

THE FORGOTTEN WOMEN AND THE CONSTITUTIONALITY OF THE *UPGRADING OF LAND TENURE RIGHTS ACT OF 1991 - MANTSHABELLE MARY RAHUBE V HENDSRINE RAHUBE AND 6 OTHERS*

By Ms Christine Botha: Legal Officer, Centre for Constitutional Rights

On 26 September 2017, the Pretoria High Court (the Court) brought great relief to an elderly woman facing eviction by her brother from the house she had been living in and maintaining for over 32 years.

The *Mantshabelle Mary Rahube v Hendsrine Rahube* matter (*Rahube*) raised the constitutionality of section 2(1) of the *Upgrading of Land Tenure Rights Act* of 1991 (the Upgrading Act). The Upgrading Act provides for the upgrading and conversion of certain rights to property (afforded under apartheid) to ownership. The Court agreed with the applicant (Mrs Rahube) that despite its well-intended purpose, section 2(1) of the Upgrading Act, which automatically converts land tenure rights to ownership without any notification to occupants and other affected parties, is unconstitutional. The Court held it violates the constitutional right to equality by perpetuating discrimination based on gender and access to Courts by failing to provide a legal mechanism to dispute the entitlement.

In Mrs Rahube's case, her brother - who neither resided on the property nor contributed to the maintenance - was issued a Deed of Grant in 1988 under *Proclamation R293 of 1962* (the Proclamation), in terms of the *Natives Administration Act* of 1927 (renamed the *Black Administration Act*), by the erstwhile Department of Local Government and Housing of Bophuthatswana. The Deed of Grant issued in terms of the Proclamation qualifies under the Upgrading Act for conversion to ownership and her brother was afforded ownership when the Upgrading Act become applicable to the area in 1998.

Mrs Rahube, who has lived in the house since 1977 and who maintains the property, only became aware that her brother became the owner of the property, when he instituted eviction proceedings against her in 2009. Mrs Rahube applied to the Court for a declaratory order that she is the owner of the property in terms of the *Restitution of Land Rights Act* of 1994 and, in the alternative, that section 2(1) of the Upgrading Act is unconstitutional. The Court did not grant her ownership due to the failure to join all family members involved whose rights might also be affected. She was however provided temporary relief, as her brother was interdicted from passing ownership in the next 18 months, until Parliament has cured the unconstitutionality of section 2(1) of the Upgrading Act.

To appreciate Mrs Rahube’s predicament, the Proclamation has to be viewed in its historical context. The *Natives Land Act* of 1913 and The *Natives Trust and Land Act* of 1936 effectively ensured that the black South African majority could only occupy and own land in 13% of South Africa. These designated areas later formed the 10 homelands in terms of the *Promotion of Bantu Self-Government Act* of 1959. In terms of the *Natives Administration Act*, the Governor-General (later the State President) had the power to govern black South Africans by proclamation. The Proclamation in question, which was adopted by the homelands, provided for the establishment and management of informal townships and stipulated who might buy or lease a house in the township, based on ethnic affiliation. The Proclamation provided limited forms of tenure granted by way of “Deeds of Grant” and “Certificates of Occupation of a letting unit for residential purposes”. However, the Deed of Grant provided very little security in reality as it could be cancelled by the township “manager” if the holder of the right had “ceased to be a fit and proper person to reside in the township”.

In 1998, the North West Provincial Legislature repealed the whole of the Proclamation, which was later constitutionally challenged in the matter of *In re: DVB Behuising v North West Provincial Government (DVB Behuising)*. The Constitutional Court confirmed the Provincial Legislature was competent to repeal it, except the provisions that dealt with the registration of title, which fell under the domain of national government. Importantly the Constitutional Court analysed the Proclamation and found it to be “ ... *admittedly racist and sexist*”. In *DBV Behuising*, it was also reiterated that the repeal of a law does not affect a right acquired under the repealed law and therefore people who are already in possession of Deeds of Grants would be protected. However, the Constitutional Court did not find it necessary to determine the nature and extent of such rights in this instance. Unfortunately the nature of the right and the origin of the right is exactly the obstacle hindering Mrs Rahube - and probably many other women - to access security of tenure.

In *Rahube* the Court echoed *DBV Behuising* sentiments of the Proclamation and emphasised that it is characterised by sexist language, especially with the referral to the head of a house in the masculine. Women were to a large extent excluded from holding any title in terms of this Proclamation. The Upgrading Act perpetuates this exclusion by failing to provide a mechanism to investigate the nature of the land tenure right.

The Court was also acutely aware that the declaration of invalidity might have serious consequences on persons who acted on good faith on the automatic conversion of ownership. In this instance, the Court specifically limited the retrospectivity, in the context

of succession, where an estate has been finalised. Furthermore, the Court rightly so recognised the diverse policy and resource considerations involved in finding a solution and stated that Parliament would be better suited to craft a mechanism to cure the unconstitutionality of section 2(1) of the Upgrading Act.

This matter highlighted that on the face of it legislation might not appear discriminatory, even a well-intentioned Act, which aimed to secure rights to property. However, on closer scrutiny the irony is that black women, who were arguably the most vulnerable under apartheid, were still unintentionally being excluded from ownership rights. This speaks to the need for laws to not merely regulate, but to also reflect the spirit and purport of the Constitution.