

Justice Delayed But Not Denied: The Constitutional Court Delivers on the Promise of Transformation

Thirteen years after the passage of the Restitution of Land Rights Act, the Constitutional Court has, in an eloquent and unanimous decision, determined that former labour tenants dispossessed of land rights are entitled to restitution. In so doing, the Court has proved that justice delayed need not always be justice denied.

The apartheid state, in its push to completely dehumanize and dispossess black South Africans of any and all claim to citizenship, pushed through a plethora of policy and legislation that eliminated any vestiges of rights in land held by blacks. The tenacity of the state in this regard paid off to such an extent that the Surplus Peoples Project found between 1964 and 1984 1,1 million black South Africans were evicted from farms, the largest single category of removals in that period. The Popela community is but one example of the impact of such laws and policies on the lives and livelihoods of black South Africans.

The Popela community lived on land in Moeketsi (in what is today Limpopo Province) as far back as the mid 1800s. The area is situated in a beautiful fertile valley between Polokwane, Duiwelskloof and Tzaneen. It is home to some of the largest tomato, avocado and mango plantations in South Africa. By all accounts the community lived according to common rules and practices. They produced crops on the land and grazed their livestock. When their land was invaded by white settlers in 1889, the community, like many others throughout South Africa were forced to enter into labour tenancy contracts whereby they provided free labour for part of the year simply to be able to stay on and use what had been their land. This arrangement worked to the benefit of the white settlers and, relative to being forced into wage labour or dumped in the reserves, it had some advantage for the dispossessed black owners of the land. The whites had a steady supply of free labour to develop their portions of land and the labour tenants were able to retain their homes and maintained their own agricultural production for part of the year.

Labour tenants are small-scale farmers who, in return for the right to cultivate crops and/or graze their livestock on land owned by others, provide labour for a period of the year, either for free, or for an amount below that paid to wage workers (i.e. they pay rent in the form of labour).

By the 1960's the apartheid government was acting to eliminate the labour tenant system throughout South Africa. The Prevention of Illegal Squatting Act of 1951 and the Bantu Laws Amendment Act of 1964 enabled government and land owners to drive millions of urban and rural blacks from their land. By the end of the 1970's, labour tenant contracts were prohibited in the then Northern Transvaal where the Popela's lived and farmed. The impact on the communities' rights was to take away the remaining rights in land that labour tenants had held onto as they were reduced to wage labourers with no right to engage in their own production. Many community members left the farm rather than subject themselves to the sun-up to sun-down labour for the pittance paid by the whites. Dispossession, then, was not a single moment in time, but a gradual process through which black people's access and rights

to land were eroded and whittled away, until they finally had no status and no rights on their former land.

During the course of decades of diminishing land rights the Popela community managed to maintain some sense of cohesiveness. They had a recognised induna who allocated land for ploughing and common grazing areas, they collectively gathered firewood and water, and had a communal graveyard. Their graves remain on the land today. The six extended families who remained on the land in 1996 approached Nkuzi Development Association, a land rights NGO based in Polokwane, when they were being threatened with eviction. Despite discouraging advice from some staff of the Land Claims Commission, Nkuzi not only helped them to resist eviction, but also assisted them to file a claim for restitution of their lost labour tenancy rights – a claim that would extend to those who had been removed from the land entirely, in total eleven families formed part of the claim.

Land reform has for years been slowed to a snail's pace by overly complex procedures and bureaucratic inertia within the Commission on Restitution of Land Rights. Furthermore, the judiciary has relied on dry, terse, technical interpretations of policy and law which seemingly disregard their transformative purpose and intent.

This formalistic approach was followed by the LCC and the Supreme Court of Appeal (SCA) in the Popela case (*Department of Land Affairs, et al v. Goedgelegen Tropical Fruits (Pty) Ltd*). In June 2005, the LCC took the view that the dispossession was neither of a community of labour tenants nor was it based on a past racially discriminatory law or practice. In September 2006, the SCA upheld the decision of the LCC and further ordered the claimants to pay costs.

This interpretation of the Restitution Act was recently rejected by the Constitutional Court in overturning the LCC and SCA judgments. (CCT 69/06) Instead the Court found that the Restitution Act should be “understood purposively because it is remedial legislation umbilically linked to the Constitution.” With this approach the Court found that although the Popela community had been dispossessed of many of their rights in the land prior to 1913, the loss of the land rights they held through the labour tenancy system was the result of “a grid of integrated repressive laws that were aimed at furthering the government’s policy of racial discrimination.” The Court recognised that the existence of the system of labour tenancy was itself the product of racist laws and practices that denied black people ownership of the land that had belonged, *de facto*, to their families and communities for generations.

The Constitutional Court also rejected the argument (which the LCC and SCA had upheld) that the Popela’s dispossession was not due to apartheid laws and policies because the government had not evicted them. It rejected the notion that white farmers acted purely in their best economic interests in diminishing the land rights of the Popelas and other labour tenants. South Africa was not a normal society at the time the Popela community were dispossessed of their land, the state did not function to protect the land rights of poor black citizens, while it did act decisively time and again to advantage white land owners. Although the Popela’s lost their land at the hands of landowners, rather than through forced removal by the state, the dispossession was ultimately “tainted by the context that allowed and actively encouraged it to occur.”

While this victory should be celebrated, it has also been too long in coming. As well as Nkuzi, the Regional Land Claims Commissioner must take credit for having continued to support this landmark case despite pressure on them not to do so and complaints, particularly by landowners who feared its implications, that they were wasting public resources.

The Land Claims Court (LCC), one of the key state institutions charged with overseeing the implementation of the Restitution Act, as well as other land reform legislation, according to Theunis Roux, a leading legal scholar, has played “no meaningful role in the land restitution process, and administers two other statutes that, at least in part because of the way they have been interpreted by the Court, are regarded as ‘facilitating’ a new wave of land dispossession.” This in part is due to the formalistic approach followed by the LCC in its interpretation of statutes, which has led the judges to disregard the discretion conferred on them by the Restitution Act to fashion decisions that promote rather than obstruct transformation.

It is an indictment of the LCC that it failed to seize the moment and understand its role in delivering justice to those dispossessed. In contrast, the Constitutional Court recognised the full range of legislative measures used over decades to strip black South Africans of their land rights and dignity and has made a critical contribution to creating the new South Africa envisaged in the Constitution.

This judgement is a long overdue recognition of the full extent and nature of the land dispossession inflicted on the Popela community and millions of other farm dwellers in the apartheid era. It is a validation of their right to justice and their right to the land that was theirs. The Constitutional Court has put the land restitution process back where it should be - at the centre of post apartheid transformation.

A once vibrant community, living productively on their ancestral land, has been reduced over the past decade to just a few elderly people supplementing their state pensions with small gardens. The challenge now is to fashion a remedy that brings community members back to the productive use of the land that they enjoyed before they were forced to move. They have the experience and they have the interest.

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