

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

CASE NO: CCT 42/12

In the matter between:-

**PONTSHO DOREEN MOTSWAGAE**

First Applicant

**FOURTEEN OTHERS**

Second to Fifteenth Applicants

and

**RUSTENBURG LOCAL MUNICIPALITY**

First Respondent

**PROMPTIQUE TR 9 CC**

Second Respondent

**LAWYERS FOR HUMAN RIGHTS**

*Amicus Curiae*

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***AMICUS CURIAE'S HEADS OF ARGUMENT: INDEX***

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<b><u>Chapter heading</u></b>	<b><u>Para No</u></b>	<b><u>Page No</u></b>
THE IMPLEMENTATION OF HOUSING PROJECTS		
THE BASIC REQUIREMENTS OF LEGALITY AND ADMINISTRATIVE JUSTICE	7-14	4-8
THE LEGISLATIVE HISTORY OF TENURE IN BOPHUTHATSWANA	15-31	8-15
THE POTENTIAL FOR GENDER DISCRIMINATION	32-36	15-16

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**HEADS OF ARGUMENT ON BEHALF OF *AMICUS CURIAE***

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1. Millions of South Africans hold rights in land which are insecure. This basic reality is to a large extent the result of the history of colonial and apartheid legislation and practices. The Black Administration Act (Nr 38 of 1927), the Black Land Act (1913) and

the Native Trust and Land Act (1936) formed the basic pillars of this legislative scheme;

See: *Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v. North West Provincial Government* 2001 (1) SA 500 CC at par. 2, 91 and 92;

*Tongoane v. Minister of Agriculture and Land Affairs* 2010 (6) SA 214 CC at 10, 23, 123 and 124.

2. This fact, as well as the concomitant need for tenure security to be addressed, is recognised at constitutional level;

See: Section 25 (6) of the Constitution.

3. The tenure insecurity exists in respect of private as well as public land. A set of post 94 legislation seeks to ameliorate the tenure insecurity and to set the stage for land reform. The present matter concerns people with insecure tenure in respect of state land;

See: Interim Protection of Informal Land Rights Act, 31 of 1996;

Land Reform Labour Tenants Act, 3 of 1996;

4. This case also concerns the state, in this case the first respondent local authority, taking measures and expending money to achieve the progressive realisation of the housing rights of its citizens. Technically, the project is called the “*Redevelopment of Municipal Female Hostels in Tlhabane*”. The project also forms part of the broader integrated development project of the local authority;

See: Volume 1, p. 113;

Section 26 (2) of the Constitution.

5. It is obvious that housing projects aimed at the progressive realisation of housing rights as contained in section 26 of the constitution may come into conflict with the tenure rights of those persons already on the land earmarked for the housing development. Just as the exercise of a discretion or the development of policy must be mindful of the fundamental rights of persons, so too must the implementation of programs be mindful of existing rights and fundamental rights;

See: *Minister of Health v. Treatment Action Campaign* 2002 (5) SA 721 CC  
at par. 80;

*Oudekraal Estates (Pty) Ltd v. City of Cape Town* 2004 (6) SA 222  
SCA at par. 36.

6. On behalf of the *amicus*, we make submissions concerning two specific aspects raised by this central tension in the present matter. These are:-

6.1 the nature of tenure rights held in the erstwhile Bophuthatswana, and the legislative history dealing with the upgrading of these rights;

6.2 the potential for gender discrimination in housing projects which involve land on which there are existing occupants.

#### THE IMPLEMENTATION OF HOUSING PROJECTS:-

#### THE BASIC REQUIREMENTS OF LEGALITY AND ADMINISTRATIVE JUSTICE:-

7. It is accepted that, as a general rule, the state can act in respect of its land in the same way as a private owner may do;

See: *Minister of Public Works v. Kyalami Ridge Environmental Association*  
2001 (3) SA 1151 CC at par 39 and 40.

8. At the same time, and as a general observation, state competencies in respect of its land are seriously inhibited by legislation, requirements of administrative justice and existing tenure rights of occupants. State entities embarking on development of state land must, with respect, proceed with great caution.

9. People who hold insecure tenure, hold tenure of varying types. The regulations made in terms of the Black Administration Act has received a fair amount of judicial attention post 94. It provided for a range of permits and permissions to occupy;

See: Proclamation , R293 of 1962;

Regulations for the administration and control of townships in Bantu areas;

Schedules 1 and 2 of the Upgrading of Land Tenure Rights Act, 112 of 1991 (ULTRA);

Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988 (Conversion Act);

*Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v. North West Government* 2001 (1) SA 500 CC.

10. Some of these rights have been upgraded to full ownership by operation of law. Therefore, they sometimes only appear to be insecure by virtue of the fact that the relevant deeds registry has not yet been updated to reflect the correct ownership. Some rights require only a simple mechanical administrative act before they are converted into township;

See: Section 2 (1) (a) to (c) of ULTRA;

Section 3 (1) of ULTRA.

11. Development of properties in this category would simply be illegal without the consent of the actual owner or without formal expropriation having taken place. This is so, even if formal registration has not been effected;

See: Section 4 (1) of ULTRA.

12. Other forms of tenure have not been upgraded to ownership by either operation of the law or through administrative processes. However, many of these rights are eligible for such upgrading. The nature of these rights and the extent to which they may be infringed, would depend on the relevant applicable legislation. These are sometimes referred to as "*the water right*";

See: Section 2 (1) read with 4 (1) of the Conversion of Certain Rights into Leasehold or Ownership Act, 81 of 1988 (Conversion Act).

13. Even at the most basic level, holders of insecure tenure are entitled to more secure forms of tenure. So much is clear from the provisions of section 25 (6) of the constitution. Even in such cases where there has been no actual upgrade, or where there is no specific eligibility for an upgrade, there remains a general right to tenure security and a right not to be evicted from one's home without a court order (section 26 (3) of the constitution). All "*weaker*" forms of tenure were granted "*statutory leases*" in terms of section 6 of the Conversion Act.

14. In such cases, a housing development must be able to positively demonstrate that it will secure the tenure of affected occupants as opposed to destroying it. The *"inclusivity"* of the Housing Code affirms this basic approach which is suggested in the Constitution.

#### THE LEGISLATIVE HISTORY OF TENURE IN BOPHUTHATSWANA:-

15. As pointed out by the applicants, an investigation into the nature of tenure held by existing occupants, as well as the history of such tenure, is necessary both for purposes of chapter 10 of the National Housing Code as well as for purposes of considering *"all relevant circumstances"* for purposes of an eviction application.
16. We submit that it is important that such an investigation inform all the parties of the correct legal position. In this case it requires that one be acquainted with the legislative history in the erstwhile Bophuthatswana. As we illustrate below, this legislative framework tended to strengthen the rights of occupants, a fact which is

relevant for purposes of considering later legislation dealing with upgrading and conversion of tenure.

17. We accept that it is not this court's function to give legal opinions as to what such rights enquiry may find. However, in a case such as this where the conclusion of the appeal may not bring an end to the disputes between the parties, it is important that the judgment give broader context to the dispute. This will give the main parties some guidance in their future conduct. The broader context will also give guidance to authorities implementing housing projects.

18. In the matter of *DVB Behuising*, the legislative history in respect of proclamation R293 was analysed;

See: *Western Cape Provincial Government: In Re DBB Behuising (Pty) Ltd v. North West Provincial Government* (2001 (1) SA 500 CC at par. 7-17;

*DVB Behuising (supra)* at par 45-47;

*DVB Behuising* at par. 86 and 87.

19. The following may be added in respect of this history:-

19.1 Bophuthatswana became independent in December 1977. In terms of its constitution, schedule 7 thereof, a range of provisions of the then "*Bantu Administration Act of 1927* was repealed. More specifically, section 11 of the act (later known as "*The Black Administration Act*") was repealed. This is the section that deemed black women to be minors;

See: *The Republic of Bophuthatswana Constitution Act, 18 of 1977, item 3 in schedule 7 thereof.*

19.2 This constitution also had an equality provision in section 9 thereof. In a formal sense, gender discrimination was therefore abolished;

19.3 Not all parts of the Black Administration Act were repealed. Although section 25 was repealed, the regulations previously made under section 25, such as

proclamation R293, were not. This is apparent from schedule 7.

20. In 1979 the Bophuthatswana Land Control Act, 39 of 1979 was passed. In terms of section 20 (3) thereof, all regulations still in place, continued to be of force. Proclamation R293 therefor remained in force.
21. Section 13 of the Land Control Act abolished all forms of racial discrimination or distinction in laws or land grants. In other words, all forms of racial discrimination was also formally removed.
22. The fact that Bophuthatswana never developed a vibrant jurisprudence around its constitutional provisions is notorious. More important for this case, is that there was never a process of large scale tenure upgrade of *“old order rights”*. For this reason, by the time that upgrading and conversion of title started in South Africa in the early 1990's, nothing had changed in the erstwhile Bophuthatswana for those townships created before the Land Control Act.

23. Although there is no evidence on record as to what the housing practices were during the period of Bophuthatswana's notional independence, it would appear from even the cursory evidence in this matter that township tenements inherited from pre-1977 South Africa did not undergo any substantive change. Proclamation R293 was eventually repealed by the North West Government as appears from the *DVB Behuising* case. The repeal was found to be constitutionally consistent, except in certain minor aspects.

24. The effect that the repeal had on existing R293 tenure rights was not decided in *DVB Behuising*. It was suggested that these rights were not affected;

See: *DVB Behuising (supra)* at par. 65 and 71.

25. If, however, the Constitution of Bophuthatswana and the Land Control Act should be regarded as relevant, they can only serve to strengthen the rights of persons who held proclamation permits during the Bophuthatswana era. The Respondent, and other

housing authorities, cannot regard the rights as non-existent, even if the regulations have been repealed.

26. The Upgrading of Land Tenure Rights Act, 112 of 1991 was eventually made applicable to the area of the erstwhile Bophuthatswana by virtue of the provisions of the Land Affairs General Amendment Act, 61 of 1998. The latter Act inserted section 25A into the Upgrading Act.

27. As far as the Upgrading Act is concerned, it must be kept in mind that this Act converts some of the rights held into ownership by operation of law. Other rights, again, are made the subject of a process which leads to the granting of full ownership;

See: Sections 2 (1) and 3 (1) of ULTRA; read with the Schedules.

28. It should be noted that the Conversion Act was never made applicable to the erstwhile Bophuthatswana, as was the case with ULTRA. The conversion and upgrading of "*weaker rights*" in former homelands must therefore happen through a different

mechanism. Some provinces, such as Gauteng, have introduced housing tribunals, but it is not clear whether this mechanism solves all the problems of so-called “*weaker rights*”.

29. The record does not provide a final answer to the exact nature of the rights held by the applicants. The different possibilities created by the Upgrading Act, however, must be kept in mind. So must the general right to tenure security.
  
30. Certain of the schedule 1 rights in the Upgrading Act which qualify for conversion into ownership are worded in very wide terms. These provisions should serve as a cautionary note to any authority who wishes to consider existing rights as having a lesser status than ownership. ULTRA even protects “*putative holders*” as is apparent from section 1 of that Act.
  
31. Finally, it is submitted that existing tenure rights are varied and their investigation would at times be complex. The present matter is a good example of how neglecting such investigations lead to

disputes and frustrate housing delivery, despite the best intentions of housing authorities.

### THE POTENTIAL FOR GENDER DISCRIMINATION:-

32. This case also illustrates the multiple ways in which black women are affected by discrimination.

33. It is trite that discrimination affects people in complex and cross cutting ways;

See: *Moseneke and Others v. The Master and Another* 2001 (2) SA 18 CC at par. 30;

*Bhe and Others v. Magistrate, Khayelitsha* 2005 (1) SA 580 CC at par. 50, 68, 72 and 78.

34. Women in the position of the applicants were historically discriminated against by virtue of the rules of customary law, then the formalised interpretation of this customary law, and finally by laws entrenching the racist and sexist policies of the pre 1994 era.

35. Just as housing authorities should be mindful of existing rights in the implementation of projects, they should further the Constitution's commitment to substantive equality;

See: *Minister of Finance v. Van Heerden* 2004 (6) SA 121 CC at paras. 26 to 27 and 31.

36. Historic discrimination should be kept in mind in the implementation of socio-economic development projects. If it is not considered, present patterns of discrimination will be entrenched;

See: *Minister of Finance v. Van Heerden (supra)* at par. 142;

*Hassam v. Jacobs* 2009 (5) SA 572 CC at par. 28.

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