelitsha (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole; South African Human Rights Commission v President of The Republic of South Africa* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC).

[65] *Ramuhovhi* above n 34 at para 57.

section 2(1) and persons who inherited such property in terms of the law of succession.[66] The second category was further restricted so that this limitation only applies to estates that had been finalised. The High Court held that in both of the above categories, a transfer of property would not qualify for the exception if a party had been on notice that the property was the subject of a dispute.[67]

[66] We agree with the High Court's limitations on retrospectivity. In the past 20 years the position of women in society has improved and the alienation of property in sexist ways has largely been declared unconstitutional.[68] Moreover, it is imperative that this Court does not disrupt the South African property scheme by making an order that would impact substantially on the financial interests of buyers, sellers and banks who acted in good faith by relying on a law that they thought was valid.

[67] This may appear to be harsh treatment of women who have already faced the consequences of property in which they have an interest being alienated. However it is the established jurisprudential position of this Court that "as a general principle . . . an order of invalidity should have no effect on cases which have been finalised prior to the date of the order of invalidity".[69] This has been applied both to criminal matters and to the finalisation of estates in terms of the law of succession even where the effect of those cases was discriminatory. The Court aims, as far as possible, to avoid injustices being perpetrated both against the victims of an impugned provision, and against parties who acted in good faith in terms of the provision. But it is impossible to craft a perfect remedy. There may be other avenues of redress available to affected women based on the specific facts in each of these finalised

[66] High Court judgment above n 4 at para 80.

[67] Id at para 81.

[68] See *Bhe* above n 64.

[69] *Engelbrecht v Road Accident Fund* [2007] ZACC 1; 2007 (6) SA 96 (CC); 2007 (5) BCLR 457 (CC) at para 45; *National Coalition for Gay and Lesbian Equality v Minister of Justice* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 93; *S v Mello* [1998] ZACC 7; 1998 (3) SA 712 (CC); 1998 (7) BCLR 908 (CC) at para 13; *S v Ntsele* [1997] ZACC 14; 1997 (2) SACR 740 (CC); 1997 (11) BCLR 1543 (CC) at para 14.

cases. These cannot however arise as a result of this declaration of invalidity. This Court recognised in *De Lange* that it is a lesser evil for a constitutional violation to go without compensation than to impose monetary liability on a person who, knowingly or not, relied on what she thought to be a valid law.[70]

[68] We do, however, believe that the list of exceptions provided by the High Court should be extended. Women who, through a stroke of luck or another unforeseen event, obtained a title in property which was upgraded to an ownership right in terms of the Act should not have these titles nullified by virtue of this declaration. We do not have before us concrete factual evidence of the full effect that the Proclamation, and therefore the Upgrading Act, had on the rights of women. While it is clear from the submissions made by all parties that many women were denied the right to register their interests in property by virtue of their gender, we cannot conclusively say that no woman obtained a title at any point. The ground on which we are declaring section 2(1) invalid is that it does not take reasonable steps to ensure access to property on an equitable basis and that the Upgrading Act perpetuates discrimination against women in contradiction to the Act's stated aims. However, in instances where this injustice has been organically rectified, to allow this to be reversed would be exceptionally dislocated from the social context within which the Act operates.

[69] Therefore, the retrospective declaration of invalidity does not apply to cases where women had their titles upgraded by section 2(1) of the Act, nor does it apply to finalised estates where the property has been inherited by a third party acting in good faith, nor, finally, to cases where the property has been transferred to a third party through a final and valid alienation process.

Suspension of the declaration of invalidity

[70] As the High Court found, the effects of this declaration of invalidity may be far-reaching, with effects on groups beyond those explicitly excluded from the

[70] *De Lange v Smuts N.O.* [1998] ZACC 6; 1998 (3) SA 785 (CC), 1998 (7) BCLR 779 (CC) at paras 104-5.

retrospective order. Parliament is in a far better position than this Court to conduct the necessary factual enquiry to establish the full extent of redress demanded. Moreover, the unconstitutional effects of section 2(1) of the Upgrading Act cannot be remedied by a simple reading-in exercise. The best way to go about achieving this cannot be determined by this Court. The order suspending the declaration of invalidity for 18 months should be confirmed.

Interim relief

[71] To ensure that the applicant is given effective relief pending Parliament curing the constitutional defect in the Upgrading Act, the High Court ordered that the first respondent be interdicted from passing ownership, selling, or encumbering the property in any manner whatsoever. The High Court also protected persons who might be vulnerable to wrongful evictions or bad faith transactions utilising unconstitutionally conveyed property rights by stating that nothing prevented them from approaching a competent court for interim relief similar to that awarded to the applicant. Both of these pronouncements are sensible and provide adequate protection for the time being. Therefore, the order of interim relief is also confirmed.

Costs

[72] The applicant successfully challenged the constitutionality of section 2(1) of the Upgrading Act in the High Court. As a result, costs were awarded against the third respondent, the Minister for Rural Development and Land Reform, who opposed that application. This was because of the Minister's role as the state authority responsible for the effects of the legislation. The applicant was not successful with her claim against the first respondent because the High Court opted not to pronounce on this dispute. The general rule that costs should follow a successful result was applied and the applicant was ordered to recover all of her costs from the third

respondent while the first respondent paid his own costs.[71] There is no reason why this costs order should be overturned.

[73] It is the norm to award costs in favour of a successful applicant for a confirmation. The third respondent did not participate in these proceedings until responding to this Court's directions issued after the hearing. Their response to these directions was useful and illustrated that the Minister no longer opposed the confirmation of constitutional invalidity. This fact is not, however, sufficient to justify this Court's deviation from the principle relating to successful confirmation proceedings.[72] In terms of *Biowatch*, "[t]he primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice".[73] It is clear that "[t]he state is under an ongoing constitutional obligation to respect, protect, promote and fulfil the rights in the Bill of Rights by ensuring (inter alia) that legislation which violates constitutional rights is amended or replaced".[74] The state failed to enact legislation that allows for the equitable distribution of land and the redress of gendered discrimination that occurred during apartheid. In the circumstances the Minister should pay the costs of the confirmation proceedings. The first respondent should bear his own costs.

Conclusion

[74] During apartheid it was not true that all persons were born free and equal in dignity and rights. The oppression that the system meted out was felt no more acutely than by African women. They were relegated to the status of perpetual minors, often forced to work in the unregulated domestic care sector to look after children who were not their own, and they were prevented from owning property which left them permanently dependent on the male heads of their families to access the basic

[71] High Court judgment above n 4 at para 95.

[72] *Levenstein v Estate of the Late Sidney Lewis Frankel* [2018] ZACC 16; 2018 (8) BCLR 921 (CC) at para 79.

[73] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*) at para 16.

[74] *Gory v Kolver N.O.* [2006] ZACC 20; 2007 (4) SA 97 (CC); 2007 (3) BCLR 249 (CC) at para 65.

protection that a home provides. Twenty-four years into democracy, a piece of legislation that reifies the factual position created by a racist and sexist apartheid Act cannot pass constitutional muster. The Upgrading Act, in its attempt to redress one injustice, exacerbated another. When enacting remedial legislation, Parliament must be aware of the historic omnipresence of patriarchy which will otherwise undermine even the noblest of legislative endeavours. In conclusion, section 2(1) of the Upgrading Act is constitutionally invalid insofar as it solidifies the position created by apartheid legislation which excluded African women from the property system and resulted in discrimination on the basis of sex and gender in terms of section 9 of the Constitution.

Order

[75] The following order is made:

1. The order of constitutional invalidity made by the High Court of South Africa, Gauteng Division, Pretoria (High Court) on 26 September 2017 in respect of section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 is confirmed subject to the variations set out in paragraph 2.

2. The order of the High Court is varied to read:

   "(a) Section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 is declared constitutionally invalid insofar as it automatically converted holders of any deed of grant or any right of leasehold as defined in regulation 1 of Chapter 1 of the Regulations for the Administration and Control of Townships in Black Areas, 1962 Proc R293 *GG* 373 of 16 November 1962 (Proclamation R293) into holders rights of ownership in violation of women's rights in terms of section 9(1) of the Constitution.

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

   (c) In terms of section 172(1)(b) of the Constitution, the order in paragraph 2(a) and (b) shall not invalidate the transfer of

ownership of any property which title was upgraded in terms of section 2(1) of the Upgrading of Land Tenure Rights Act 112 of 1991 through: finalised sales to third parties acting in good faith; inheritance by third parties in terms of finalised estates; and the upgrade to ownership of a land tenure right prior to the date of this order by a woman acting in good faith.

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

(e) The first respondent is interdicted from passing ownership, selling, or encumbering the property known as Stand 2328 Block B, Mabopane in any manner whatsoever, until such time as Parliament has complied with the order in 2(a) above.

(f) The third respondent is ordered to pay the costs of the applicant, including the costs of two counsel."

3. The third respondent is ordered to pay the costs of the applicant in this Court, including the costs of two counsel.

For the Applicant:	A de Vos SC and M P Moropa instructed by Lawyers for Human Rights
For the First Respondent:	N L Skibi instructed by Legal Aid Board South Africa
For the Second, Third and Seventh Respondents:	L T Sibeko SC, M J Gumbi and X Mofokeng instructed by Leepile Attorneys Incorporated and State Attorney, Pretoria