CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 308/18

In the matter between:

GRAHAM ROBERT HERBERT N.O.	First Applicant
KEVIN LAWRENCE COTTERRELL N.O.	Second Applicant
DAWN EARP N.O.	Third Applicant
JAMES THOKOANA MOTLATSI N.O.	Fourth Applicant
STEWART STRAUSS TRUSWELL N.O.	Fifth Applicant
and	
SENQU MUNICIPALITY	First Respondent
REGISTRAR OF DEEDS, MTHATHA	Second Respondent
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	Third Respondent

Neutral citation:	*Graham Robert Herbert N.O. and Others v Senqu Municipality and Others* [2019] ZACC 31
Coram:	Cameron J, Froneman J, Jafta J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J
Judgments:	Jafta J (unanimous)
Heard on:	21 May 2019
Decided on:	22 August 2019

Summary: [Land Affairs General Amendment Act 61 of 1998] — [constitutionality of section 1] — [section is inconsistent with the Constitution]

[Upgrading of Land Tenure Rights Act 112 of 1991] — [constitutionality of section 25A] — [section is inconsistent with the Constitution]

[Upgrading of Land Tenure Rights Act 112 of 1991] — [applicability of section 3]

ORDER

On appeal for confirmation of the order of the High Court of South Africa, Eastern Cape Division, Grahamstown:

1. The declaration of invalidity made by the High Court of South Africa, Eastern Cape Division, Grahamstown is confirmed.
2. Section 1 of the Land Affairs General Amendment Act 61 of 1998 and section 25A of the Upgrading of Land Tenure Rights Act 112 of 1991 are declared to be inconsistent with the Constitution and invalid to the extent that they do not extend the applicability of section 3 of the Upgrading of Land Tenure Rights Act to the entire Republic of South Africa.
3. As from the date of this order section 25A of the Upgrading of Land Tenure Rights Act shall be read as if it makes no reference to section 3.
4. Senqu Municipality and the Minister of Rural Development and Land Reform are ordered, jointly and severally, to pay the applicants' costs in this Court, including the costs of two counsel.

JUDGMENT

JAFTA J (Cameron J, Froneman J, Khampepe J, Ledwaba AJ, Madlanga J, Mhlantla J, Nicholls AJ and Theron J concurring):

Introduction

[1] These confirmation proceedings concern legislation that sought to extend the scope of the Upgrading of Land Tenure Rights Act[1] (Upgrading Act), to cover the whole country. The complaint relates to a provision that excluded certain sections of the Upgrading Act from the rest of the Act whose operation was extended to the entire country. The applicants successfully challenged the validity of the exclusion in the High Court. They now seek confirmation of the declaration of invalidity made by that Court.

[2] The Upgrading Act constitutes land reform which commenced during the final years of the apartheid era. Its object was to grant Africans a secure form of land tenure, which until then they could not have, owing to discriminatory laws of that era. The enactment of the Upgrading Act was a welcome development and brought relief to millions of Africans who had been denied the right to own land in the country of their birth.

[3] But due to a related policy of apartheid, that relief was not available to all Africans who suffered similar deprivation. This was because when the Upgrading Act was passed, some parts of South Africa had been balkanised into the so-called TBVC "states".[2] These territories were excluded from the rest of the country and were not subject to the laws passed by the South African Parliament, from the date on which each

[1] 112 of 1991.

[2] These comprised the homelands of Transkei, Bophuthatswana, Venda and Ciskei which were granted "independence" by the apartheid government.

territory attained "autonomy". This meant that when the Upgrading Act was passed, its application did not extend to the TBVC states.

[4] This continued to be the position even after their reincorporation into the rest of the country. When the interim Constitution came into force in April 1994, all homelands which were established by the apartheid state, including the TBVC states, became part of a unitary South Africa.[3] But these states had their own legislative bodies with authority to pass laws over each territory. Those laws were limited to each territory, just like laws passed by Parliament of the old order whose application was restricted to the area constituting the old South Africa.

[5] The interim Constitution permitted all those laws to continue in operation provided they were not inconsistent with it. Section 229 of the interim Constitution proclaimed that all laws in existence when it came into operation would remain in force until amended or repealed by a competent authority. As a result from area to area there were differences in laws that dealt with the same subject matter. But sometimes Parliament of the old South Africa would pass laws which were not replicated in the homelands. The Upgrading Act was one such legislation. Its operation was extended to the rest of the country by the Land Affairs General Amendment Act[4] (Amendment Act) which came into effect on 28 September 1998.

Historical context of rights

[6] The tenuous rights in land that were available to Africans were regulated by various pieces of legislation which were passed over a period of time. The first legislation that deprived Africans the right to own land was the Native Land Act[5] which

[3] Although the homelands which were not part of the TBVC states like KwaZulu were still part of South Africa, they had their own legislative bodies and had their own laws.

[4] 61 of 1998.

[5] 27 of 1913.

was followed by the Native Trust Land Act.[6] Describing the prejudicial effects of these Acts to Africans, Madala J stated:

> "The 1913 Land Act continued the process of dispossessing black persons of land and put in place a system of land use and occupation which was calculated to be legally insecure, racially discriminatory and devised to obliterate investment opportunities for black persons, whether in urban or rural areas. Black people were to be accommodated in the urban areas only as temporary sojourners and contract workers who were expected to return to their rural homes on the expiry of their labour contracts or so soon as they were no longer in employment. In terms of this Act, the black majority population of South Africa was allocated 13% of the land while 87% went to the minority white population.
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> . . .
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> This process was carried further by the Native Trust and Land Act (the 1936 Land Act) in terms of which black people lost even the right to purchase land in the reserves and were obliged to utilise land administered by tribal authorities appointed by the government. Black families who had owned land under freehold title outside the so-called reserves before 1913 were initially exempted from the provisions of the 1913 Land Act: this resulted in a number of so called 'black spot' communities in areas designated for whites. Later they were the subject of further forced removals which took place between the 1950s and the 1980s."[7]

[7] The Native Trust and Land Act established the South African Native Trust which owned 13% of the land that was reserved for use by Africans. However, access to this land by Africans was governed by Proclamation 293 of 1962 which was issued in terms of the Native Administration Act.[8] The Proclamation afforded Africans rights in land which could not be equated to ownership. Africans were given permits to occupy land or deeds of grant. These rights could be cancelled by authorities for a variety of reasons

[6] 18 of 1936.

[7] *Western Cape Government: in re DVB Behuising v North West Government* [2000] ZACC 2; 2001 (1) SA 500 (CC); 2000 (4) BCLR 347 (CC) (*DVB Behuising*) at paras 76-7.

[8] 38 of 1927.

and upon cancellation, those who had lost rights were often required to leave the area where they had lived.[9]

[8] The 13% of land that was reserved for use by Africans was later divided into homelands, with cooperation of certain traditional leaders. And some of these traditional leaders became leaders of those homelands which were established along ethnic lines. Homelands were established for AmaZulu, AmaXhosa, Batswana, Basotho, Bapedi, AmaNdebele, VhaVhenda and VhaTsonga. Each homeland was granted a degree of autonomy which included legislative and executive powers. This meant that the homeland governments could pass laws over their respective territories. Acts of Parliament that were passed after the homelands were granted autonomy, generally did not apply to homeland territories. Later Transkei, Bophuthatswana, Venda and Ciskei were granted "independence" and became known as the TBVC states.

[9] However, even in the homelands black people did not enjoy secure rights in land, outside urban areas. This is because the big part of the land continued to be administered by traditional authorities in terms of apartheid laws which permitted black people nothing more than tenuous occupational rights. Access to land could be attained through a permission to occupy. This land tenure system continues to apply even today, despite the adoption of the Constitution in 1994.

[10] The Upgrading Act was enacted to give black people secure rights in land. It permitted them to convert their occupational rights into ownership. However, the difficulty was that its operation was limited to the area that comprised the old South Africa. This was corrected in 1998 when the application of the Upgrading Act was extended to cover the entire country. But even then three sections, including section 3, were omitted from the extended application. This means that to date many victims of apartheid who are located in the former homelands cannot convert their occupational and other insecure rights into secure rights.

[9] A detailed list of rights that were enjoyed under the Proclamation is to be found in *DVB Behuising* above n 7 at para 53.

[11] Teba Property Trust, represented in these proceedings by its trustees, claims to be the holder of a right in land described as a permission to occupy. It asserts that this right was granted to its predecessor in terms of legislation that preceded the Proclamation. The permission was granted in September 1949. The right relates to the piece of land situated in the small town of Sterkspruit which was part of the "independent" Transkei.

Litigation background

[12] Sterkspruit now forms part of Senqu Municipality in the Eastern Cape Province. For over 10 years, the Trust has been engaged in talks with the Municipality about the transfer of the land it occupies. The Trust wanted the land to be transferred to it, but the Municipality resisted the claim. The stance taken by the Municipality led to the present litigation.

[13] In May 2016 the Trust, through its trustees, the applicants, launched an application in the Eastern Cape Division of the High Court for an order declaring that its permission to occupy constitutes "a land tenure right referred to in item 2 of Schedule 2 of the Upgrading of Land Tenure Rights Act 112 of 1991". It also sought an order directing the Municipality to submit a deed of transfer to the Registrar of Deeds in Mthatha. The Municipality and the Registrar of Deeds were cited as respondents. However, the application was opposed by the Municipality only.

[14] The Municipality pointed out that section 3 of the Upgrading Act on which the Trust relied for its claim did not apply to the area that formed part of the former Transkei. The Trust responded by challenging the validity of the provision in terms of which the extension of the Upgrading Act was effected. As stated, the extension was done in terms of the Amendment Act which amended the Upgrading Act by introducing section 25A. This section provides that the Upgrading Act shall apply throughout the country, except sections 3, 19 and 20.

[15] The Trust invoked sections 9(1) and 25(1) of the Constitution in impugning the Amendment Act and section 25A of the Upgrading Act. With regard to the equality claim, the Trust asserted that its right to equality before the law and the right to equal protection and benefit of the law were limited unjustifiably by excluding section 3 from the extended territorial application of the Upgrading Act. Regarding deprivation of property, the Trust contended that the impugned exclusion deprives it of "the legally secure tenure which would otherwise be provided to it by virtue of section 3".

[16] The constitutional challenge necessitated joinder of the Minister of Rural Development and Land Reform who is responsible for the administration of the Upgrading Act. While accepting that the impugned provisions were not justifiable, the Minister opposed the relief sought on the grounds advanced by the Municipality. She added the assertion that Parliament has already begun the process to pass a Bill designed to cure the defect raised by the Trust. The Minister stated that the Bill in question would be passed within a period of 12 months.

[17] Apart from the inapplicability of section 3 of the Upgrading Act, the Municipality had raised a number of defences. These included the lack of legal standing by the Trust; its use of the property contrary to the conditions of the permission to occupy; its lack of compliance with statutory provisions in terms of which the permission was granted and the validity of the consent granted by the Transkei Government that the permission to occupy could be ceded to the Trust.

[18] At the hearing, the High Court granted an order that separated the claim for invalidity from the other issues. The Court proceeded to adjudicate the invalidity claim and postponed the determination of the remaining issues to an unspecified future date.

[19] The High Court held that the exclusion of section 3 in the extended geographical application of the Upgrading Act was inconsistent with section 9 of the Constitution. That Court also concluded that the relevant exclusion denied the Trust an opportunity to convert its right into ownership and that constituted deprivation of property

proscribed by section 25(1) of the Constitution. The Court rejected the argument advanced by the Minister to the effect that there was no need for a declaration of invalidity in view of the Bill that remedied the defect and which was then pending before Parliament.

[20] The High Court declared that section 1 of the Amendment Act and section 25A of the Upgrading Act were inconsistent with the Constitution, to the extent that they excluded section 3 of the Upgrading Act from applying to the entire Republic. To remedy the defect, the High Court declared that section 25A should be read as not making any reference to section 3.

Confirmation

[21] Declarations of invalidity concerning national and provincial legislation must be confirmed by this Court before they may come into force.[10] Before this Court may confirm an order of invalidity like the present one, it must be satisfied that legislation declared invalid is indeed inconsistent with the Constitution. This requires the Court to enquire into the validity of the relevant legislation and test its validity against provisions of the Constitution relied upon in the challenge.

[22] A good point at which to begin this inquiry is to interpret the relevant provisions so as to determine what they mean. Once this is done, the provisions must be measured against the relevant clauses of the Constitution.

[23] This Court has had the occasion to consider the Upgrading Act before. In *DVB Behuising* the purpose of the Act was defined in these words:

[10] Section 172(2)(a) of the Constitution provides:

> "The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

> "As part of apartheid policy, a range of insecure forms of land tenure were created for Africans. In 1991, during the period of transition from apartheid to democracy, Parliament passed the Upgrading of Land Tenure Rights Act (the Upgrading Act). The express purpose of this legislation, as its name suggests, was to provide for the conversion into full ownership of the tenuous land rights which had been granted during the apartheid era to Africans. One of the forms of tenure targeted for upgrading is the deed of grant established by the proclamation. When the Upgrading Act was introduced, it was not applicable in Bophuthatswana but it was extended to Bophuthatswana on 28 September 1998 by the Land Affairs General Amendment Act, which made provisions of the Upgrading Act applicable throughout South Africa. Deeds of grant in some but not all townships were converted into ownership in terms of the provisions of section 2(1) of the Upgrading Act. Section 6(1) of the Upgrading Act provides, in effect, that the land tenure and registration provisions of the proclamation will continue to apply in townships in respect of which no general plan has been approved or in respect of which a township register has not been opened in a deeds registry established under the Deeds Act. It is clear that, in this case, the relevant township in the North West province, Meriteng, is not a township in respect of which a township register has been opened. At this stage, therefore, the provisions of the proclamation would, but for their repeal, still apply there."[11]

[24] It is apparent from this statement that the Upgrading Act targets for conversion into ownership tenuous land rights which were granted to Africans. It is not clear from the papers whether the Trust falls within the class or group of people in the interest of whom the Act was enacted. What is clear though is that the Trust and its predecessors were actively involved in the implementation of shameful policies of the apartheid government by recruiting black workers to provide cheap labour for the mining industry. Those workers travelled long distances from their homes and families and were obliged to work under the most appalling conditions, while living in single-sex hostels, which exposed them to all sorts of illnesses and dangers associated with mining operations and arising from their migrant status.[12]

[11] *DVB Behuising* above n 7 at para 105.

[12] *Mankayi v AngloGold Ashanti Ltd* [2011] ZACC 3; 2011 (3) SA 237 (CC); 2011 (5) BCLR 453 (CC).

[25] However, the constitutional and legal question whether the Trust is entitled to claim conversion of rights under the Upgrading Act is not before this Court. Consequently, we need not express any opinion on it. The sole issue placed before this Court for determination is the question whether the relevant provisions are inconsistent with the Constitution.

Meaning of section 25A

[26] Section 25A of the Upgrading Act provides:

> "As from the coming into operation of the Land Affairs General Amendment Act, 1998, the provisions of this Act, excluding sections 3, 19 and 20, shall apply throughout the Republic."

[27] The text employs simple and clear language. It extends the provisions of the Upgrading Act to apply throughout the country. However, this provision also carves out sections 3, 19 and 20 from this extension. The extension came into force on 28 September 1998 at the time the Amendment Act came into operation. It has taken Parliament more than seven years to extend the benefits of the Act to the entire country. It will be recalled that the areas on which the Act did not apply were those which were exclusively reserved for Africans under the apartheid government. These were the homelands including the TBVC states and Transkei was part of them. But to add salt to injury, people in those areas were permitted to convert rights to ownership only in terms of section 2 of the Upgrading Act. For unexplained reasons, section 3 was excluded.

[28] Evidently the partial extension of the Upgrading Act perpetuated the unequal protection and benefit of the Act on victims of the discriminatory laws of the apartheid era. This unequal treatment applied between people who held land tenure rights in the old South Africa and those who were forced to live in the homelands. In addition, the unequal protection occurred even among those who held tenuous rights in the homelands. Those who held rights convertible in terms of section 2 of the

Upgrading Act could convert their rights into ownership as from September 1998. But those who held rights governed by section 3, could not and are still not permitted to convert.

Constitutional breach

[29] It is this unequal benefit and protection of the law which the Trust relied on in impugning the relevant provisions on the ground that they were not consistent with the rights guaranteed by section 9(1) of the Constitution. This section provides:

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

[30] The test for determining whether an impugned provision is inconsistent with section 9(1) was laid down in *Harksen*.[13] At the first stage a court has to determine whether the provision differentiates between people or categories of people. As illustrated above, section 25A of the Upgrading Act differentiates between holders of land tenure rights by not allowing those who hold rights governed by section 3 to convert their rights to ownership if these people are in the homelands. In contrast, holders of the same rights in the area that constituted the old South Africa were permitted to convert their rights as from September 1991. Furthermore, section 25A differentiates between the holders of land tenure rights in the former homelands. The differentiation is between the holders of rights which may be converted under section 2 and those whose rights may be converted in terms of section 3. In the former homelands, the latter group is denied the right to convert.

[31] Once the existence of a differentiation is established the inquiry may proceed to the second stage which is whether there is a rational link between the differentiation in question and a legitimate government purpose.[14] Here the relevant Minister has failed

[13] *Harksen v Lane NO* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 43.

[14] Id.

to identify any purpose served by the differentiation. Instead, the affidavit filed on behalf of the Minister stated:

> "The Department's considered policy is that there appears to be no reason in law or logic why the provisions of the Act – which was designed to strengthen land rights in accordance with the constitutional property clauses – should not reflect, and be made, applicable to the entire new democratic Republic of South Africa."

[32] This demonstrates beyond doubt that the differentiation created by section 25A is irrational. It does not serve any government purpose, let alone a legitimate one.

[33] What aggravates the objection to this particular differentiation is the fact that it seeks to perpetuate the obnoxious apartheid policy of dividing the country into homelands which were nothing else but impoverished areas reserved for Africans. This differentiation sustains the impairment of the human dignity of the affected black people. With regard to differentiation created by separate pieces of legislation in *Mabaso*, this Court stated:

> "The differentiation drawn in the Act between those who were admitted under the Act itself, and those admitted under other legislation enacted in the former 'homelands' needs to be evaluated in the light of the history of the 'homelands'. They were invented and established by the pre-democratic government, as part of apartheid policy, in an attempt to allocate small and generally poor areas of South Africa to black people. The disastrous and impoverishing effects of this policy are well-known. In excluding attorneys admitted under 'homeland' legislation from benefiting under the provisions of section 20, the Act clearly discriminates between those attorneys admitted in terms of 'homeland' legislation and those admitted in terms of the Act. This discrimination reinforces and perpetuates a pattern of disadvantage which exists between "homeland" areas and the rest of South Africa. Accordingly, the discrimination has the potential to impair the fundamental human dignity of those adversely affected. Our Constitution expressly seeks to avoid the perpetuation of such patterns of disadvantage and the concomitant impairment of human dignity."[15]

[15] *Mabaso v Law Society, Northern Provinces* [2004] ZACC 8; 2005 (2) SA 117 (CC); 2005 (2) BCLR 129 (CC) at para 38.

[34] In the circumstances, I conclude that the impugned provisions limit the rights in section 9(1) of the Constitution. Although the High Court had held in addition that the provisions concerned also breached the prohibition against unfair discrimination, and as a result, were inconsistent also with section 9(3), it is not necessary to determine this issue in light of the view I take of the matter in relation to section 9(1).

[35] What remains for consideration is whether the limitation established meets the requirements of section 36 of the Constitution.[16] This section requires that a limitation of a right in the Bill of Rights must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Here the limitation is in the form of an irrational differentiation. By nature an irrational limitation cannot be reasonable nor can it be justifiable. The deponent to the affidavit, filed on behalf of the Minister, asserted that the limitation imposed by the Upgrading Act was not justifiable. Accordingly, the declaration of invalidity made by the High Court must be confirmed.

[36] The discriminatory differentiation to which millions of black people continue to be subjected in the former homelands should have been remedied a long time ago. There can be no excuse for having extended it beyond September 1998 when the Upgrading Act was made to cover the entire country. In *Mabaso* this Court lamented

[16] Section 36(1) of the Constitution provides:

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

the continuing presence of discriminatory legislation of the apartheid era on the statute books:

> "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."[17]

[37] In the former homelands access to land and occupation of land are still regulated by legislation that was passed by Parliament and other legislative bodies of the apartheid era. Many people continue to be denied secure land tenure rights. They are not afforded rights better than occupational rights in land which may be terminated in terms of the old order laws. As noted here the continuing operation of laws that deny black people secure rights in land is inconsistent with the Constitution, our supreme law. The dignity of the affected people is persistently impaired by the enforcement of those laws. The victims of the unfair differentiation brought about by these laws have become second class citizens to whom the fruits of the Constitution remain a dream, deliberately kept out of their reach.

[38] It is not necessary for present purposes to determine whether section 25(1) of the Constitution is also infringed. The breach of section 9(1) is sufficient.

Remedy

[39] At the hearing of the matter the Municipality urged this Court to suspend the declaration of invalidity for a period of time, contending that it is just and equitable to do so. But it could not point to any facts on the record which warrant suspension of the order. In a number of decisions, this Court has stated that suspension is not there for the asking. A party that seeks to have an order of invalidity suspended must place on record facts justifying suspension.[18] In *Chief Lesapo*, the Court held:

[17] *Mabaso* above n 15 at para 42.

[18] *S v Mello* [1998] ZACC 7; 1998 (3) SA 712 (CC); 1998 (7) BCLR 908 (CC) at para 11; *S v Julies* [1996] ZACC 14; 1996 (4) SA 313 (CC); 1996 (7) BCLR 899 (CC) at para 4; *S v Mbatha, S v Prinsloo* [1996] ZACC 1; 1996

> "Counsel agreed that, should section 38(2) be found to be unconstitutional and invalid, this Court would need to suspend its order of invalidity in terms of section 172(1)(b)(ii) of the Constitution. However, there was no evidence to support that submission, nor are there any other grounds for so doing. This Court has, in several of its judgments, stressed the importance of laying a proper foundation for the granting of ancillary orders of suspension of invalidity, retrospectively or prospectively. Although the rule was formulated in terms of section 98(6) of the interim Constitution, which required this Court to take into account 'the interests of justice and good government' before suspending an order of invalidity, these requirements are included in section 172(1)(b)(ii) of the Constitution, which provides that an order made must be 'just and equitable'. Such evidence would relate to what the effect of the order would be on the successful litigant and on those prospective litigants in positions similar to that of the former, as well as the effect on the administration of justice or State machinery. No such evidence is before this Court. There is therefore no basis for this Court to suspend an order of invalidity."[19]

[40] Moreover, a suspension of an order of invalidity is usually granted to avoid an injustice or serious disruption of good government.[20] In other words, the purpose served by the invalid statutory provision must outweigh the constitutional breach relied on.[21] Otherwise the supremacy of the Constitution must be given effect to by allowing a declaration of invalidity to take immediate effect. It is where the immediate operation of the order would create a void from which greater injustice or serious disruption of good governance would flow that the need to suspend would be warranted.

[41] Not only was there a failure to make out a case for suspension but the impugned provisions are plainly so inconsistent with the equality clause and so indefensible that

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(2) SA 464 (CC); 1996 (3) BCLR 293 (CC) at para 30; and *S v Bhulwana, S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 30.

[19] *Chief Lesapo v North West Agricultural Bank* [1999] ZACC 16; 2000 (1) SA 409 (CC); 1999 (12) BCLR 1420 (CC) at para 33.

[20] *J v Director General, Department of Home Affairs* [2003] ZACC 3; 2003 (5) SA 621 (CC); 2003 (5) BCLR 463 (CC).

[21] *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa; Sheard v Land and Agricultural Bank of South Africa* [2000] ZACC 9; 2000 (3) SA 626 (CC); 2000 (8) BCLR 876 (CC).

there is no justification for allowing them to continue in operation for even a limited period.[22] Those who are denied the benefits of section 3 should not be made to wait much longer before they may convert their insecure rights.

[42] However, since the challenge was limited to the exclusion of section 3 only in the extended territorial reach of the Upgrading Act, the declaration of invalidity need not go beyond that claim. This means that, barring section 3, the exclusion in section 25A may continue to operate.

[43] The Municipality cautioned against confirmation of the order of invalidity. It argued that section 3 itself may well be unconstitutional. Reliance was placed on *Rahube*[23] where this Court declared that section 2(1) of the Upgrading Act was inconsistent with the Constitution to the extent that it limited rights to be converted to those which were held by men under the racist apartheid legislation. This argument is misguided. *Rahube* is irrelevant. The declaration of invalidity here is limited to the exclusion of section 3 by section 25A. Confirmation of that declaration does not insulate section 3 from constitutional challenges in the future. Since there was no attack directed at section 3 in the High Court, that Court did not and could not have pronounced on the validity of section 3. Therefore, confirmation of the order of invalidity made by that Court may not be withheld on the speculative ground that section 3 may well be unconstitutional.

[44] The order granted by the High Court sufficiently addresses the defect pertaining to section 3. That order must be endorsed. As this Court observed in *DVB Behuising*—

> "the provisions of section 25 of the Constitution and the Upgrading Act are clear indications that apartheid forms of land tenure that are legally insecure are no longer to be tolerated in our new democratic dispensation."[24]

[22] *Coetzee v Government of the Republic of South Africa, Matiso v Commanding Officer, Port Elizabeth Prison* [1995] ZACC 7; 1995 (4) SA 631 (CC); 1995 (10) BCLR 1382 (CC) at para 18.

[23] *Rahube v Rahube* [2018] ZACC 42; 2019 (2) SA 54 (CC); 2019 (1) BCLR 125 (CC).

[24] *DVB Behuising* above n 7 at para 69.

[45] To postpone the application of section 3 to the areas that formed homelands under the previous order would perpetuate further the denial of secure rights in land to those who were precluded from enjoying those rights on racist grounds. In the circumstances of this case, there is simply no justification for the delay. It is now 25 years since the democratic order was established under a Constitution that was designed to dismantle all racist laws and practices of the apartheid era. Section 25(6) of the Constitution proclaims that those whose tenure was insecure as a result of past racially discriminatory laws or practices are entitled to tenure that is legally secure.[25] The restoration of the dignity of many black people who were subjected to racial discrimination should not be delayed any further.

[46] It is egregiously unfair to afford redress to some of the victims of discrimination under apartheid and withhold that redress from other victims on the basis of where they are currently located. Under our democratic order there can be no justification for denying secure rights to a large group of people on the account of where they live in the country. Nor can there be good reason for a land tenure that continues to entrench insecure land rights of the apartheid era. The Constitution guarantees equality to everyone. This means that people of all races are entitled to equal land rights, regardless of where they live in the country. Any land tenure system that affords people less secure rights in land on the basis of where they are located is inconsistent with the Constitution and the values on which our Constitution was founded.

[47] Millions of black people in this country continue to live in the 13% of the land that was reserved for Africans under the 1913 Land Act. This is because the former homelands to which they were forcibly removed were located on that 13% of the land. To this day those millions continue to have insecure land rights which were afforded to

[25] Section 25(6) of the Constitution provides:

> "A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress."

them during apartheid. To date many of them may access and occupy land through the means of a permit to occupy issued by authorities. This is not in line with the Constitution which imposes upon the State the obligation to "respect, protect, promote and fulfil the rights in the Bill of Rights".[26]

[48] By enacting section 25A of the Upgrading Act, Parliament acted in a manner that was at odds with the obligation to promote the fulfilment of the rights in the Bill of Rights. This shortcoming is compounded by the fact that there is no good reason for depriving those in the former homelands, the benefits brought about by the Upgrading Act.

Costs

[49] The Trust has succeeded in having the declaration of invalidity confirmed. I can think of no reason for not allowing it to recover its costs in this Court.

Order

[50] In the result the following order is made:

1. The declaration of invalidity made by the High Court of South Africa, Eastern Cape Division, Grahamstown is confirmed.

2. Section 1 of the Land Affairs General Amendment Act 61 of 1998 and section 25A of the Upgrading of Land Tenure Rights Act 112 of 1991 are declared to be inconsistent with the Constitution and invalid to the extent that they do not extend the applicability of section 3 of the Upgrading of Land Tenure Rights Act to the entire Republic of South Africa.

3. As from the date of this order section 25A of the Upgrading of Land Tenure Rights Act shall be read as if it makes no reference to section 3.

[26] Section 7(2) of the Constitution.

4. Senqu Municipality and the Minister of Rural Development and Land Reform are ordered, jointly and severally, to pay the applicants' costs in this Court, including the costs of two counsel.

For the Applicants:	I J Smuts SC and J G Richards instructed by Lexicon Attorneys
For the First Respondent:	J De Waal SC and Y S Ntloko instructed by Le Roux Inc
For the Third Respondent:	T J M Paterson SC instructed by the State Attorney