

PROPERTY RIGHTS OF WOMEN - RAHUBE V RAHUBE AND OTHERS

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On 30 October 2018 the Constitutional Court handed down judgment in *Rahube v Rahube* - an application for the confirmation of an order of constitutional invalidity made by the High Court in Pretoria. The order was made in respect of section 2(1) of the *Upgrading of Land Tenure Rights Act 112 of 1991 (ULTRA)* and concerned the automatic conversion of land tenure rights into ownership rights, without due process and in a manner that was discriminatory, specifically to African women. The judgment is delivered at a time that South Africa grapples with the “land question” and arguably demonstrates that despite the property clause making provisions for access to land and tenure security, it is often the legislation - whether poorly implemented or drafted - which fails to deliver on the underlying constitutional premise.

The facts are that the applicant, Ms Rahube, and the respondent, Mr Rahube, are siblings who moved into the concerned property in North West Province with other family members in the 1970s. Their grandmother was the “owner” of the house until her passing. There is no documentary proof of this ownership. This is important because at the time, the law made it impossible for African women to have formal rights in land because of gender discrimination. Ms Rahube married and later returned to the property following the dissolution of her marriage. She had lived in the property from 1977 with her children and grandchildren. Her siblings and uncle left the property.

In 1987, Mr Rahube was nominated by the family to be the holder of the certificate of occupation of the property, as only men were permitted to do so. In 1988, as holder of the certificate, he was issued a Deed of Grant in terms of Proclamation R293. ULTRA was enacted in 1991 and took effect in the North West Province (then Bophuthatswana) in 1998. The effect of its commencement was the automatic conversion of Deeds of Grant to ownership rights. Therefore, Mr Rahube, as the holder of the Deed of Grant, became the lawful owner of the property, although he neither lived in, nor used the property. In 2009, he instituted eviction proceedings against Ms Rahube. Ms Rahube says that it was only then that she became aware that the Deed of Grant had been converted to full right of ownership. She raised the constitutional invalidity of section 2(1) of ULTRA in opposition to the eviction and the matter was suspended in the Magistrates’ Court pending the High Court application regarding the constitutional invalidity.

Ms Rahube sought to vindicate her rights to equality, access to housing, property, as well as just administrative action, as protected in the Bill of Rights. She argued that ULTRA perpetuated apartheid legislation, which precluded her and other African women in similar positions from holding land tenure rights simply because of their race and gender. The High Court upheld her challenge because ULTRA provides for the automatic conversion of land tenure rights to ownership without any processes to hear and consider competing claims. Further, those who were not holders of certificates or Deeds of Grant were prevented from owning properties in which they had substantial interest.



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The High Court found the exclusion inherently gendered because a woman could not, by law, be a head of a family and therefore, could not be a holder of the certificate and register a Deed of Grant in her name. The language in the Proclamation was racist and gendered because whilst it did not define “head of family”, it used only masculine pronouns in its text. Therefore, ULTRA recognised and converted rights which had been acquired through a discriminatory legislative framework. In addition, ULTRA provided for the automatic upgrade without the accompanying review mechanism. The High Court found section 2(1) to be inconsistent with the Constitution.

The Constitutional Court (the Court) explored the systematic exclusion and disenfranchisement of African women during apartheid and found that often, the exclusion was executed in a seemingly gender-neutral manner. Apartheid further exacerbated their status because patriarchy was reinforced via legislation. The Court said that the matrimonial property systems of the TBVC states dispossessed African women of property rights in favour of men. Further, the language of the Proclamation made it clear that the legislature envisaged situations where only men could be the head of a family. This was emphasised by the Court when measuring the provision against the equality clause, which protects everyone from both direct and indirect discrimination. The Court noted that the property clause requires the state to take legislative and other measures to enable citizens to gain land and do so, with the objects and purports of the Constitution in mind. The Court confirmed the High Court’s order retrospectively to 27 April 1994 - when the Interim Constitution came into effect. This is to offer remedy to women like Ms Rahube, who were usurped of their property rights due to discriminatory legislation.

The judgment is important because of the particular history of African women during apartheid. As part of an already vulnerable group, race, class and gender compounded their suffering. What the judgment does is ask whether under the new democracy, an African woman truly benefits from the Constitution. Further, the judgment is a victory for security of tenure for women and emphasises the importance for access to both formal and substantive equality. The judgment also illustrates how a seemingly progressive and neutral law can be discriminatory for vulnerable groups such as African women. Despite the progressive intentions of ULTRA, however, its roots in discriminatory apartheid legislation fell far short of the constitutional goals of equality as well as rights to housing, property and tenure security. It is important for the legislators, when seeking to redress past inequalities, to adopt a contextual approach and consider South Africa’s particular history of exclusion and rights violations.