HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 33497/2018

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.
DATE 4 September 2019
SIGNATURE

In the matter between:

MAMPHOPHA DAVID RAKGASE First Applicant

MMOFA AMON RAKGASE Second Applicant

and

MINISTER OF RURAL DEVELOPMENT AND LAND REFORM First Respondent

MEMBER OF THE LIMPOPO EXECUTIVE COUNCIL FOR AGRICULTURE AND RURAL DEVELOPMENT Second Respondent

Coram: Davis J

Land – Land Reform – Duty of State – failure to comply with Constitutional imperatives – decision not be sell land to an African farmer who qualified for a grant – failure to convert

tenuous land rights when able to do so – amounting to a breach of Constitutional obligation.

Administrative action- review – Failure to furnish reasons, failure to act rationally, failure to act reasonably, failure to hear an affected person – decision not to sell State land to 78 year old applicant but to a decide on a long term (30 years) lease reviewable on all these grounds.

JUDGMENT

DAVIS, J

Introduction

[1] MR Rakgase ("the Applicant") is currently 78 years old. He has been farming on certain portions of the farm Nooitgedact in the Limpopo Province ("the farm") since 1991. He had initially leased the farm from the (then) Bophutatswana homeland government and subsequently from the National Government who now owns the farm. In 2003 the Provincial Grant Committee of the National Department of Agriculture approved his application to purchase the farm through the then operative Land Redistribution for Agricultural Development Programme ("LRAD"). Seven years later, the delegate of the relevant minister decided not to approve the sale of the farm to the Applicant, but rather to lease it to him for a period of 30 years, ostensibly to see if he qualifies to purchase the farm. It is this decision which formed the subject matter of the present review application. The Second Applicant is the Applicant's son, who also lives and farms on the farm in question.

[2] The issue of land distribution in the Constitutional and legistative context:

2.1 In the Bill of Rights Handbook (Currie & De Waal, Sixth Edition) at 25.2 the learned authors state that property clauses in modern bills of rights,

protecting some or other formulation of the 'right to property' embody three broad categories of rights claims. These are:

1) Claims to immunity against uncompensated expropriation of private property (this category is not relevant to the present application as the State is already the owner of the land).

2) A claim of eligibility to hold property. The best example of recognition of such a claim in human rights instruments is article 17 of the Universal Declaration of Human Rights: "*Everyone has the right to own property, alone as well as in association with others*".

3) A claim to have property. This claim is based on the premise that all people have a moral right to have at least enough property to enable them to survive or to lead a dignified existence.

2.2 The Bill of Rights contained in our Constitution provides in Section 25 (2) 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*".

2.3 Eighteen years ago, the Constitutional Court, in Government of the Republic of South Africa v Grootboom & Others 2001 (1) SA 46 (CC) explained how the Constitutional imperatives regarding these rights should be achieved.

> "*The State is required to take reasonable legislative and other measures. Legislative measure by themselves are not likely to constitute Constitutional compliance. Mere legislation is not enough. The State is obliged to act to achieve the intended result,*

and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the Executive. These policies and programs must be reasonable both in their conception and their implementation. The formulation of a program is only the first stage in meeting the State's obligations. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State's obligations". (my emphasis for purposes of this judgment).

2.4 In the present instance, neither these rights nor the legislative framework enabling these rights were in dispute. In fact, the deponent for the First Respondent (the Minister) states the following in answering papers:

"*13. Land redistribution forms one part of the government's land reform programme, alongside restitution and tenure reform. All three aspects of the land reform programme are ultimately derived from section 25 of the Constitution of South Africa.*

16. The piece of legislation governing land redistribution is the Provision of Certain Land for Settlement Act 126 of 1993, which provides for the designation of land for settlement purposes and financial assistance to people acquiring land for settlement support. It has since been renamed twice: first, as the 'Provision of Land and Assistance Act, by an amendment, Act 26 of 1998'; second, as the 'Land Reform: Provision of land and Assistance Act', by an amendment, Act 58 of 2008.

18. Land redistribution is that part of land reform where by people apply for financial and other assistance with which to acquire land for farming, and sometimes settlement purposes. Whereas tenure reform is mainly effected through legislation and associated processes regarded as 'rights based' interventions, and the explicit function of restitution is to provide for restorative justice, the purpose of land redistribution is primarily economic, namely to reduce poverty and/or promote opportunities for economic advancement through agriculture".

2.5 To further enable the implementation of the State's Constitutional obligations referred to above, the then Department of Land Affairs launched a revised redistribution programme, the "LRAD" referred to in paragraph [1] above in August 2001. The key mechanism of the LRAD was a grant system which beneficiaries could access. Beneficiaries were also required to make an own contribution to the prospective acquisition, either in cash or in kind, the size of which would be taken into account in determining the size of the grant.

2.6 The Minister's deponent explains the functioning of the LRAD as being an improvement on the previous Settlement/Land Acquisition Grant System ("SLAG") in operation from 1995 to 1999 as follows:

"*28. The LRAD differed from SLAG in a number of important respects. For the current matter it is worthwhile to note that the approval and implementation of projects was decentralized to provincial and district level, and closer cooperation was expected between various government*

departments and spheres of government, with an enhanced role for district municipalities and provincial departments of agriculture.

29. *LRAD grants could be used for the outright purchase of freehold land or for leasing land with an option to purchase, as long as such land would be used at least partially for agricultural purposes. It could also be used to contribute towards investments in land.*

30. *Though the LRAD grant was primarily intended to assist applicants to acquire farmland, and the policy promoted the acquisition of privately-owned commercial agricultural land, other sources of land, such as state land and land repossessed by the Land Bank, are not precluded. The State did not generally acquire land on behalf of applicants or take steps to ensure that land is available in areas or in quantities that suit applicants. Whether LRAD beneficiaries buy private land or acquire state-owned land, the price is usually market-related"* (the aim was therefore acquisition of ownership and not mere securing of occupancy or tenure).

[3] Relevant chronology

It is within the above legislative framework and the programmes for implementation of the Constitutional imperatives, taking into account the close co-operation between various organs of state referred to in paragraph 28 of the affidavit deposed to on behalf of the Minister as quoted above, that the following occurrences took place:

3.1 On 7 November 2002 the Land Bank office in Limpopo valuated the farm at a productive value of R621 000.00.

3.2 Officials from the Limpopo Provincial Department of Land Affairs approached the Applicant and offered him in writing an opportunity to purchase the farm. He immediately accepted this offer, also in writing.

3.3 On 3 January 2003 the Provincial Grant Committee (a joint committee of the relevant National and Provincial departments) approved the purchase of the farm by the Applicant. This involved an assessment of the viability of the farm and the ability of the Applicant.

3.4 On 26 February 2003 the Provincial Director of the National Department of Land Affairs in writing reported to the Public Land Support Services that the purchase of the farm had been approved as mentioned above, that a memorandum "*for the issuing of an Item 28(1) Certificate for vesting and disposal has been submitted to the Minister*" and upon receipt of the certificate, transfer will take place. The letter mentions that the Applicant has been "updated" in this regard.

3.5 On 16 April 2003 the Provincial Government confirmed that on date thereof the Applicant was still leasing the farm but that "*he has also bought it through LRAD*" (my emphasis). They further stated that the transfer process was being handled through the State Attorney.

3.6 On 13 July 2004 the deputy manager in the Provincial Government's Waterberg District of its Department of Agriculture confirmed to ABSA bank regarding the Applicant and his permanent place of residence as follows: "*The farm is leased from the department on a contractual basis.*

Mr Rakgase has already purchased the farm but the title deed has not been registered yet" (again, my emphasis).

3.7 Some years passed since the above, but, in the interim, the Applicant had been loaned 50 Nguni Cattle from the Industrial Development Corporation through the LRAD which he used for breeding purposes. At the time of his founding affidavit, the herd had increased to 147 cattle (the total number of livestock on the farm was 500 cattle, 30 pigs, 80 sheep and 130 goats).

3.8 On 24 August 2009 the Chief Director of the Limpopo Provincial Rural Development and Land Reform Office of the National Department recommended that the Minister approve the sale of the farm to the Applicant in terms of the State Land Disposal Act 48 of 1961 and requested that the said Chief Director be authorized to sign all documents to effect the registration and transfer of the farm.

3.9 On 7 November 2009 the Limpopo Provincial State Land Disposal Committee considered the application for disposal of state land favourably and also recommended to the Minister that the sale of the farm to the Applicant be approved.

3.10 On 23 July 2010 the Deputy Director-General: Land and Tenure Reform (the "DDG") took the decision not to sell the farm to the Applicant.

3.11 The "route form" of the disposal documents indicate that it went through an approval process via various offices in the National Department from that of a project manager, through that of a manager, an executive manager, an acting director, an assistant director and those mentioned in paragraph 3.8 and 3.9 above prior to landing on the desk of the DDG.

After his decision not to approve the disposal of the land, the memorandum submitted for his approval featured the following inscription: "*The applicant to be granted a long term lease and would be considered in future for disposal, depending on performance*". In the route form this was recorded as follows: "*File returned ... the Minister did indeed not approve sale but long term lease!!*". The author of the inscription is unknown.

3.12 I interrupt this chronology to state that initially the Respondents, in their opposition to the application before court, claimed that the Minister had nothing to do with a proposed sale of land by a Provincial Government who was not the owner of the land and that the Minister never saw nor refused the disposal. In view of the documentation detailed above in the chronology of this matter, both these grounds of opposition fell by the wayside and the Respondents conceded that the DDG was the Minister's delegate in having taken the decisions referred to in paragraph 3.10 and 3.11 above and that the application was indeed aimed at a review of those decisions, i.e. not to sell but to lease only.

3.13 The Applicant was not informed of the DDG's decision/s.

3.14 On 14 June 2011, that is almost a year after the DDG's decision, the Applicant was presented with a five-year lease agreement. It did not contain an option to purchase, which prompted enquiries from the Applicant's side. The Applicant further explained to the official who had presented him with the agreement that he had already accepted the offer to purchase and was still awaiting finalization thereof. The official informed the Applicant that if he did not sign the agreement, he and his family would have to vacate the farm. At that time, some of the

Applicant's neighbours who were in a similar position than him and who had refused to sign new leases, were evicted from their farms. In these circumstances and faced with the risk of eviction but on the expectation of the processing and finalization of his sale, the Applicant signed the new lease.

3.15 Since the signing of the lease, the Applicant met with various officials from the Provincial Government who repeatedly assured him that the farm would be transferred into his name.

3.16 On 4 December 2013 the Applicant elevated his oral queries to a written one. He never received a response.

3.17 In May 2016 a number of unlawful occupiers occupied the farm, necessitating the Applicant approaching the Limpopo High Court to obtain an interim interdict to prevent the unlawful occupation of the farm. On 26 July 2018 such as interim interdict was granted.

3.18 Also in July 2016, after the expiry of the 5 years lease, the Applicant was required to apply for a further lease and to submit a business plan for the farm to the National Department, which he did to ensure his continued occupation of the farm. The plan was approved and he continued to lease the farm which he is currently still doing, apparently now on a month to month basis. At all relevant times, the Applicant has continued to pay the monthly rental of the farm. The currently proposed lease is for a period of 30 years with a possible extension thereof for another 20 years.

3.19 The interim interdict mentioned in paragraph 3.17 above was opposed by the unlawful occupiers, alleging a lack of locus standi on the part of the Applicant. He (rightly) contends that, had the transfer of the property

taken place long ago, he would not have been in this invidious position. His locus standi would then have been that of an owner of the farm.

3.20 On 15 September 2016, the Provincial Department conducted an inspection of the farm and concluded that the farm showed potential of good grazing but overgrazing has taken place as a result of the "*adverse effect of the presence of the unlawful occupiers and their ... 300 cattle*".

3.21 On 20 October 2017 the Minister applied to the Limpopo High Court for an order for the eviction of the unlawful occupiers (on 26 March 2019 the matter was postponed sine die after which it was again set down by the Minister for hearing on 15 October 2019).

3.22 On 14 May 2018 the Applicant launched the present application.

3.23 On 12 April 2019 (only) the answering affidavit on behalf of the Minister, deposed to by the acting Director-General of the National Department was filed.

3.24 On 3 May 2019 the Applicant filed his replying affidavit.

3.25 The matter eventually came before me in the Third Court on 13 August 2019.

[4] Relief sought

It is against the abovementioned background that the Applicant seeks to have the DDG's decision not to sell but to lease the farm reviewed and set aside and that the Minster be ordered to take the necessary steps to have the farm transferred to the Applicant. In the alternative a referral back to the Minister is included in the Notice of Motion. A prayer not persisted with was for a

declaration that the refusal by the Minister to grant subsidies for the acquisition of land to all other applicants who had qualified therefor under the LRAD programme constituted a breach of the Minster's obligations under section 25(2) of the Constitution. The Applicant also claimed costs. Only the Minster opposed the application (the relevant MEC in the Limpopo Provincial Government was the Second Respondent).

[5] The grounds of review and the Minister's opposition thereto:

The Applicant relied on various grounds on which he alleges that the DDG's decision should be reviewed and set aside. I shall deal with them and the opposition to each ground as succinctly as possible hereunder:

5.1 Procedural unfairness under PAJA

5.1.1 Section 3(1) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") requires a decision which materially and adversely affects the rights or legitimate expectations of any person to be procedurally fair.

5.1.2 For purposes of review under this ground, the Applicant does not rely on a substantive legitimate expectation (giving rise to a contractual obligation) but a legitimate expectation of a fair process. This is where a person concerned has a legitimate expectation that before an adverse decision is to be taken by a public authority, he will at least be given an opportunity to be heard. See Administrator, Transvaal & other v Traub and Others 1989 (4) SA 731 (A).

5.1.3 Where the Applicant had been given consistent assurances by various officials, including those of the National Department, that he not only qualifies for the acquisition of the farm, but would even be assisted in doing so, his expectation that the decision for approval of the disposal of

the land to him would follow, was reasonable, competent and lawful. See South African Veterinary Council V Szymanski 2003 (4) SA 442 SCA at para 19 and National Director of Public Prosecutions V Phillips 2002 (4) SA 60 (W) at para 28.

5.1.4 It is in dispute whether the National Department's policy had changed since the initial decision to sell the farm to the Applicant or at least since his grant approval. If it had, then such change should firstly not be applied retroactively and prejudicial to the interests and legitimate expectations of the Applicant, but, at the very least he should have been given opportunity to make representations in this regard, to the DDG. See: Premier, Mpumalanga & another v Executive Committee, Association of State-aided School, Eastern Transvaal 1999 (2) SA 91 (CC) at para 41.

5.1.5 In the present instance, it is not clear whether the DDG decided on the issue of whether to approve the disposal of the farm to the Applicant in terms of the LRAD or the Proactive Land Acquisition Strategy ("PLAS"), which has come into operation in 2006 (which aspect I shall deal with later), but what is clear is that the DDG, in considering taking an adverse decision to all the previous approvals and recommendations already referred to above, did not give the Applicant any opportunity to be heard or to make representations.

5.1.6 Counsel for the Minister argued that it was not incumbent on the DDG to furnish the Applicant an opportunity to be heard as there was no formal "application to the Minter" by the Applicant before the DDG. This argument is, in my view, clearly wrong. It ignores the express provisions of section 3 of PAJA. The Applicant is clearly a person who had

legitimate expectations to have the disposal process fairly adjudicated and who expected the sale pursuant to the approval of the grant in his favour to be considered favourably in the decision-making process. Both these expectations and rights were adversely affected by the DDG's decision and his case falls squarely in the category of circumstances contemplated in the section. The argument on behalf of the Minister also loses sight of the formulation of the DDG's decision itself as referred to in paragraphs 3.10 and 3.11 above where the Applicant was expressly (and correctly) referred to as "the Applicant".

5.1.7 The decision of the DDG should therefore be set aside on the grounds of procedural unfairness alone.

5.2 Unreasonableness under PAJA review

5.2.1 The DDG has failed, both at the time of the decision and in papers filed in the application to furnish reasons for his decision. This alone, makes the decision open to attack. See: Sections 33(1), 33(2) of the Constitution and Section 5 of PAJA, King William's Town TLC v Border Alliance Taxi Association 2002 (4) SA 152 (ECD) and Kiva v Minister of Correctional Service (2007) 28 ILJ 597 (E).

5.2.2 Apart from the requirement to furnish reasons, Section 6(2)(h) of PAJA as a separate substantive ground requires that administrative action must itself be reasonable. This means that the decision taken must not be one "that a reasonable decision-maker could not reach". See: Bato Star Fishing (Pty) Ltd v Minster of Environmental Affairs & Tourism and others 2004 (4) SA 490 (CC) at para 44.

5.2.3 The Applicant's contentions, set out in his founding affidavit in this regard are the following:

"I respectfully submit that it is inexplicable that at a time when there is quite rightly national concern about the relatively limited amount of agricultural land which is owned by black South Africans, the Minister should have a Policy which requires that

- *An experienced black farmer,*
- *Who has successfully farmed state-owned land for 27 years,*
- *Who has at all times made payment of rent which is due,*
- *Who has been training young black would-be farmers,*
- *Who wishes to buy the farm which he has leased for 27 years,*
- *Whom the Land Bank was willing to support with a loan, and*
- *Whose business plan has been approved by the Department should be required to enter into a lease for a further 30 years in order to obtain any assistance from the government's land redistribution programme, and in order to be able to remain on the farm.*

I respectfully submit that this is patently absurd, and irrational, when the person concerned is 77 years old".

5.2.4 As stated above, the DDG offered no answer to this nor were any reasons furnished why, in the above circumstances, the adverse decision would not be "absurd". The Minister's position, following on the decision of the DDG, is that the proposed long term lease as alternative to the sale of the farm to the Applicant, would be for him to lease the farm for at least it another 30 years (which may even be extended by a further 20 years). The fact that the Applicant would have to live well beyond 100 years to,

on this scenario, be eligible for consideration of purchasing the farm, glaringly illustrates the absurdity of the decision.

5.2.5 Two attempted justifications for the decision were put up in the answering affidavit filed on behalf of the Minister:

a) The decision was justifiable as being in accordance with the State Land Lease and Disposal Policy ("SLLDP"). This ground is not only without foundation but is cynical in the extreme: the SLLDP only came into operation in 2013, that is 3 years after the impugned decision had already been taken.

b) There were allegedly "competing and/or overlapping property rights and interests of others on the property". This allegation was never made by the DDG and no such alleged competing or "overlapping" rights appear from the papers. In fact, the memorandum submitted to the DDG in one of its annexures expressly states that there are no land claims on the farm. In the pending eviction application by the Minister before the Limpopo High Court referred to in paragraph 3.21 above, it was expressly stated that none of the other (unlawful) occupiers of the farm have any rights thereto. In view of these facts and the distressingly vague and laconic manner in which this allegation has been made, it rejected out of hand. See King William's Town TLC v Border Alliance Taxi Association (supra) at 156I – 175B.

5.2.6 In argument a third justification was proferred and it was this: in 2006 the (then) Minister launched the Proactive Land Acquisition Strategy "PLAS" referred to in paragraph 5.1.5 above. The Strategy was explained as follows in the statement files on behalf of the Minister:

"From 2006 when the Proactive Land Acquisition Strategy ("PLAS") was launched under then Minister of Agriculture and Land Affairs, Lulu Xingwana, it was to initially operate alongside the LRAD programme".

5.2.7 It must firstly be noted that PLAS did not replace the LRAD programme (at least not until its alleged discontinuation in 2011 or the implementation of the SLLDP in 2013). In fact, the deponent on behalf of the Minister says it was to operate "alongside" the LRAD.

5.2.8 It must secondly be noted that, despite argument to that effect, neither the DDG nor the answering papers actually said that the DDG's decision was taken in terms of the PLAS. If, as argued, it was, then were are back to the ground of review dealt with under paragraph 5.1 above where a decision-maker took a decision in terms of a policy which had not been in existence when the application for disposal of the State land in question had commenced and where the decision-maker sought to adjudicate the matter in terms of a changed policy without informing the person concerned what this change was or giving him an opportunity to be heard.

5.2.9 In oral argument, the purported reliance on PLAS was taken yet a step further: it was argued that the DDG had no choice in the matter and that in terms of PLAS he was precluded from approving disposal of State land. Not only was this not the defence relied on in the papers, but it is clearly wrong. PLAS, as explained on behalf of the Minister, was firstly a strategy whereby land was to be acquired by the State for redistribution. The farm in question was not such land as it had at all material times belonged to the State or its predecessor in various forms. It therefore never formed part of PLAS. Even if it did, PLAS did not preclude

disposal of land, it provided for "transfer or lease" as set in the following portion of the answering affidavit:

> "34. *PLAS empowers the Department to purchase land directly, rather than disburse grants to enable beneficiaries to buy land for themselves. Department could determine the which land should be acquired by the state, whether it should be transferred or leased, and if so, to whom and on what terms*". (my emphasis)

5.2.10 In the absence of any legitimate justification and, in view of the factors set out in paragraph 5.2.3 above, the DDG's decision was clearly so unreasonable that no reasonable decision-maker could have taken the decision in the fashion that he did. This ground of review must therefore also succeed.

5.3 Irrationality

5.3.1 For very much the same reasons as set out in paragraph 5.2 above, the DDG's decision appears to have been taken completely arbitrarily.

5.3.2 The Constitution requires every administrative action to be underpinned by plausible reasons, justifying the action taken. See: Minister of Justice and another v SA Restructuring and Insolvency Practitioners Association and others 2018 (5) SA 349 (CC) at para [49].

5.3.3 In the present instance, no reasons were given by the DDG at all and therefore the absence of reasons by itself renders the decision arbitrary.

5.3.4 Whilst arbitrariness is but one of the forms of irrationality, the decision itself appears to be irrational: where an organ of state is presented with an

opportunity to implement the Constitutional imperatives prescribed in section 25(2) of the Constitution and has the means to do so through a structured grant procedure for which an African farmer with a proven track record has qualified, then a decision not to sell to that farmer State land which the State does not otherwise require and which was not utilized for any other function of service delivery, appears to me to be totally irrational.

5.3.5 At the outset during argument I enquired as to the particularity of the Minster's defence or justification on the rationality test of the DDG's decision and, although counsel for the Minister argued valiantly, he could not satisfy this enquiry and the reason for this is simple: there was no answer disclosed on the papers. This ground of review should also therefore succeed.

5.4 Constitutionality

In the final instance, the Applicant argued that the DDG's decision was in breach of the Minister's Constitutional obligations. The argument set out in paragraph 5.3.4 above, to a large extent, already provides the answer to this issue. In addition, and whilst mindful of the delineation of separation of powers and the fact that whatever policy may have been in place at the relevant time is not itself being taken on review, the following must be considered:

5.4.1 Since the birth of democracy in our country in 1994, land reform, despite it being a Constitutional imperative, has been slow and frustratingly so.

5.4.2 The First National Land Policy was only published in 1997. It attempted to address the burning issue of land-related and reform orientated elements of key policy issues. It did not succeed in doing so. See inter

alia: J.M Pienaar, Reflections on the South African land reform programme, characteristics, dichotomies and tensions, Journal of South African Law 2014 para 4, 611 – 930.

5.4.3 Land Reform, by JM Pienaar, Juta & Co 2015 has been hailed as "*the most comprehensive book to date on a subject of enormous significance in South Africa*" R Spoor, SALJ, 2018 vol 135 Part 3, at 403 – 592. Both the work and the topic is so vast that it would serve no purpose to traverse the whole subject matter here. What is of importance, is that it describes how the various organs of State have struggled to achieve meaningful reform or redistribution. In the above review of the book, the disjointed attempts have been summed up as follows: "*None of the redistribution programmes, beginning with the Settlement/Land Acquisition Programme ("SLAG"), the Land Redistribution and Agriculture Development Programme ("LRAD"), the Proactive Land Acquisition Strategy Programme ("PLAS"), the Settlement and Production Land Acquisition Grant ("SPLAG") and other programmes intended to promote land reform, operate within any clearly defined legislative framework*" – Spoor, op cit. Despite the contents of the various "programmes" and "strategies", the evidence in this case confirms the ineffectiveness of either these policies or their implementation.

5.4.4 Yet another review of Land Reform (supra) by Van Wyk in Stellenbosch Law Review, 2015 vol 26, part 1 at 3 – 249 highlights the attempts to, at least, secure rights of tenure, even by way of communal land rights in instances where actual access to land distribution cannot be achieved or afforded. Security of tenure is therefore presented as the cheaper (poorer?) substitute for actual transfer of ownership. Our case law is further replete with examples of where the ineffectiveness of land reform

and restitution necessitated judicial intervention. See for example: Florence v Government of the Republic of South Africa 2014 (6) SA 456 (CC) and the numerous other decisions cited therein.

5.4.5 A recent and well researched publication, The land is ours, Tembeka Ngcukaitobi, Penguin, 2018 highlights, as many other writings do, the emotive and historical development of the concept of a Bill of Rights with specific reference to land dispossession. When such a Bill of Rights finally found its way into our Constitutional as referred to in paragraph [2] above and a Minister is presented with a perfect opportunity to realise one of its imperatives, in this instance the transfer of ownership of land, then the failure to grasp such as opportunity with both hands, in my view, amount to a breach of a Constitutional duty. This is even more so where an opportunity presented itself to remedy tenuous occupational rights acquired in a former homeland as a result of apartheid policy and it was without reasons or justification ignored. See: Mabaso v Law Society of the Norther Provinces 2005 (2) SA 117 (CC) at [38], Western Cape Government: in re DVB Behuising v North West Government 2001(1) SA 500 (CC) at [69], [76] – [77] and [105] and Jacobs v Department of Land Affairs 2016 (5) SA 382 (LCC) at [58] with reference to Department of Land Affairs and others v Goedgelegen Tropical Fruits (Pty) Ltd 2007 (6) SA 1999 (CC) and Alexkor Ltd and Another v Richterveld Community and others 2004 (5) SA 460 (CC).

5.4.6 There is no explanation why, when the well motivated occasion for conversion of a right presented itself, it was shied away from and the elderly Applicant was presented with a much lesser right, being a long-term lease, the end of which he will not see in his lifetime. The argument on behalf of the Minister that the Applicant has security of tenure and that

there are no imminent eviction prospects on his horizon smacks of callousness and cynisism, particularly given our country's historical deficiencies in dealing with land reform. The same applies to others in similar position as the Applicant as mentioned in paragraph 3.14 and [4] above.

5.4.7 In a judgment which was yet unreported at the time of hearing of this application but which has since been reported as District Six Committee v Minister of Rural Development and Land Reform and others 2019 (5) SA 164 (LCC) Kollapen, J made the following apposite statements regarding the fulfillment of Constitutional duties in the context of land reform:

> *"[28] Section 235 of the Constitution provides that all constitutional obligations must be performed diligently and without delay. That this should be so is self-evident. Compliance with the supreme law affirms and validates the law while dilatory conduct not only undermines that law but also deprives the bearers of constitutional rights of timeous performance of the obligations owed to them. It must follow that a relatively young and fragile democracy such as ours must ensure that the letter and spirit of the Constitution are internalized into the DNA of the State and the rest of society. A strong commitment to performing constitutional obligations without delay, diligently and conscientiously, contributes not only to the consolidation of democracy and greater respect for the Constitution, but also engenders confidence amongst all, that the law can and does indeed work and that the imperatives contained in the Constitution are much more than paper promises, but promises of substance that can be enforced. It is in this regard that courts carry an important duty in respect of s*

237 of the Constitution in ensuring that there is compliance with the imperatives of diligence and non-delay".

5.4.8 In view of all of the above, I conclude that a breach of the State's constitutional duties has occurred. This ground of review should therefore also succeed.

[6] Appropriate relief

6.1 It is clear from what I had found above, that the Applicant is entitled to have the decision of the DDG reviewed and set aside, on various grounds.

6.2 The next question is whether the question of approval of the sale of the farm should be referred back to the DDG (or the Minister) to reconsider or whether this court should substitute its decision for that of the DDG.

6.3 The Minister has not suggested that the matter needs to be referred back to her for decision.

6.4 Section 8(1)(c)(ii)(aa) of PAJA provides that in proceedings for judicial review of administrative actions, a court can substitute its own decision for that of the decision-maker in "exceptional cases".

6.5 In Trencon Construction (Pty) Ltd v Industrial Development corporation of South Africa and Another 2015 (5) SA 245 (CC) it was held that the factors be taken into account in deciding whether a case is "exceptional" are:

(a) where the court is in as good as position as the decision-maker to make the decision,

(b) whether the decision is a foregone conclusion,

(c) delay and

(d) bias or incompetence on the part of the administrator.

6.6 Even if exceptional circumstances had been established, a court must still be satisfied that the substituting decision would be just and equitable.

6.7 Here, the court was in as good a position as the DDG was. All the reports, motivations and other relevant factors necessary for consideration of the decision form part of the papers filed of record. The vague reference to other "competing interests" has already been rejected and nine years after the event, neither the DDG nor the Minister has presented any evidence of other factors to be considered.

6.8 Furthermore, insofar as the incidence of a Constitutional imperative is concerned, the court is in as good a position as the DDG or the Minister to determine what that entails, as already set out in paragraph 2 and 5.4 above.

6.9 Following on the issue of Constitutionality and the findings on irrationality as dealt with in paragraph 5.3 above, the decision should be a foregone conclusion. In fact, that is what all relevant parties, role players, organs of state and the Applicant had all along contended.

6.10 The delay in the matter and, in particular, the long periods of inaction on the part of various organs of state and the delay that occurred prior to the DDG making his decision call for an urgent need to finalize this matter. Having regard to the Applicant's advanced age, any delay which may occur should the matter be remitted, would be prejudicial to him.

6.11 In view of the above conclusions, I find that the case is a proper one where substitution should take place without the need to make a finding of bias or incompetence. *"Viewing through the lens of fairness to both parties and in the context of the findings in relation to the other relevant*

factors" substitution should take place even where the (then) DDG and Minister (or current incumbents of these positions) were or are all equally and sufficiently unbiased and competent. See: Trencon (supra) at [78].

6.12 Having regard to all the above and not least the factors mentioned in paragraph 5.2.3 above, I find, in the exercise of my discretion, that the granting of prayer 3 of the Notice of Motion would be fair and equitable in the circumstances, namely that the Minister be compelled to proceed with the sale of the farm to the Applicant.

6.13 As to the alternative portion of prayer 3, namely that the purchase price of the farm should be adjusted upwards in accordance with the consumer price index, I find that such an upward adjustment would not be fair in the circumstances. Had the approval of the sale of the farm taken place on 23 July 2010, then the Applicant would by now have had the benefit of having paid nine years of installments in respect of the financed portion of the purchase price. Instead, he has now been deprived of that benefit by having had to pay monthly rental to the State. The fact that he had the benefit of occupancy during this period is also no valid answer, he would have had that benefit as owner had the decision correctly been taken nine years ago.

6.14 I mention in passing that the issue of extension of the time period of 180 days mentioned in Section 7(1) of PAJA and in prayer 1 of the Notice of Motion had been addressed by the Applicant and was not opposed with any force by the Minister. Having regard to the facts of the matter as already set out, and, insofar as necessary this relief is hereby granted.

6.15 That leaves the issue of costs. I find no cogent reason why costs should not follow the event. Having regard to the nature of the case, the issues

involved and the importance thereof, the employment of both senior and junior counsel was justified.

[7] Order:

1. The decision of the Deputy Director General of the Department of Rural Development and Land Reform as delegate of the Minister of that department on 23 July 2010 whereby the sale and disposal of portion 0 (the remaining extent) and Portion 1 of the Farm Nooitgedacht 11 JQ (the "Farm") was not approved, is hereby reviewed and set aside.

2. The First Respondent is ordered to take all necessary steps, within 30 calendar days of this order, to sell the Farm to the First Applicant on the terms and conditions and price that would have applied if the Farm had been sold to the First Applicant under the Land Redistribution for Agricultural Development (LRAD) Programme in January 2003 and to thereafter see to the transfer of the Farm to the First Applicant at the State's costs.

3. The First Respondent is ordered to pay the Applicants' cost of this application, including the costs of senior and junior counsel.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 13August 2019

Judgment delivered: 4 September 2019

APPEARANCES:

For the Applicants:	Adv G Budlender SC and Adv M Musandiwa
Instructed by:	Minde, Schapiro & Smith Attorneys, Bellville c/o Klagsbrun Edelstein Bosman De Vries Inc, Pretoria
For the First Respondent:	Adv. S. Ogunronbi
Instructed by:	The State Attorney, Pretoria