IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

HELD AT BRAAMFONTEIN, JOHANNESBURG

Case No.: CCT 157/2025
SCA Case No.: 133/2025
Land Court Case No.: LCC40/2024

In the application of:

CENTRE FOR APPLIED LEGAL STUDIES	Applicant for admission as *amicus curiae*

In the matter between:

SOPHIE DLAMANGA BUTA	First Applicant
ROSE BUTA	Second Applicant
THEMBI BUTA	Third Applicant
THEMBINKOSI BUTA	Fourth Applicant
AARON BUTA	Fifth Applicant
JULIA MENGAYI BUTA	Sixth Applicant
JOHN BUTA	Seventh Applicant
JOSEPTH BUTA	Eighth Applicant

and

MAFUBE COAL MINING (PTY) LTD	Respondent

FOUNDING AFFIDAVIT:

APPLICATION FOR ADMISSION OF AMICUS CURIAE IN TERMS OF RULE 10

I, the undersigned,

CHRISTOPHER GEVERS

state under oath:

1 I am the Director at the Centre for Applied Legal Studies ("CALS") in the School of Law, University of the Witwatersrand ("Wits University") situated at 1 Jan Smuts Avenue, Braamfontein, Johannesburg.

2 The facts contained in this affidavit are within my personal knowledge, unless the context indicates otherwise, and are both true and correct to the best of my knowledge and belief.

3 I am duly authorised to depose to this affidavit and to bring this application on behalf of CALS. I am deposing to this affidavit in support of CALS's application for leave to intervene as an *amicus curiae* in the above matter.

4 In this affidavit I will deal with:

4.1 The purpose of this application;

4.2 CALS's interest in these proceedings;

4.3 CALS proposed submissions in the matter;

4.4 The parties attitude towards CALS's admission as *amicus curiae* in this matter;

4.5 The relevance and novelty of submissions to be made by CALS; and

4.6 Conclusion and relief sought.

PURPOSE OF THIS APPLICATION

5 This is an application under Rule 10 of the Rules of this Court for the admission of CALS as an *amicus curiae*. The appeal concerns the statutory entitlement to bury Mr Simon Buta on the land where his family resides and the justification for an order requiring the exhumation and relocation of his remains.

6 CALS seeks to assist the Court through submissions on the interpretation of the Extension of Security of Tenure Act 62 of 1997 ("ESTA"), informed by international law and the constitutional obligations in sections 39(1)(b) and 39(2). Its proposed contribution concerns the protection of familial, religious and cultural connections with graves and the consequences of those protections for the determination of appropriate relief.

7 CALS proposes to develop two connected submissions:

7.1. How international law informs the interpretation of the relevant constitutional rights and the relationship between sections 5, 6 and 7 of ESTA, including the protection of burial practices, continuing access to family graves and the prohibition against prejudice for exercising legal rights.

7.2. How those protections inform the assessment of alternative burial arrangements and the separate justification required for an order of exhumation.

8 CALS's central submission is that the statutory requirements governing a burial and the justification for exhumation require distinct consideration. A finding that a burial was unlawful does not, without further inquiry into the applicable law, the

affected interests and the evidence, establish that exhumation is appropriate relief.

9 These questions must be considered against South Africa's history of land dispossession and the insecurity of tenure it produced, and the broader Constitutional imperative to redress "the injustices of our past" (Preamble, Constitution, 1996). ESTA gives effect to the constitutional protection of persons whose tenure is insecure because of past racially discriminatory laws or practices. That purpose informs the interpretation of its protections and the resolution of disputes arising under it.

10 The landowner's protection under section 25(1) and the occupiers' protection under section 25(6), as given effect through ESTA, must be considered within the same constitutional framework. CALS would explain why ownership cannot be treated as automatically decisive, and how the statutory framework requires the respective rights and interests to be identified and appropriately accommodated.

11 For farm-dwelling families, land may be both a home and a place of familial, cultural and ancestral connection. Burial practices and continuing observance at family graves give concrete expression to those relationships. CALS would explain their relevance to the content and practical exercise of ESTA's protections.

12 The approach adopted in this matter consequently has implications for other farm-dwelling families whose burial practices and access to graves intersect with disputes over the use of privately owned land. CALS's proposed submissions

would assist in developing an approach that gives practical effect to tenure security, dignity and religious and cultural participation when determining appropriate relief.

13 This approach draws on the constitutional understanding of tenure security developed in *Daniels v Scribante* and Another.[1] Writing about that judgment, *Boggenpoel and Slade* explain that the starting point adopted in a property dispute can shape its outcome and remedy, and that placing ownership at the centre may impede the Constitution's transformative purposes.[2] CALS would develop the implications of that insight for the statutory and remedial questions arising in this appeal.

CALS' INTEREST IN THESE PROCEEDINGS

14 CALS is a law clinic registered with the Legal Practice Council, situated within Wits University's School of Law. CALS was established in 1978 and it has been at the forefront of human rights research, advocacy and strategic impact litigation in South Africa. CALS has five programmes namely: Business and Human Rights; Environmental Justice; Gender Justice; Home, Land and Rural Democracy and Civil and Political Justice. Working through these five overlapping streams, CALS promotes human rights and advances justice by

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[1] *Daniels v Scribante and Another* [2017] ZACC 13; 2017 (4) SA 341 (CC)

[2] Boggenpoel Z and Slade B "*Where is Property? Thoughts on the Theoretical Implications of Daniels v Scribante*", *Constitutional Court Review* (2020), Volume 10, 379-399 at 379. "the starting point of a dispute involving property is important in the sense that it may determine the potential outcome, or remedy that is awarded, in any particular dispute. Placing property at the centre, or at the heart of any dispute that may involve property, can in certain circumstances go against the constitutional aspirations of healing the divisions of the past and building a society based on fundamental values, such as human dignity"

focusing on research, teaching, advocacy and litigation to bring about meaningful change in our constitutional democracy.

15 CALS has a longstanding interest in land justice, equitable access to land, tenure security and the protection of vulnerable communities whose rights and livelihoods are affected by their relationship with land.

16 CALS is working towards creating a society in which historical and social justice are achieved, state institutions are strengthened and marginalised groups can hold powerful entities to account. CALS's work places importance on increasing the agency of marginalised communities and advancing the horizontal application of the Bill of Rights.

17 Of particular relevance for the present matter, is CALS's Home, Land and Rural Democracy programme, which focuses on ensuring that socio-economic rights are fulfilled by the State. The programme seeks to ensure that everyone has access to secure land rights and that rural residents are free to exercise their constitutional rights. CALS also focuses on ensuring that everyone has a home in which they can live with dignity, with adequate food, water, sanitation and other necessities. Marginalised communities living in poverty often carry the burden of not having access to basic services and where these communities live on farms, they carry the added burden of not having security of land tenure.

18 CALS has been advocating for land justice in South Africa for many years, even prior to our country becoming a democracy. CALS has long-since been committed to achieving equitable access to land for all South Africans, with a special focus on disenfranchised and vulnerable, marginalised communities.

Since the early 1990s, CALS has undertaken research and advocacy concerning land ownership, land redistribution, indigenous land rights and the need to address the enduring consequences of colonialism and apartheid. I mention two examples of this longstanding commitment:

18.1 In February 1991, CALS published Occasional Paper 11 titled *Who Owns South Africa?: Can the Repeal of the Land Acts De-Racialise Land Ownership in South Africa?* The paper critically analysed the government's land reform policies to determine whether they addressed historical injustices or merely reinforced existing inequities. A copy is attached marked as **Annexure FA1**.

18.2 In October 1993, Heinz Klug authored *Defining Property Rights of Others: Political Power, Indigenous Tenure and the Construction of Customary Law* under CALS, which examined the role of indigenous land rights within South Africa's evolving legal framework. This paper highlighted the impact of colonialism on indigenous land ownership and the need to restructure the legal system to recognise and protect these rights. A copy is attached marked as **Annexure FA 2**.

19 CALS has also made submissions to public institutions on matters concerning land reform, tenure security, access to land, housing rights and the protection of socio-economic rights. In particular, CALS has contributed to legal and policy debates concerning section 25 of the Constitution, land allocation, the Prevention of Illegal Eviction from and Unlawful Occupation of Land legislation, and the protection of vulnerable persons affected by insecure land rights. In order to

avoid prolixity and unduly burden this application, I mention the following recent examples:

19.1 In June 2018, CALS made a written submission to Parliament's Joint Constitutional Review Committee on Section 25 of the Constitution. A copy is attached marked as **Annexure FA3**. CALS submitted that Parliament's review of section 25 should consider the gendered historical imbalances in access to land, as well as international and other sections of the Constitution which mandate land reform through expropriation and equitable access to land.

19.2 During March 2020, CALS made a submission to the Minister of Agriculture, Land Reform and Rural Development on Beneficiary Selection and Land Allocation Policy. A copy is attached as **Annexure FA4**. CALS focused on a) the right to food, b) the appointment of members of the Land Allocation and Selection Panel, and c) persons convicted of crimes being disqualified from being allocated land under the policy.

19.3 In May 2022 CALS made a Submission to the Speaker of the National Assembly on the Prevention of Illegal Evictions from Unlawful Occupation of Land Amendment Bill, B 6 2023. CALS commented on the criminalisation and feminisation of poverty and landlessness through the imprisonment provisions in relation to unlawful occupation and the consideration of financial means, health and previous living arrangements. To avoid unduly burdening this application, a full copy of the Submission is not attached. A copy can be made available should the Court so direct.

19.4 During April 2026, CALS made a Joint Submission to the United Nations (UN) Human Rights Council Advisory Committee on the Achievement of Social Justice through the Legal Enforcement of Economic, Social and Cultural Rights by National Courts. To avoid unduly burdening this application a full copy of the Joint Submission is not attached. A copy can be made available should the Court so direct.

19.5 In June 2026, CALS made a Joint Submission to the Department of Human Settlements on the Draft Prevention of Illegal Eviction from Unlawful Occupation of Land Amendment Bill, 2026. CALS submitted that the proposed amendments potentially criminalise landlessness as a mirror image of South Africa's racially motivated pre-democracy laws and how the proposed amendments prioritised fiscal considerations over the achievement of substantive equality and the protections of fundamental rights. A copy of the Joint Submission is attached marked as **Annexure FA5**.

19.6 In 2022, CALS co-authored, with Amnesty International South Africa and Sekhukhune Combined Mining-Affected Communities, *Unearthing the Truth: How the mines failed communities in the Sekhukhune region of South Africa*. The report examines mining's effects on affected communities, including relationships with land, cultural identity, graves and resettlement, and the adequacy of consultation and participation. Sections 6.1 and 6.4 are particularly relevant to CALS's experience informing its proposed submissions on alternative burial arrangements and meaningful engagement. A copy is attached marked **Annexure FA6**.

20 CALS has further participated in strategic litigation concerning housing rights and evictions, including *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* and the proceedings commonly known as the Olivia Road case. These matters concerned, among other things, the protection of vulnerable occupiers and the obligations arising where evictions may result in homelessness.

21 CALS's interest in the present proceedings arises from the land reform and tenure security work as detailed above.

INTERNATIONAL LAW

22 Section 39(1)(b) of the Constitution requires a court interpreting the Bill of Rights to consider international law. Section 39(2) further requires legislation to be interpreted in a manner that promotes the spirit, purport and objects of the Bill of Rights. CALS would explain how international protections of family life, religion and cultural participation inform the interpretation of the relevant constitutional rights and, through section 39(2), the protections afforded by ESTA. This interpretive approach assists in identifying both the interests affected by interference with burial practices and the justification required for that interference.

A. International Covenant on Civil and Political Rights (ICCPR)

23 South Africa signed the International Covenant on Civil and Political Rights on 3 October 1994 and ratified it on 10 December 1998. Article 17 protects against arbitrary or unlawful interference with privacy, family and home, while Article 18

protects freedom of thought, conscience and religion. Article 27 additionally protects the rights of persons belonging to ethnic, religious or linguistic minorities to enjoy their culture and practise their religion in community with others. CALS would address the protection these provisions afford to familial and religious observance, while distinguishing Article 27's particular scope from the protections applicable to everyone under Articles 17 and 18. These provisions assist in explaining why interference with burial practices and access to graves may affect continuing family relationships and religious observance beyond the initial act of interment.

B. International Covenant on Economic, Social and Cultural Rights (ICESCR)

24 The Republic of South Africa acceded to the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 12 January 2015. Article 11 recognises the right to an adequate standard of living, including adequate housing, and provides context for understanding the relationship between home, tenure security and the lives of farm dwellers. Article 15(1)(a) protects everyone's right to take part in cultural life, while Article 2(2) requires the Covenant's rights to be guaranteed without discrimination on the specified grounds. CALS would explain how these protections inform the interpretation of ESTA where burial and commemorative practices form part of a family's cultural life. In doing so, CALS would draw on General Comment 21's explanation of cultural appropriateness to

develop the assessment of whether proposed alternative arrangements adequately accommodate the affected family's cultural practices.[3]

C. African Charter on Human and Peoples' Rights

25 South Africa became a party to the African Charter on Human and Peoples' Rights on 9 July 1996. The African Charter recognises the obligation of States Parties to "eliminate…apartheid [and] … all forms of discrimination, particularly those based on race", and protects religious freedom, cultural participation, the family, property and development within a regional human rights framework. CALS would draw on this framework to explain how the relationship between land, family graves and religious and cultural observance informs the interpretation of ESTA, including the accommodation of the respective rights and interests of occupiers and landowners.

26 Article 2 requires enjoyment of the African Charter's rights without discrimination on the specified grounds, Article 3 enshrine "equal protection of the law", and Article 19 states that all peoples "shall enjoy the same respect and shall have the same rights". Article 8 protects freedom of conscience and the profession and free practice of religion. CALS would explain how these provisions assist in recognising burial and commemorative practices as exercises of protected rights. Their significance includes the ability of affected families to continue observing practices associated with particular graves and places, and the need to assess

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[3] *United Nations Committee on Economic, Social and Cultural Rights, General Comment 21: Right of everyone to take part in cultural life, UN Doc E/C.12/GC/21 (2009), para 16(e).*

restrictions on those practices within the African Charter's framework of protection and permissible limitation.

27 Article 14 guarantees the right to property and regulates interference with it. CALS would address this protection alongside Article 17(2), which protects participation in the cultural life of one's community, Article 17(3), which requires the State to promote and protect morals and traditional values recognised by the community, and Article 21(2) which states that "[i]n case of spoilation the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation". Read together, these provisions assist in explaining why an assessment of the landowner's property interests must also account for the cultural interests affected by the proposed use of the land or interference with graves, particularly when the affected parties were dispossessed on the basis of race under apartheid. The relevant practices must be considered within the broader protection of rights under the African Charter and the Constitution, and their common objective to eliminate apartheid and its ongoing effects.

28 Article 18(1) recognises the family as the natural unit and basis of society and requires its protection by the State. CALS would address its relevance to the continuing familial relationships expressed through burial, remembrance and observance at family graves. Article 22 recognises the right of all peoples to economic, social and cultural development, with due regard to their freedom and identity. CALS would draw on this provision to explain why the assessment of development-related interests must include the effects on the cultural life and

identity of affected communities. Its relevance is particularly evident where development is advanced as a justification for disturbing existing graves.

29 These African Charter provisions give content to the interests that must be identified before competing claims concerning burial and access to graves can be evaluated. CALS would explain how their interpretation assists a court in assessing the significance of the particular location, the consequences of losing access or relocating remains, and the adequacy of proposed alternatives. This would connect the regional human rights framework to the interpretation of ESTA and the determination of appropriate relief, rather than leaving the Charter as a general statement of relevant rights.

D. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

30 South Africa signed the International Convention on the Elimination of All Forms of Racial Discrimination on 3 October 1994 and ratified it on 10 December 1998. The Convention requires the elimination of racial discrimination and equality in the enjoyment of protected rights. CALS would address its relevance to the interpretation of ESTA against South Africa's history of racially discriminatory access to land and the resulting insecurity of tenure experienced by farm dwellers.

31 Article 2 requires States Parties to pursue the elimination of racial discrimination, including through measures directed at discrimination by persons, groups and organisations. Article 5 requires equality before the law in the enjoyment of the rights it identifies. These include the right to own property under Article 5(d)(v),

freedom of thought, conscience and religion under Article 5(d)(vii), and equal participation in cultural activities under Article 5(e)(vi). CALS would explain how these provisions inform the protection of religious and cultural practices where their exercise intersects with historically unequal access to land.

32 CALS would distinguish the Convention's relevance to the historical and constitutional interpretation of ESTA from a finding that particular conduct constitutes racial discrimination. Any such finding must rest on the facts established in the record. Where restrictions on burial practices or access to graves form part of racially discriminatory treatment or exclusion, the Convention provides an additional framework for assessing that conduct. Its interpretive relevance also lies in ensuring that the protection afforded by ESTA responds meaningfully to the historical inequalities the legislation seeks to address.

INTERNATIONAL JURISPRUDENCE ON BURIAL AND ANCESTRAL CONNECTIONS

Endorois Welfare Council v Kenya (2010)

33 The African Commission on Human and Peoples' Rights considered the displacement of an indigenous community from its ancestral land and restrictions on access to sites central to its religious and cultural practices in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*. The African Commission recognised the relationship between religious freedom, access to particular places and the community's continuing connection with its ancestors. It found that the

restrictions were not adequately justified and violated Article 8 of the African Charter.[4]

34 CALS would draw on that reasoning of the African Commission to explain why the consequences of interference with family graves cannot be assessed solely by reference to the physical availability of another burial site. The significance of the location and the practices associated with it must form part of the inquiry.

African Commission on Human and Peoples' Rights v Kenya (2017)

35 The African Court on Human and Peoples' Rights considered restrictions on access to sites central to the religious and cultural practices, including the right to "bury the dead according to their traditional rituals", in a case brought by the African Commission on behalf of the Ogiek community against Kenya, following an eviction order requiring them to leave the Mau Forest. The African Commission alleged that Kenya had violated, *inter alia*, the right to equality and non-discrimination, the right to religion, the right to culture, the right to property and the right to development.

36 The African Court endorsed the findings of the African Commission in *Endorois Welfare Council v Kenya*, and emphasised that the right to culture "places strict obligations on State Parties to protect and promote traditional values", and "requires respect for, and protection of, … cultural heritage essential to the group's identity". The Court added that "culture should be construed in its widest sense encompassing the total way of life of a particular group", including "the

[4] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, Communication 276/2003, paras 165–173.

group's particular way of dealing with problems and practicing spiritual ceremonies; identification and veneration of its own heroes and models and shared values of its members which reflect its distinctive character and personality".[5] While this right could be limited in the "common interest", the Court found that "in the circumstances of each case, the State Party should substantiate that its interference was indeed genuinely prompted by the need to protect such common interest", and "any interference ...shall be necessary and proportional to the legitimate interests sought to be obtained by such interference".

37 CALS will make submissions on the relevance of the Court's reasoning in respect of the violation of the right to culture, as well as other implicated rights and obligations, to the rights of the parties in the present dispute.

Sabanchiyeva and Others v Russia

38 The European Court of Human Rights also considered the refusal to return deceased relatives' bodies for burial and the concealment of their graves' location in *Sabanchiyeva and Others v Russia*. It found a violation of Article 8 of the European Convention on Human Rights, emphasising the severity of permanently severing the families' connection with the remains. The Court criticised the automatic nature of the restrictions, the absence of an individual assessment and the failure to consider less intrusive measures. CALS would

[5] *African Commission on Human and Peoples' Rights v Republic of Kenya,* Application No. 006/2012, Judgment (Merits), paras 176—190.

draw on this reasoning in developing the assessment required before interference with a family grave is justified.[6]

Beljić and Others v Serbia

39 The European Court of Human Rights also considered the exhumation and relocation of relatives' remains as part of the relocation of a cemetery to enable coal extraction in *Beljić and Others v Serbia.* The Court rejected the applicants' Article 8 complaints as manifestly ill-founded, having assessed the legal basis, legitimate aim and necessity of the interference, together with the domestic scrutiny afforded to their objections. The decision illustrates that interference with family graves may be justified, but requires examination of its justification and the protections afforded to affected families.[7]

40 CALS recognises that these decisions concern state conduct under distinct legal frameworks. Their relevance to this appeal lies in the principles they develop concerning the significance of particular places, continuing familial connections with graves and the justification of interference. CALS would explain how those principles inform the interpretation of the relevant constitutional rights under section 39(1)(b), and consequently the interpretation of ESTA under section 39(2), within the statutory framework governing the parties' rights.

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[6] *Sabanchiyeva and Others v Russia*, application 38450/05, judgment of 6 June 2013, paras 138 and 144–147.

[7] *Beljić and Others v Serbia*, applications 3000/16 and 7189/16, decision of 23 January 2024, particularly para 102.

THE PROPOSED SUBMISSIONS TO BE MADE BY CALS

41 CALS proposes to develop two connected submissions within the themes identified in its request for consent. The first concerns the interpretation of ESTA's burial and grave-access protections, including the distinction between regulating their exercise and withdrawing or extinguishing them in substance. The second concerns how that distinction informs the assessment of alternative burial arrangements and the justification required for exhumation.

A. International law and the content of ESTA's protections

42 CALS would explain how international protections of family life, religion and cultural participation inform constitutional interpretation under section 39(1)(b), and the interpretation of ESTA under section 39(2). Section 233 further requires a court to prefer a reasonable interpretation of legislation consistent with international law over an alternative interpretation inconsistent with it. CALS would apply these interpretive obligations to the particular statutory questions identified below.

43 CALS would distinguish the entitlement to conduct a burial under sections 6(2)(dA) and 6(5) of ESTA from the continuing protection of family graves under section 6(4), taking account of each provision's requirements. Within that framework, it would address two distinct questions:

43.1 Whether the applicable statutory entitlement exists. In relation to section 6(2)(dA), CALS would distinguish the historical permission relevant to establishing a practice from fresh consent to a particular burial. The

absence of fresh consent cannot, by itself, defeat an entitlement established under that provision.

43.2 How an established entitlement may be exercised. CALS would develop the balancing exercise required by section 6(2), distinguishing a restriction directed at the location or manner of burial from a prohibition that removes the practical ability to exercise the right on the land. CALS' proposed submission is that the balancing requirement must accommodate legally protected interests without restoring an unrestricted landowner veto over an established statutory entitlement.[8]

44 CALS would further explain how ESTA protects the continuity of these rights and regulates their surrender:

44.1 Section 6(4) recognises continuing rights concerning family graves beyond the initial act of burial and extends protection to persons who no longer reside on the land.

44.2 Section 24 addresses the binding effect of occupiers' rights and relevant consent on successors in title. A change of ownership must therefore be considered within the statutory framework governing existing rights.

44.3 Section 25 regulates waiver and agreements limiting occupiers' rights. CALS would explain why accepting an alternative site for a particular burial, agreeing to relocate existing graves, surrendering future burial entitlements and relinquishing residence are distinct matters. The legal

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[8] *Dlamini and Another v Joosten and Others* [2005] ZASCA 138; 2006 (3) SA 342 (SCA) paras 24–25; *Hattingh and Others v Juta* [2013] ZACC 5; 2013 (3) SA 275 (CC) paras 32–33.

effect of any arrangement arising on the existing record must be assessed by identifying the particular right affected and applying the relevant statutory requirements.

45 CALS would address sections 7(2) and 7(3) as a further protection against the erosion of statutory rights. Its submissions would identify the legal right exercised or anticipated, the prejudicial conduct alleged, and the facts necessary to engage the rebuttable presumption. This would provide a statutory framework for assessing whether restrictions on burial or access to graves constitute prejudice because an occupier has asserted protected rights, including in the context of relocation negotiations.

B. Alternative burial sites, exhumation and appropriate relief

46 CALS would submit that the assessment of an alternative burial arrangement must identify whether it accommodates the exercise of an existing right or requires that right to be surrendered or materially diminished. Another location on the occupied land and a replacement cemetery outside that land do not necessarily have the same legal or practical consequences. The availability of another place of interment is therefore insufficient, by itself, to establish an adequate alternative.

47 CALS would develop a framework for this assessment, addressing:

47.1 The source, holder and content of the statutory right, including the interests protected by continuing access to family graves.

47.2 The nature and extent of the proposed restriction, and whether it regulates the exercise of the right or removes its practical substance.

47.3 The legally protected interest advanced to justify the restriction and the evidence establishing the interference with that interest.

47.4 Whether reasonable accommodation, including an appropriate location on the land, could protect the respective interests with less interference.

47.5 The adequacy and security of any proposed alternative, assessed against the family's practices, its relationship with existing graves, continued access and observance, and the legal effect of any proposed surrender of rights.

47.6 The relevance of the Spatial Planning and Land Use Management Act 16 of 2013 where land use change is relied upon. CALS would address sections 6 and 7, particularly spatial justice, access to secure tenure and the minimisation of adverse social and economic impacts, as supporting statutory context for the assessment of accommodation and alternatives. This would inform the existing ESTA inquiry without seeking a separate determination of the validity of a planning approval.[9]

48 CALS would explain how these considerations should be assessed alongside the landowner's interests, on the evidence before the Court, without assuming that every alternative is either adequate or unacceptable.

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[9] *SPLUMA*, ss 6(1), 7(a)(i), 7(a)(v) and 7(c)(ii).

49 CALS would further submit that the lawfulness of the burial and the appropriateness of exhumation are distinct questions. Even if a burial is found to have occurred without satisfying the applicable statutory requirements, the court must still determine whether exhumation is legally competent and justified. A conclusion on the first question does not supply the answer to the second.

50 The further inquiry must identify the purpose served by exhumation, the prejudice established by the party seeking it, and the consequences for the affected family. CALS would explain how the international and constitutional protections discussed above inform the assessment of those consequences, including whether reasonably available measures could adequately protect the landowner's interests while causing less interference with the family's protected interests.

51 CALS would also explain the role of meaningful engagement in identifying alternatives and protecting the rights affected by exhumation. Participation in discussing how relocation will be implemented does not, without more, establish agreement that relocation should occur or a legally effective surrender of existing rights. The assessment must distinguish those questions and consider whether the affected persons had sufficient information and a meaningful opportunity to address preservation, accommodation and alternatives. Any exhumation ultimately justified would require appropriate safeguards for dignity and religious and cultural observance.

52 These submissions would assist the Court in determining just and equitable relief under section 172(1)(b) of the Constitution, consistently with ESTA's protective

purposes and the rights of all affected parties. CALS would address what relief is supported by the existing record and the procedural fairness required before an order affecting a family grave is made.

RELEVANCE AND NOVELTY OF THESE SUBMISSIONS

53 CALS recognises that the applicants already address the requirements of section 6(2)(dA), the absence of a unilateral power to withdraw an established burial right, and the contention that unlawfulness does not automatically justify exhumation. CALS proposed contribution would develop the statutory method for distinguishing permissible regulation of a burial right from its withdrawal or effective extinguishment, and the consequences of that distinction for the assessment of alternatives and relief.

54 In particular, CALS would explain the relationship between the burial and grave-access provisions, the protection against prejudice in section 7, and the provisions governing successors in title and waiver in sections 24 and 25. Drawing on its relevant research and the international framework, CALS would identify the considerations necessary to determine whether an alternative preserves meaningful exercise of the protected rights or requires their surrender. Where applicable, SPLUMA's development principles would provide supporting domestic context.

55 These submissions develop the themes of ESTA's protections, prejudice, the significance of land and graves, alternative burial arrangements and the appropriateness of relief. They remain directed at the statutory and remedial questions arising in the appeal and the existing factual record. CALS seeks no

additional substantive relief or adjudication of a separate challenge to a planning approval or relocation agreement.

THE PARTIES' ATTITUDE TO CALS'S ADMISSION AND PROPOSED PARTICIPATION

56 On 13 October 2026, CALS addressed correspondence to the parties requesting their consent to its admission as amicus curiae and requesting responses by 16 October 2026. A copy of that correspondence is attached marked **Annexure FA7**.

57 The applicants granted their consent on 13 October 2026. A copy of their written consent is attached marked **Annexure FA8**.

58 The respondent granted its consent on 18 October 2026. A copy of its written consent is attached marked **Annexure FA9**.

59 CALS has considered the applicants' Heads of Argument dated 8 October 2026. In developing its submissions, CALS will take account of the parties' written arguments to ensure that its contribution remains focused and useful to the Court.

60 CALS's factual submissions concerning the dispute will remain confined to the existing record. The report annexed as FA6 documents CALS's research experience and informs the identification of interests and considerations relevant to its legal submissions. CALS does not rely on findings concerning other communities as proof of the respondent's conduct or the circumstances of the

Buta family and does not seek to introduce additional disputed facts into the appeal.

61 CALS seeks permission to file written submissions within the period and on the terms determined by this Court, and to make oral submissions if the Court so directs.

CONCLUSION AND RELIEF

62 CALS's established work on land justice and tenure security gives it an interest in the issues arising in this appeal. Its proposed contribution would explain how international law informs the interpretation of ESTA through sections 39(1)(b) and 39(2) of the Constitution, and how that interpretation bears on alternative burial arrangements and the justification for exhumation. For the reasons set out above, those submissions would assist the Court and provide a contribution distinct from the parties' arguments.

63 I accordingly request an order:

63.1 admitting CALS as *amicus curiae* in these proceedings;

63.2 permitting CALS to file written submissions within such period and on such terms as the Court may direct;

63.3 permitting CALS to make oral submissions at the hearing, should the Court so direct; and

63.4 granting further or alternative relief as the Court considers appropriate.

64 I respectfully submit that it is in the interests of justice to grant the relief sought in the accompanying notice of motion.

CHRISTOPHER GEVERS

I certify that the deponent has acknowledged knowing and understanding the contents of this affidavit, has no objection to taking the prescribed oath and considers the oath binding on the deponent's conscience. The affidavit was signed and sworn to before me at DURBAN on this 23RD day of OCTOBER 2026, in compliance with the regulations published under Government Notice R1258 of 21 July 1972, as amended.

COMMISSIONER OF OATHS

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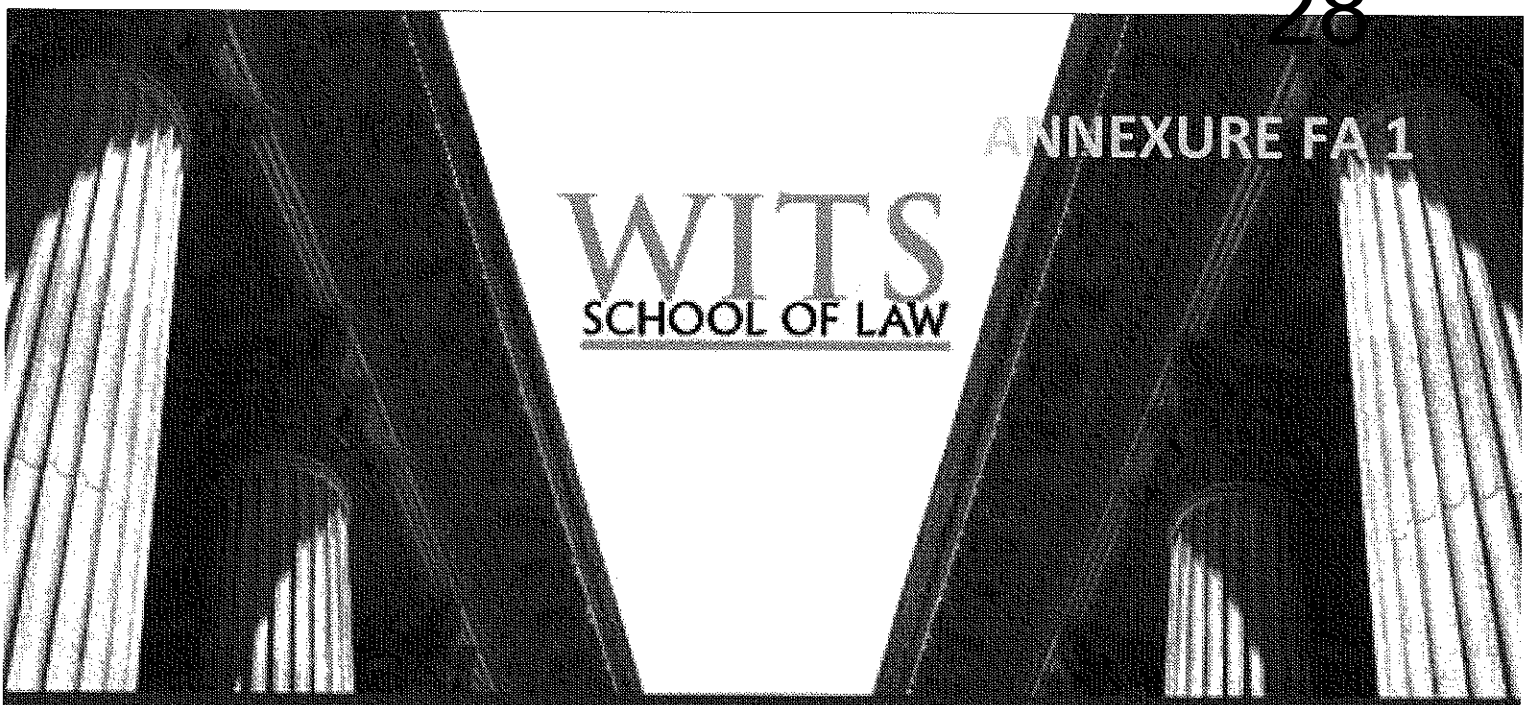
Durban, KwaZulu-Natal

ANNEXURE FA 1



WITS
SCHOOL OF LAW

Working Paper Number 10

WHO OWNS SOUTH AFRICA?

Can the repeal of the Land Acts de-racialise land ownership in South Africa?

by

Aninka Claassens

The Paper was originally published by the
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(February 1991)

CALS
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UNIVERSITY OF THE WITWATERSRAND
JOHANNESBURG

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JOHANNESBURG

WHO OWNS SOUTH AFRICA?

CAN THE REPEAL OF THE LAND ACTS DE-RACIALISE LAND OWNERSHIP IN SOUTH AFRICA?

Paper presented at the University of Cape Town in a joint session with Mr. Jacob de Villiers, Minister of Agriculture on the 29th January 1991. The session was part of the "Issues in Transition" course co-sponsored by IDASA and the Department of Adult Education and Extra-Mural Studies.

by Aninka Claassens

Occasional Paper 11

February 1991.

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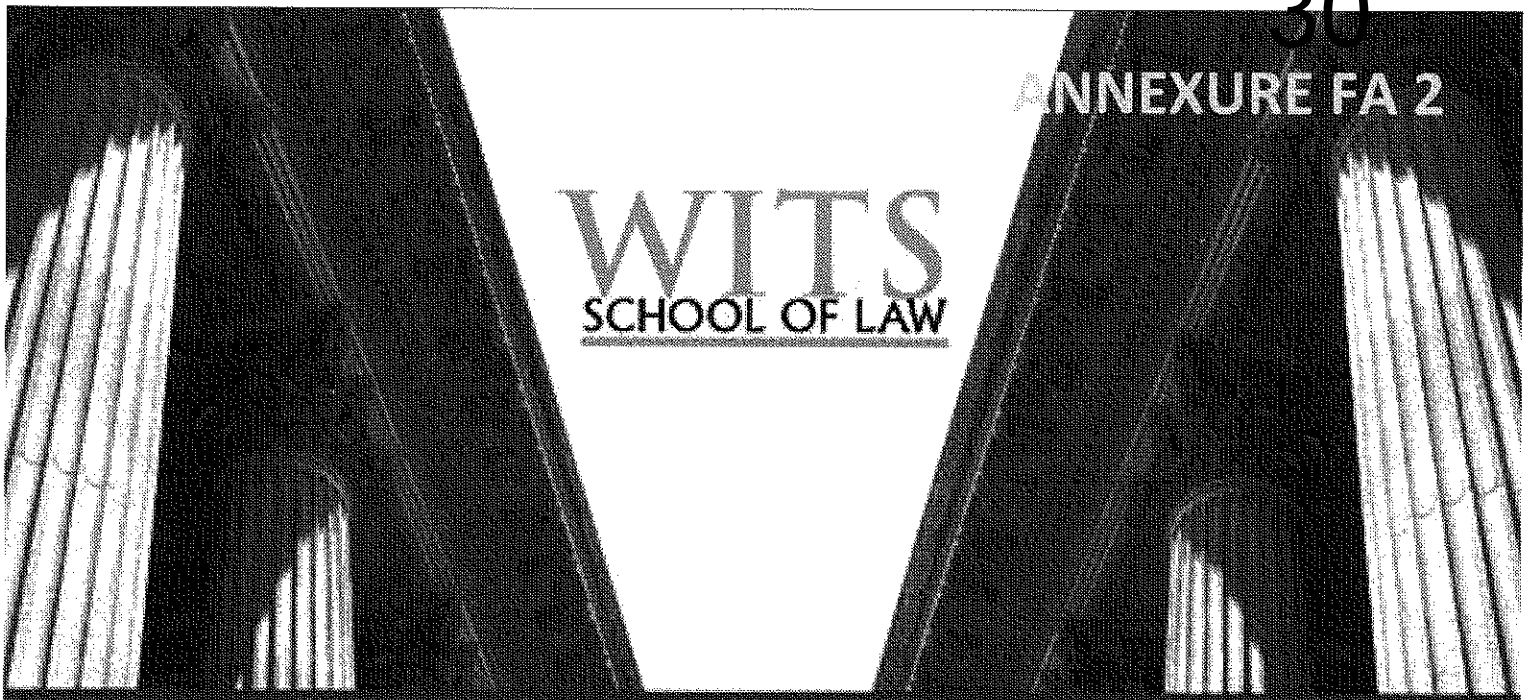

WITS
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Working Paper Number 22

DEFINING THE PROPERTY RIGHTS OF OTHERS: POLITICAL POWER, INDIGENOUS TENURE AND THE CONSTRUCTION OF CUSTOMARY LAW

by

Heinz Klug

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DEFINING THE PROPERTY RIGHTS OF OTHERS:POLITICAL POWER, INDIGENOUS TENURE AND THE CONSTRUCTION OF CUSTOMARY LAND LAW

by

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October 1995

WORKING PAPER 23

ANNEXURE FA 3

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Submission

to the

Joint Constitutional Review Committee

on the

Review of section 25 of the Constitution

June 2018

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INTRODUCTION

About the Centre for Applied Legal Studies

1. The Centre for Applied Legal Studies ('CALS') welcomes the opportunity to submit comments on the Review of section 25 of the Constitution in response to the Joint Constitutional Review Committee call by the to make these submissions. In the event that the Joint Constitutional Review Committee hosts public hearings on the Bill, CALS hereby requests that it be placed on the roll to make oral submissions.

2. CALS is a human rights organisation and registered law clinic based at the School of Law at the University of the Witwatersrand. CALS is committed to the protection of human rights through the empowerment of individuals and communities and the pursuit of systemic change.

3. CALS' vision is a country and continent where human rights are respected, protected and fulfilled by the state, corporations, individuals and other repositories of power, the dismantling of systemic harm and a rigorous dedication to justice. It fulfils this mandate by:

    - challenging and reforming systems within Africa which perpetuate harm, inequality and human rights violations,
    - providing professional legal representation to survivors of human rights abuses; and
    - using a combination of strategic litigation, advocacy and research, to challenge systems of power and act on behalf of the vulnerable.

4. CALS operates across a range of human rights issues: basic services, business and human rights, environmental justice, gender, and rule of law.

BACKGROUND

5. It is undisputed that colonial and apartheid laws sought to benefit and were in the interests of a white minority of European origin and discriminated and excluded Africans from participation and in particular benefiting from their land. This exploitation and exclusion of Africans began at the inception of colonialism and more formalised by law in 1894 through the Glen Grey Act of 1894 and many others after it.[1]

[1] Such as the Native Land Act 27 of 1913; the Transvaal Asiatic Land Tenure Act 35 of 1932; the Native Service Contract Act of 1932; The Native Trust and Land Act 18 of 1936; the Slums Act of 1934; The Rural Dealers Licensing Ordinance Natal of 1935; the Representation of Natives Act 12 of 1936; the Pegging Act in 1946

6. The Constitutional Court, has said the following in *Agri South Africa v Minister of Minerals & Energy*:

   "[T]he architecture of the apartheid system placed about 87% of the land and the mineral resources that lie in its belly in the hands of 13% of the population. Consequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty."[2]

7. To address this gross economic inequality, CALS submits that existing legislative measures must facilitate equitable access to land and opportunities in key industries like the agricultural and mining sector. Taking into account the racially discriminatory nature of these industries in particular under Apartheid and its lasting legacy, CALS submits that it is imperative that redress measures be substantive and extensive in nature. The land regulatory system should address not only the economically exploitative nature of these industries, but the migrant labour system, the abhorrent housing and living conditions of black people, the exclusion of black people from the management, ownership and job reservation, and the disproportionate burden of impact on sexual minorities, gender non-conforming peoples and communities at large.

GENDER APPROACH AND POVERTY REDUCTION

8. CALS submits that the most affected people by landlessness are women and this is due to the social construct of gender. Further that women affected by landlessness are often denied the opportunity to speak or make recommendations on the issue of land and this is due to a patriarchal history of South Africa. CALS hopes therefore that this process initiated by the Constitutional Review Committee will give due consideration to indigenous people, minority groups, and those disadvantaged by age, disability, gender or sexual orientation.

9. In this regard, also notes the commitment to gender equality in terms the Convention on the Elimination of all forms of Discrimination against Women ('CEDAW') by the South African government. Further, that sixty-six percent of African states have ratified or accessioned the Protocol to the African Charter on Human and People Rights on the Rights of Women in Africa, which provides that states will take measures to prevent discrimination against women.

10. Exclusion of black people from owning land through various legal instruments has resulted in poverty. Poor people, and in particular black women depend on the

[2] 2013 (4) SA (CC) para 1.

environment for food, shelter, and water. Landlessness leads to hunger, malnutrition and ill-health and thus exacerbates poverty.

11. CALS submits that in its intended land reform programme, the South African government must seek to address the racial and gendered impact of landlessness of previously disadvantaged persons and therefore ending poverty.

LAND EXPROPRIATION MANDATED BY THE CONSTITUTION IN VARIOUS SECTIONS

12. Section 25 of the Constitution must be interpreted with due regard to the constitutional commitment to substantive equality and the recognition of the need for transformative or restitutionary measures by the state, in sections 1(a), 7(2), 9(2) and section 25 in its entirety.

13. The Preamble to the Constitution states that the Constitution was adopted "*recognis[ing] the injustices of our past*", and that one of its purposes is to "*improve the quality of life of all citizens and free the potential of each person*". The very first founding provision of the Constitution, section 1(a), provides that the founding values of the Republic of South Africa include "*human dignity, the achievement of equality and the advancement of human rights and freedoms*".

Section 7(2) and 9(2) of the Constitution

14. The rights in the Bill of Rights are interdependent and mutually supporting. The Bill of Rights therefore imposes the following two obligations on anyone tasked with the implementation of any right, and in particular to this submission land reform:

15. The first obligation arises from section 7(2): This section requires that the state "*must respect, protect, promote and fulfil the rights in the Bill of Rights.*" This constitutional obligation includes the duty to pass legislation to ensure that the right is promoted. The State, through a Minister cannot for instance promote and fulfil the right to equality if he cannot compel compliance with the legislative and other measures taken in this sphere to achieve the fulfilment of the right. The Minister's failure to compel compliance with these measures would constitute a breach of the state's obligations under section 7(2).

16. The second obligation flows from section 9(2): Where the state has put in place a measure to promote and achieve substantive equality, the Minister is obliged to ensure and compel compliance with that measure. Should the Minister fail to compel compliance, he fails to fulfil his obligations under section 9(2).

17. In *Minister of Finance and others v Van Heerden*[3], Moseneke J (as he then was) for the majority of the Constitutional Court observed that South African equality jurisprudence recognises a conception of equality that goes beyond mere formal equality. He noted that:

> "*This substantive notion of equality recognises that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist... It is therefore incumbent on courts to scrutinise in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but 'situation-sensitive' approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.*"[4]

18. The Court in *Van Heerden* recognised that remedial measures are not derogations from, but substantive and composite parts of, the right to equality envisaged in the Constitution.

19. The constitutional recognition of the critical need for state policies aimed at transformation was identified in the judgments of O'Regan J and Ngcobo J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*, in the context of review of administrative action with restitutionary objectives in relation to the fishing indusiry.

20. As was pointed out by the Constitutional Court in *Bel Porto School Governing Body and Others v Premier, Western Cape*:

> "*The difficulties confronting us as a nation in giving effect to these commitments are profound and must not be underestimated. The process of transformation must be carried out in accordance with the provisions of the Constitution and its Bill of Rights. Yet, in order to achieve the goals set in the Constitution, what has to be done in the process of transformation will at times inevitably weigh more heavily on some members of the community than others.*"

[3] 2004 (6) SA 121 (CC)
[4] Para 27.

SECTION 25 (5) – "LEGISLATIVE AND OTHER MEASURES"

21. CALS notes with concern that the Expropriation Bill ("the Bill")[5] intended to be a transformative measure "provide for the expropriation of property for a public purpose or in the public interest" has not been signed into law since its introduction in the National Assembly in February 2015.

22. The spirit and purport of the Constitution as reflected in sections 7 (2), 9 (2) and 25 of the Constitution is reiterated in the Preamble of the Bill and further providing that "*uniformity across the nation is required in order to deal effectively with these matters*". The Constitution, in a number of provisions, calls upon the state to take positive measures to redress the unfair effects of past.[6] The state is therefore mandated to take measure to advance and protect historically disadvantaged peoples. This is not a need or a privilege, but a constitutional imperative, and an obligation.

23. A preamble, while not enforceable, is a significant aspect of any legislation. It sheds light on the historical context and the broad aims and purposes that motivate the law.[7] It is therefore imperative that the preamble speak not only to the purpose of the law itself but also, where its purpose is aligned with the Constitution, speak in a manner consistent to the latter. Section 7(2) of the Constitution imposes a duty (not a need) on the State to protect the rights in the Bill of Rights which must be read together with section 237 requiring that all constitutional obligations be performed diligently and without delay.

24. As stated above, the very first founding provision of the Constitution, section 1(a), provides that the founding values of the Republic of South Africa include "*human dignity, the achievement of equality and the advancement of human rights and freedoms*".

25. The Bill is a legislative measure which, if enacted, must give effect to section 25 (5) of the Constitution and therefore bringing "*uniformity*" where the State, "within its available resources, fosters conditions which enable citizens to gain access to land on an equitable basis" and thus facilitating redress for historical injustices through land reform.

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[5] B4D-2015

[6] Sections 9(2), 23(6), 24(b), 25(5), 26(2), 27(2), 29(1)(b), 32(2), and 33(3) of the Constitution.

[7] S v Shaik and Others 2008 (5) SA 354 (CC), at para 50-51.

Mandatory compliance

26. Compliance by the Minister with the measures provided in the current Bill is not optional but constitutionally mandated to ensure compliance with the spirit and purport of the Bill which directly flows from section 25 of the Constitution. Any failure on the part of the state would directly lead to the objects of the Act and the provisions of the Constitution not being realised. In addition, it is incumbent upon any Minister to promote and fulfil the state's responsibility in terms of section 7(2) of the Constitution.

27. Section 25 of the Constitution itself envisages the need for such measures by providing in section 25(4) that for the purposes of the property clause "*the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources*"; and in section 25 (8), that no provision of the property clause "*may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1)*".

28. Lastly, section 39(2) of the Constitution enjoins courts interpreting legislation to "*promote the spirit, purport and objects of the Bill of Rights*", CALS submits that any expropriation must be interpreted with due regard to these provisions of the Constitution. If interpreted with these provisions in mind, expropriation without compensation meets constitutional muster and where it is contended that certain compensable expropriation is appropriate; the amount of compensation must be calculated with reference to the provisions of section 25(3) of the Constitution.

29. International law special measures[8] which South Africa has either signed or is a party to and which are targeted at particular disadvantaged groups[9] in order to pursue restitutionary measures are also of great significance for the interpretation of section 25 of the Constitution. These measures are designed to promote the achievement of equality and to protect and advance categories of persons disadvantaged by past unfair discrimination.

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[8] International Convention on the Elimination of all Forms of Racial Discrimination 1965 (CERD); the African Charter on Human and Peoples' Rights 1986; the International Covenant on Civil and Political Civil Rights 1966 (ICCPR); the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR); and Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW).

[9] Sometimes seeking the advancement of particular racial or ethnic groups, women and other groups in appropriate circumstances.

CONCLUSION

30. In summation, we call on the Constitutional Review Committee to commit to:

30.1. Effective consultation on and addressing the racial and gendered impact of landlessness of previously disadvantaged persons through land reform;

30.2. Transformative constitutional mandate as provided by the sections and case law outlined above;

30.3. Facilitating the appropriate amendment of the Expropriation Bill to be enacted reflecting and giving effect to section 25 (5) of the Constitution and therefore bringing "*uniformity*" where the State, within its available resources, fosters conditions which enable citizens to gain access to land on an equitable basis.

ANNEXURE FA 4

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Submission

to the

Minister for Agriculture, Land Reform and Rural Development

on the

Beneficiary Selection and Land Allocation Policy

March 2020

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INTRODUCTION

About the Centre for Applied Legal Studies

1. The Centre for Applied Legal Studies ("***CALS***") welcomes the opportunity to submit comments on the Beneficiary Selection and Land Allocation Policy ("***the Policy***") in response to the call by the Minister for Agriculture, Land Reform and Rural Development ("***the Minister***"). In the event that the Minister hosts public hearings on the Bill, CALS hereby requests that it be placed on the roll to make oral submissions.

2. CALS is a human rights organisation and registered law clinic based at the School of Law at the University of the Witwatersrand. CALS is committed to the protection of human rights through the empowerment of individuals and communities and the pursuit of systemic change.

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    - using a combination of strategic litigation, advocacy and research, to challenge systems of power and act on behalf of vulnerable persons and communities.

4. CALS operates across a range of human rights issues, namely basic services, business and human rights, environmental justice, gender justice, and the rule of

law, and adopts a gendered and intersectional approach to interpreting, implementing and – where necessary – promoting the development of the law.

BACKGROUND: BRIEF COMMENT ON THE SOUTH AFRICAN LAND REFORM PROGRAMME

5. It is undisputed that South Africa's colonial and apartheid history served to benefit a white minority, and expressly discriminated against Black persons. This discrimination sought to exclude Black persons from participation in the economy, and in particular to prevent Black persons from benefiting from South Africa's abundant land and resources.

6. The Constitutional Court recognized this in *Agri South Africa v Minister for Minerals & Energy* 2013 (4) SA (CC) para 1 –

> *"[T]he architecture of the apartheid system placed about 87 percent of the land and the mineral resources that lie in its belly in the hands of 13 percent of the population. Consequently, white South Africans wield real economic power while the overwhelming majority of black South Africans are still identified with unemployment and abject poverty. For they were unable to benefit directly from the exploitation of our mineral resources by reason of their landlessness, exclusion and poverty."*

7. The Constitution calls upon the State to take positive measures to redress the unfair effects of the past.[1] The State is therefore mandated to take measures to advance and protect historically disadvantaged peoples. This is neither a need nor a privilege, but a constitutional imperative and an obligation.

8. CALS accordingly recognizes the need for legislative measures that facilitate equitable access to land and opportunities to address pervasive gross economic inequality, and supports those measures which are substantive and extensive in nature.

[1] See Constitution sections 9(2), 23(6), 24(*b*), 25(5), 26(2), 27(2), 29(1)(*b*), 32(2), and 33(3).

9. CALS submits that the land regulatory system should address not only the economically exploitative nature of industries such as the agricultural and mining sectors, but the migrant labour system; the abhorrent housing and living conditions of Black persons, the exclusion of Black persons from management and ownership of land-related business; and the disproportionate burden of this impact on sexual minorities and gender non-conforming individuals and communities.

10. CALS nevertheless cautions that the current Land Reform programme, encompassing as it does various relevant legislative and other measures, is inadequately managed and often poorly implemented. CALS encourages the responsible State officials to pursue the Land Reform programme vigorously, to ensure the complete restitution of dignity for all South Africans.

COMMENT ON THE SUBSTANCE OF THE POLICY

11. CALS seeks to make three discrete comments on the Policy, focusing on (1) the Right to Food; (2) the appointment of members of the Land Allocation and Selection Panel; and (3) persons convicted of crimes being disqualified from being allocated land under the Policy.

The purpose of Land Reform in the context of transforming South African society

12. Firstly however, CALS submits that the greater purpose of South Africa's Land Reform programme must be the foundation stone on which the Policy is built.

13. Flowing as it does from the Constitution, the Land Reform programme must give effect to the constitutional demand that we "recognize the injustices of our past" and "improve the quality of life of all citizens and free the potential of each person".[2]

14. The systems of colonialism and apartheid which excluded Black persons from owning land have wide-ranging effects in contemporary society, not all of which are

[2] Preamble to the Constitution of the Republic of South Africa, 1996.

tangible. We must remain cognizant of the devastating denial of Black persons' dignity through these systems, and the extent to which the Land Reform programme seeks to restore this dignity.

15. In restitution thereof, Black South Africans are entitled to benefit from land allocation by virtue of this historical denial of and injury to their dignity. That right is not contingent on their intended use of that land, but rather the restoration of their basic human dignity. The allocation of land is thus not limited to human settlement and the achievement of the narrow forms of productivity which are prioritized in a capitalist economy; the return of land serves a much broader purpose in transforming South African society and redressing past injustices.

16. Despite this, the Policy appears to prioritize applicants for land allocation who are able and/or willing to utilize their allocated land for purposes of agriculture or other recognized forms of economic productivity, or more generally for human settlement by the State, to the exclusion of all other applicants.

17. In the light thereof, CALS submits that the Policy should recognize and give effect to the broader bases on which beneficiaries may justify their claims to the land sought to be allocated, including that the allocation itself serves to recognize and restore their human dignity.

The Right to Food and food sustainability

18. Section 27 of the Constitution enshrines the right *inter alia* of access to sufficient food, and imposes a duty on the State to take reasonable legislative measures to achieve the progressive realization thereof. This obligation is elaborated upon in Article 11 of the International Covenant on Civil and Political Rights,[3] which calls upon States Parties to –

[3] UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

> *"(1) [Recognize] the right of everyone to an adequate standard of living for himself and his family, including adequate food . . . and to the continuous improvement of living conditions . . .*
>
> *(2) [Recognize] the fundamental right of everyone to be free from hunger, [and] take, individually and through international co-operation, the measures, including specific programmes, which are needed:*
>
> *(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;*
>
> *(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need."*

19. CALS notes that despite this clear and vital duty resting on the State, and further despite South Africa's status as a food- and water-scarce country plagued by poverty and hunger, the Policy fails to prioritize the need for food production, security and sustainability in the selection of beneficiaries for land allocation.

20. CALS considers this failure to constitute a violation of the State's duty in this regard, which violation is unjustifiable in the context of prevailing drought and the ongoing climate crisis. These emergencies make the need for policies that centre training in the production of indigenous food sources, which are resilient and appropriately geared towards our water-scarce climate, increasingly urgent. Such policies will go some way towards ensuring food sustainability, fighting hunger and promoting an agricultural sector that is able to withstand the climate crisis.

21. In the circumstances, CALS recommends that the Policy stipulate a clear preference for applicants for land allocation who are either trained in or willing to undergo training in the production of indigenous food sources to be selected as "beneficiaries".

The appointment of members of the independent Land Allocation and Selection Panel

22. At the outset, the Policy notes that –

> *"The lack of a credible and transparent process for land allocation and beneficiary selection has resulted in manipulation of the process."*[4]

23. As a mechanism to remedy this, the Policy proposes the establishment of an independent Land Allocation and Selection Panel ("***the Panel***").[5]

24. Clause 12.1 then elaborates as follows –

> *"A National and Provincial Land Allocation and Selection Panel shall be established and shall be a non-statutory body which shall be multi-disciplinary and diverse with representatives from all relevant stakeholders in the Land and Agrarian Reform sector and the Terms of Reference and the composition shall be determined by the Department."*

25. While the National Offices of the Department shall compile a preliminary shortlist of beneficiaries, the Panel is tasked with conducting a further shortlisting exercise, after which it will undertake farm inspections and interviews of shortlisted applicants. The Panel then makes recommendations to the relevant Departmental structure for approval.[6] The Panel is also empowered to consider written appeals from applicants aggrieved by the selection, allocation and categorization process.[7]

26. It is clear therefore that the Panel has significant and wide-ranging powers integral to the determination of which applicants ultimately benefit under the Policy. Despite this, and the contents of Clause 12.1 detailed above, the exact appointment procedures for members of the Panel is not outlined in the Policy.

[4] Policy clause 2.2.
[5] Policy clause 4.1(h).
[6] Policy clause 12.4.
[7] Policy clause 13.1.

27. CALS appreciates the need for such a Panel, and supports an administrative system which ensures that beneficiary selection is both transparent and expeditious. CALS further recognizes the primacy of the Panel to the broader Land Reform programme, given that it is ultimately the Panel which will determine which applicants benefit from that programme.

28. CALS nevertheless submits that the nomination, interview and appointment criteria and processes relevant to the selection of Panel members should be contained in the Policy itself; these processes are integral to ensuring that the Panel indeed meets the envisioned goals of transparency, independence and fairness in beneficiary selection, which will in turn promote the efficiency and legitimacy of the broader Land Reform programme.

29. CALS accordingly recommends that the Policy be amended to include a stipulation of the criteria and processes to be followed in establishing the Panel, including any circumstances in which (1) a nominee is disqualified from being appointed to the Panel, and (2) an existing Panel member may be removed.

Persons convicted of crimes being disqualified from being allocated land under the Policy

30. Clause 14.1.2 of the Policy provides that a provisional allocation of land or selection of a beneficiary shall cease in the event that the beneficiary either holds a criminal record or is convicted of a "serious crime".[8] This is distinct from clause 7.4 of the Policy, which details who does not qualify to benefit under the Policy, wherein the fact of a criminal conviction is not mentioned.

31. CALS is of the view that Clause 14.1.2 of the Policy ("***the Clause***") is vague and appears to be *prima facie* irrational.

32. On a first reading of the Clause, the appropriate interpretation is as follows: a beneficiary who was either provisionally selected or is actually selected, becomes

[8] Notably, the term "serious crime" is not defined in the Policy.

disqualified if they are convicted of a serious crime and consequently incur a criminal record, because such provisional allocation and/or actual selection (whichever is applicable) will cease or be terminated.

32.1. The Clause is vague because, on the second reading it is unclear at which stage of the process a criminal record becomes the disqualifying factor for the beneficiary; it could mean disqualification if one incurs a criminal record in the course of the period of provisional or actual allocation, or one could have a prior criminal record which comes to the attention of the Panel, after which one may be disqualified for that reason.

32.2. Whichever meaning and interpretation is applicable is problematic. This is because a person with a criminal record is not listed as a person who is not eligible to be a beneficiary in clause 7.4. Secondly, if the former interpretation is applicable, this is problematic because an individual could have ticked all the boxes from the selection criteria and then suddenly be disqualified on an 'unlisted ground'.

32.3. CALS accordingly recommends either (1) that the words "criminal records or" should be removed from clause 14.1.2, or (2) that the Clause should be drafted in a manner which clarifies the position with regards to persons with criminal records, in order to remedy this vagueness. In particular, CALS recommends that since a person with a criminal record is not listed as a person who is ineligible to be a beneficiary under the Policy, option (1) above should be followed.

33. Moreover, CALS submits that the Clause is irrational, as the the basis upon which a beneficiary would be disqualified and/or ineligible if they hold a criminal record is unclear.

34. Finally, CALS submits that the Clause is irrational as it directly contradicts the stated objectives of the Policy.

34.1. It appears from the White Paper on South African Land Policy of 1997[9] that –

> "*The purpose of the Land Redistribution Programme is to provide the poor with land for residential and productive purposes in order to improve their livelihoods . . . Land redistribution is intended to assist the urban and rural poor, farmworkers, labour tenants, as well as emergent farmers.*" (Emphasis added.)

34.2. Furthermore, clause 4 of the Policy, which outlines the Policy Proposals and Principles, states that the Policy is intended to enable poor, landless and previously disadvantaged rural and peri-urban communities to gain access to land. Such categories of persons could very well be holders of criminal records for crimes committed under various circumstances including poverty and lack of access to land and other resources. It is thus irrational to disqualify such persons, not only because this does not speak to the purpose of the Policy, also because criminal records may very well be obtained in an attempt to escape the cycle of poverty, an affliction which mostly affects poor, previously disadvantaged persons.

35. The purpose of a criminal record, and any sanction imposed on the conviction of a crime, is to punish the individual concerned for their unlawful conduct. Such punishment is the sole purview of the criminal justice system, which scope the Department and this Policy necessarily fall outside of. It is submitted therefore, that this exclusionary Clause seeks to further, and unjustifiably, punish such individuals.

36. Moreover, individuals convicted of a crime often struggle to reintegrate into society, making them particularly vulnerable to poverty and unemployment, and thus susceptible to committing further crimes to ensure their livelihood.

36.1. It is trite that a criminal record is a barrier to entry to the formal labour market, with many employers either requesting applicants to confirm that

[9] As quoted in clause 1.1 of the Policy.

they have not been convicted or seeking consent to conduct a 'background check'.

36.2. This very issue was one of the factors that influenced the amendment to section 271 of the Criminal Procedure Act 51 of 1973, through the Criminal Procedure Amendment Act 65 of 2008, wherein formerly incarcerated persons were for the first time offered a statutory mechanism and procedure for the expungement of certain criminal convictions.[10] However,

> *"[The] process of having a criminal record expunged is not an easy one . . . and may be confusing and intimidating to the lay person. At minimum the applicant has to interact with three entities: the police upon application for a clearance certificate; the Department of Justice and Constitutional Development, and the SAPS Criminal Record Centre."*[11]

Therefore, persons with criminal records remain constructively excluded from entering the formal labour market.

37. The allocation of land for productive use under the Policy presents an obvious opportunity for the rehabilitation of persons convicted of a crime, allowing them to form a community within and through which they may contribute positively to society and seek the support required to maintain their rehabilitation. This is consistent with our legal system's approach to rehabilitation, which all State entities should promote.

38. In the circumstances, CALS submits that the Clause is vague, and constitutes an unjust and irrational exclusion of persons who should otherwise qualify as beneficiaries under the Policy, in the event that they meet all other stipulated criteria.

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[10] L Muntingh (2011) *Civil Society Prison Reform Initiative Report on the law and the business of criminal record expungement in South Africa* 4. Accessed from: https://acjr.org.za/resource-centre/The%20law%20and%20the%20business%20of%20criminal%20record%20expungement%20in%20South%20Africa.pdf.

[11] *Ibid* at 24.

39. CALS accordingly recommends that clause 14.1.2 be removed from the Policy in its entirety. In the alternative, CALS recommends that the Panel be required to conduct an assessment of the particular crime committed by the beneficiary concerned, in order to determine whether the nature and circumstances thereof warrant a disqualification under the Policy. In doing so, the Panel should be compelled to consider the general Proposals and Principles of the Policy, as well as the greater purpose of the Land Reform programme in the context of transforming South African society, as detailed above.

CONCLUSION

40. In summary, we call on the Minister to amend the Policy as follows:

- To recognize and give content to the potential for land allocation to restore human dignity;
- To recognize and fulfil the State's constitutional duty to ensure access to adequate food;
- To stipulate the criteria for nomination to the Land Allocation and Selection Panel, and outline the processes to be followed in appointing and removing members of the Panel; and
- To remedy the unjust, vague and irrational disqualification of persons convicted of crimes from being allocated land under the Policy.

ENDS.

Faculty of Commerce, Law and Management
University of the Witwatersrand

ANNEXURE FA 5

Submission

to the

Department of Human Settlements

on

Draft Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill, 2026 as published in Government Gazette Notice No. 3896 of 2026

15 June 2026

Jointly submitted by:

Abahlali baseMjondolo
Centre for Applied Legal Studies
Ndifuna Ukwazi Law Centre
Socio-Economic Rights Institute
Isandla Institute
Reclaim The City
Rent Control Group
Solidarity Space
Housing Assembly
Indibano Yabahlali
Intlungu yasematyotyombeni
Development Action Group
International Labour Research and Information Group
Tshisimani Centre for Activist Education

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2 Historical overview of evictions in the apartheid era 6
3 Evictions in the constitutional democracy era 7
4 Shortcomings of the Amendment Bill 11
5 Conclusion 15

1 Introduction and background

1. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill (**"the Amendment Bill"**) was first introduced in the National Assembly as a Private Member's Bill by a member of the Democratic Alliance, namely Ms EL Powell, on 28 March 2023.

2. The long title of the Amendment Bill described its purpose, *inter alia,* as follows:

"*To amend the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 so as to extend the offence to incite or promote orchestrated unlawful invasions to include instances where no payment was received or solicited. . .and to require courts to stipulate the period of time that alternative accommodation or land would need to be provided for an unlawful occupier. .*"

3. The Amendment Bill lapsed on 21 May 2024 in terms of the National Assembly Rule 333(2) and was revived on 29 October 2024.

4. On 28 May 2025, the Human Settlements Portfolio Committee met to consider a motion of desirability of the Private Member's Bill. At this meeting, Ms Powell indicated that the proposed amendments were prompted by "*municipal appeals for legislative reform to help manage growing incidents of unlawful land occupation*".[1]

[1] https://pmg.org.za/committee-meeting/40805/

5. Democratic Alliance (DA) Members supported the Bill and argued that "municipalities were struggling to deliver services due to the diversion of resources towards addressing unlawful occupations and emergency housing".

6. Members from the African National Congress (ANC), Economic Freedom Fighters (EFF), uMkhonto weSizwe Party (MKP) and the National Coloured Congress (NCC) objected to the Bill's framing and intent, stating that it failed to acknowledge the historical context of land dispossession and the structural causes of landlessness in South Africa. These Members also argued that certain portions of the Bill would criminalise vulnerable people rather than addressing housing backlogs and failures in land redistribution.

7. The Human Settlements Portfolio Committee elected not to vote on the motion of desirability at that stage.

8. On 29 October 2025, the Human Settlements Portfolio Committee met once more to discuss the Amendment Bill.[2] At this meeting, Members of the Portfolio Committee once again raised concerns regarding the Bill's potential to criminalise poverty, and its implications for municipalities tasked with providing alternative accommodation. They questioned whether the Bill aligned with constitutional principles and the White Paper on Human Settlements. The members also generally agreed that the Department of Human Settlements was best placed to lead the legislative process to ensure comprehensive consultation and coherence with national policy.

[2] https://pmg.org.za/committee-meeting/41900/

9. On 16 April 2026, the Minister of Human Settlements, Ms Thembisile Simelane, published the Amendment Bill for public comment.

10. It is against this backdrop that this joint submission, in opposition to the Amendment Bill, is made on behalf of the following organisations:

10.1. Abahlali baseMjondolo

10.2. Centre for Applied Legal Studies

10.3. Ndifuna Ukwazi Law Centre

10.4. Socio-Economic Rights Institute

10.5. Isandla Institute

10.6. Reclaim The City

10.7. Rent Control Group

10.8. Solidarity Space

10.9. Housing Assembly

10.10. Indibano Yabahlali

10.11. Intlungu yasematyotyombeni

10.12. Development Action Group

10.13. International Labour Research and Information Group

10.14. Tshisimani Centre for Activist Education

11. This joint submission will firstly, provide a historical overview of evictions in the apartheid era; secondly, it will explore evictions and housing rights in the democratic,

constitutional dispensation, and finally, it will highlight the ways in which the Amendment Bill betrays the constitutional promise.

2 Historical overview of evictions in the apartheid era

12. In the 1930s and 1940s, there was rapid urbanisation in South Africa, which led to some racially-integrated peri-urban settlement that was a cause for concern for the colonial government. Accordingly, in the 1940s, the Smuts cabinet became increasingly preoccupied with "reconstruction".[3]

13. The War Measure, 1940, which was enacted in 1944, enabled a magistrate to issue an order for the removal of people living on land or in buildings without the permission of the owner / lawful occupier and for the demolition of any buildings or structures that threatened the health and safety of the general public or the maintenance of peace and good order.

14. The War Measure was primarily used to stem the influx of black people who moved to cities in search of employment opportunities, and it was unsuccessful because with nowhere else to go, the evicted merely moved to other pieces of land nearby and waited for the process to begin again.

15. Accordingly, after the National Party won the election in 1948 to become the governing party in the Union of South Africa, the Group Areas Act, 1950 was

[3] A Mabin "Comprehensive Segregation: The Origins of the Group Areas Act and Its Planning Apparatuses" (1992) 18 JSAS 413 - 414.

promulgated. The Prime Minister at that time, DF Malan, described the Group Areas Act as "the essence of apartheid". [4]

16. The Group Areas Act led the era of widespread forced removals, and its two enforcement mechanisms were the Prevention of Illegal Squatting Act, 1951 ("**PISA**") and the Natives Abolition of Passes and Coordination of Documents, 1952 which, respectively, prohibited "squatting" and required black people to carry passes containing their legal and residency statuses. Anyone residing or occupying land or premises in an area outside of his or her scheduled residential area, without justification or a permit, could be evicted.

17. The PISA also criminalised entering and remaining on land or in buildings without any lawful reason. Moreover – much like the Amendment Bill – the PISA prohibited the collection of fees or the exercise of authority with regard to the organisation of "illegal squatting".

3 Evictions in the constitutional democracy era

18. It was in response to the above historical background that the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998 ("**PIE Act**") was enacted to give effect to the constitutional principle which prohibited arbitrary and unlawful evictions. It also served to repeal and replace the apartheid-era PISA.

[4] M Festenstein & C Pickard-Cambridge Land and Race: South Africa's Group Areas and Land Acts (1987) 6.

19. In this regard, section 26 (2) of the Constitution of the Republic of South Africa, 1996 ("**the Constitution**") requires the state to take reasonable, legislative and other measures, within available resources, to achieve the progressive realisation of the right to access adequate housing. Section 26 (3) explicitly prohibits arbitrary evictions and directs courts to consider all relevant circumstances before granting an eviction order.

20. In terms of section 39 of the Constitution, a court must consider international law when interpreting the Bill of Rights.

21. Accordingly, with respect to international standards applicable to the right of access to adequate housing, South Africa is a party to and has ratified the International Convention on Economic, Social and Cultural Rights ("**ICESCR**").

22. Article 11 of the ICESCR protects the right to housing as a component of the fundamental right of everyone to an adequate standard of living for themselves and their family.

23. State parties are obliged under Article 2(1) of the ICESCR to take steps utilising the maximum of their available resources, to progressively realise the rights recognized by the ICESCR, by all appropriate means, including the adoption of legislative measures.

24. The statements and general comments of the Committee on Economic, Social and Cultural Rights ("**CESCR**") are also sources of non-binding but persuasive

international law, which have been regularly referred to in South Africa's leading cases on socio-economic rights.

25. CESCR General Comment 4 states that a number of factors must be taken into account in determining whether particular forms of shelter can be considered to constitute 'adequate housing' for the purposes of the ICESCR. These factors include legal security of tenure, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy.

26. General Comment 7 of the CESCR deals with evictions in the context of the right to adequate housing. It confirms the obligation of states to provide adequate housing to persons who would be rendered homeless by evictions:

'Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.'

27. In *Grootboom,*[5] the Constitutional Court dealt with the right to housing in the context of an eviction. The court emphasised the interconnectedness of rights, the importance of socio-economic rights, and the requirement for the state's positive conduct towards those living in poverty, affected by homelessness or staying in intolerable housing. In this regard, the Court stated that, "*the Constitution will be worth infinitely less than its paper if the reasonableness of state action concerned with*

[5] *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169

housing is determined without regard to the fundamental constitutional value of human dignity".[6]

28. In *Port Elizabeth Municipality,*[7] the Court held that the PIE Act *"not only repealed PISA but in a sense inverted it: squatting was decriminalized and the eviction process was made subject to a number of requirements*" and thus "*the first part of the title of the new law emphasises a shift in thrust from prevention of illegal squatting to prevention of illegal eviction*".[8] The Court held further that "*the former depersonalised processes that took no account of life circumstances of those being expelled were replaced by humanised procedures that focused on fairness to all*".[9] The Court also expressed that, "*it is not only the dignity of the poor that is assailed when homeless people are driven from pillar to post in a desperate quest for a place where they and their families can rest their heads. Our society as a whole is demeaned when state action intensifies rather than mitigates their marginalisation*".[10]

29. In *Blue Moonlight*,[11] the Constitutional Court expressed that section 26 of the Constitution highlighted the *transformative vision* of the Constitution.[12] The Court continued that "*PIE was adopted with the manifest objective of overcoming past abuses like the displacement and relocation of people*".[13] In this judgment, the Court clarified the breadth of the protection offered by the Constitution and the PIE Act by

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[6] Para 83.
[7] *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC).
[8] Para 12.
[9] Para 13.
[10] Para 18.
[11] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (CC) [2011] ZACC 33; 2012 (2) BCLR 150 (CC); 2012 (2) SA 104 (CC) (1 December 2011).
[12] Para 35.
[13] Para 36.

finding that a housing policy which excluded people evicted by a private landowner (as opposed to those evicted by the municipality) from the municipality's temporary housing programme was unconstitutional.[14]

30. In *Commando,*[15] in finding that the City of Cape Town's policy of excluding emergency housing in the inner city was unconstitutional, the court expressed that the City should have foreseen in its planning that urban regeneration would lead to displacement and its conduct was unreasonable because it failed to mitigate the effects and consequences of gentrification on the most vulnerable.[16] The Court went further and held that "*it is unconscionable that residents should now, in the new democracy, face the ignominy of apartheid-style displacement. . .* ".[17]

4 Shortcomings of the Amendment Bill

31. In contrast to the above jurisprudence and the social justice objectives of the PIE Act, the stated objectives of the Amendment Bill are, *inter alia*, to "*seek to relieve municipalities of the huge financial burden in providing alternative accommodation*", to "*broaden the offences provision by prohibiting a person who... incites others to unlawfully occupy land*" and to "*give courts powers to stipulate a period of occupation in a temporary alternative accommodation facility*". In other words, broadly speaking, the Amendment Bill proposes to (1) provide alternative accommodation less frequently, (2) to limit the period of such alternative accommodation and (3) to

[14] Para 97.
[15] *Charnell Commando and Others v City of Cape Town and Another* (CCT 49/23) [2024] ZACC 27; 2025 (3) BCLR 243 (CC); 2025 (3) SA 1 (CC) (20 December 2024)
[16] Para 103.
[17] Para 111.

criminalise those who organise around shared struggles of landlessness and homelessness.

Proposed amendment: substitution of section 3 of the PIE Act

32. It is noteworthy that the proposed amendment creates a statutory offence of inciting, arranging, organising or permitting any person to occupy land without consent in circumstances where the underlying conduct, namely, "occupation without consent" is not a crime under the PIE Act. Instead, the PIE Act defines "unlawful occupiers" and regulates eviction procedures. The proposed provision effectively creates an offence (incitement) linked to conduct that is not clearly criminalised under the same statute.

33. In essence, the proposed amendment amounts to the criminalisation of community leaders and activists who are directly or indirectly involved in the struggle against homelessness and landlessness. This is an unjustified infringement on communities and land activists' constitutionally protected rights to freedom of expression and the right to protest around land and housing rights.

34. There is an extensive history in this country and abroad of the occupation of space as a protest and activist tool (including in anti-apartheid struggle, civil rights, labour rights, and environmental justice). Historically, in South Africa, land occupations were utilised in the broader struggle against land dispossession of black people under apartheid and colonialism. In the United States, the sit-ins of segregated businesses were a tactic of the civil rights struggle against Jim Crow in the Southern states. In Argentina, factory occupations of businesses in the 1990s were organised as

companies sought to pass the costs of the economic crisis to the workforce through withholding salaries, closures and retrenchments.[18]

35. The proposed amendment not only criminalises legitimate forms of activism, but it also regards them as deserving of the most punitive outcomes in the form of either a custodial sentence or an excessive fine, which is also tied to the value of the land and is inherently problematic.

36. This criminalisation is especially inhumane at a time in which the housing backlog is growing while the budget for housing is being cut, and the annual delivery of housing is in steep decline, for example, from 75 000 units in 2019 to 25 000 units in 2023.[19] Furthermore, the continued inability of the state to meet its own targets on housing provision, as illustrated in the 2026/27 budget speech where only 23 027 of the targeted 37 779 were built in the previous financial year. All this is in significant contrast to earlier commitments in terms of the National Development Plan to eliminate housing backlogs by building at least 200 000 housing units per year towards 2030.

37. As discussed above, the Constitutional Court has, on several occasions, adopted a purposive reading of socio-economic rights centred on the need for the Constitution to be corrective, just, and especially responsive to the injustices of the past – and this proposed amendment is an unreasonable departure from our historical context and constitutional jurisprudence on housing and eviction.

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[18] (A Tauss 'Revisiting Argentina's recuperated factories – reflections on over a decade of workers' control (2014) 27 Desaffios 118-125

[19] https://www.up.ac.za/school-of-public-management-and-administration/news/south-africas-low-cost-housing-model-broken-study-suggests-how-fix-it)

Proposed amendment: amendment of section 4 of the PIE Act

38. The proposed amendment suggests that courts have regard to the "circumstances under which the unlawful occupier occupied the land" and the "period of occupation" when considering whether it is just and equitable to grant an eviction order. These factors are ahistorical and, in many respects, constitute a return to PISA-inspired bans on "squatting".

39. The proposed amendment further requires courts (in peremptory language) to "*stipulate the period for which such alternative accommodation or land must be made available*". This is patently illogical as the temporary emergency accommodation must remain available until such time that the vulnerable people are either able to afford paid accommodation or until such time that the state fulfils its constitutional obligation to provide access to adequate housing to such vulnerable people. This right is subject to progressive realization and therefore it is illogical and irrational to require courts to stipulate that the temporary emergency accommodation lapse after a certain time period, as the need might continue to exist.

40. Moreover, the proposed amendment also proposes that, where a court has determined that the occupier is an "unlawful occupier", the court grant an eviction order without requiring the municipality or other organ of state to provide alternative accommodation or land. This is patently unconstitutional and flies in the face of settled jurisprudence as outlined above. The right to the provision of alternative accommodation is not limited to "lawful" occupiers but applies when an occupier would

be rendered homeless by an eviction. This is a question of result and not of conduct. Drawing a distinction between "lawful" and "unlawful" occupiers is irrational and unreasonable.

41. Moreover, this distinction is, in essence, tantamount to unfair discrimination on the basis of class as it unfairly excludes poor people who are more likely to be "unlawful" occupiers from the protections afforded by the PIE Act.

5 Conclusion

42. The Amendment Bill appears to prioritise fiscal considerations over the achievement of substantive equality and the protection of fundamental rights and constitutional promises.

43. The Amendment Bill also appears to regard vulnerable people as obnoxious social nuisances deserving to be met with as little assistance as possible and as much punishment as possible.

44. It is our collective view that this Amendment Bill is regressive. It is an echo from the past and it should have no place in our hard-won constitutional democracy.

ANNEXURE FA 6



UNEARTHING THE TRUTH

HOW THE MINES FAILED COMMUNITIES IN THE SEKHUKHUNE REGION OF SOUTH AFRICA

CALS
Centre for Applied Legal Studies

scmac
THE SECRETARIAT FOR MINING COMMUNITIES

SOUTH AFRICA AMNESTY INTERNATIONAL

ABOUT PARTICIPATING ORGANISATIONS

ABOUT SEKHUKHUNE COMBINED MINING-AFFECTED COMMUNITIES

Sekhukhune Combined Mining-Affected Communities (SCMAC) is a non-profit community-based organisation based in the Limpopo Province of South Africa. SCMAC's membership is made up of communities and individuals from various parts of the district, whose environmental and human rights are affected by mining and related activities in the region. SCMAC is also a member of the national network of mining-affected communities, the Mining and Environmental Justice Community Network of South Africa (MEJCON-SA). A focus of SCMAC's work is the compliance of mining companies with their social and economic obligations.

ABOUT THE CENTRE FOR APPLIED LEGAL STUDIES

The Centre for Applied Legal Studies (CALS) is a civil society organisation based at the School of Law at the University of the Witwatersrand in Johannesburg, South Africa. CALS is also a law clinic, registered with the Legal Practice Council. CALS connects the worlds of academia and social justice. CALS's vision is a society in which historical justice and social justice are achieved through strengthened state institutions and where marginalised actors themselves hold the state and other powerful actors accountable. More specifically, we operationalise this vision through the following five-intersecting programmes: Business and Human Rights; Civil and Political Justice; Environmental Justice; Gender Justice; and Home, Land and Rural Democracy.

ABOUT AMNESTY INTERNATIONAL

Amnesty International is a global movement of more than 10 million people which mobilises the humanity in everyone and campaigns for change so we can all enjoy our human rights. Amnesty International's vision is of a world where those in power keep their promises, respect international law and are held to account. Amnesty International is independent of any government, political ideology, economic interest or religion and are funded mainly by their membership and individual donations. Amnesty International believes that acting in solidarity and compassion with people everywhere can change our societies for the better.

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First published in 2022

Cover photo: *GA-MAMPA VILLAGE, SOUTH AFRICA - 10 APRIL 2021: A view from a local resident's backyard onto the Sefateng Chrome Mine's opencast operations less than 100 metres away. (Photo by Charl Naudé & Xander Ehlers / Amnesty International South Africa)*

CALS Centre for Applied Legal Studies

SCMAC

SOUTH AFRICA AMNESTY INTERNATIONAL

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EXECUTIVE SUMMARY

The extractives industry in South Africa has a dark and sordid history characterised by discrimination, exploitation and exclusion. The mining industry was both a beneficiary and a driver of colonialism and apartheid in its economic, social and legal manifestations. As the mining industry grew, Black communities were driven away from ancestral lands and ghettoised into informal settlements. The mining sector also perpetuated and strengthened the apartheid state through ill treatment and economic exploitation of Black workers.

Given this past, the post-apartheid government, has made some attempts to regulate mining operations and to offset the challenges wrought by mining in local communities through the adoption of new legislation which includes Social and Labour Plans (SLPs) - legally binding mechanisms through which mining companies are required to address socio-economic impacts of mining on communities surrounding the mines.

Despite this, there is a growing body of research which shows that this legislation has done little to transform how mining companies operate. This is predominantly due to impropriety on the part of the mining sector coupled with lack of state oversight on their activities. A manifestation of this impropriety is the failure by some mines to abide by the obligations which arise from their SLPs.

This report examines the compliance of Social and Labour Plans (SLPs) of three mining companies in the Fetakgomo Tubatse Local Municipality (FTLM) area, namely Twickenham Platinum Mine (Twickenham), Marula Platinum Mine (Marula) and Sefateng Chrome Mine (Sefateng) and finds that these mines are to varying extents in non-compliance with aspects of their SLP obligations, resulting in human rights abuses in the communities they operate in.

METHODOLOGY

This report is based on desk and remote field research conducted between October 2020 and July 2021. Researchers conducted an extensive review of documents on the progress of implementation of SLPs by three mining companies operating in the Sekhukhune region, as well as a review of other documents including domestic legislation relative to mining operations, regional and international human rights standards, and correspondence from the mining companies. The research was complemented by interviews with 25 community members in six focus group discussions and individual interviews. These were conducted in order to capture the lived experiences of rightsholders impacted my mining activities in the area.

The research was conducted jointly by Amnesty International, the Centre for Applied Legal Studies and Sekhukhune Combined Mining-Affected Communities.

BACKGROUND

The Sekhukhune region of South Africa is a mineral-rich but under-resourced area of the Limpopo province. In addition to agriculture, mining is an increasingly dominant source of direct employment in the province. Yet even

with the arrival of mining operations and the potential employment opportunities for the region they bring, unemployment remains high at 47% and is projected to increase to 52% by 2023 and 56% by 2030.

People in Sekhukhune suffer poor access to services and score poorly on various development indicators, such as education and literacy levels, and access to health facilities. While they experience various intersecting negative impacts of mining on their environment and well-being, interviewees stated that they hardly saw any of the promised benefits of development. Witnesses interviewed felt excluded in local supply chain deals and transactions thereby increasing discontent. Our research also found that there was poor coordination and monitoring of implementation of SLPs.

LEGAL FRAMEWORK

South Africa is a party to a number of international human rights instruments that are relevant in the context of mining and its associated impacts, including the International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights (ICCPR) and other international instruments and standards, including the UN Guiding Principles on Business and Human Rights (the Ruggie Principles). Under international law, South Africa has an obligation to respect and protect human rights in the context of corporate activities, including mining, through regulation, oversight, investigation, adjudication, and punishment. At the national level, mining activities are also subject to the provisions of the Constitution and directly regulated by the Interim Protection of Informal Land Rights Act (IPILRA) and the Mineral and Petroleum Resources Development Act (MPRDA) which places mineral and petroleum resources within state custodianship "for the benefit of all South Africans".

MINE FAILURES TO COMPLY WITH SLPS

To varying degrees, this report found that all three mining companies investigated had failed to comply with obligations which arose from their respective SLPs. Upon receiving information requests from researchers, the mines would, in some cases, evade questions in relation to certain projects, at times provide answers which were contradictory to information in official progress reports and at other times refused outright to respond to requests for information. When answers were given, many justifications for non-compliance were questionable.

Twickenham - a wholly owned subsidiary of Anglo American Platinum Limited which is the world's largest primary producer of platinum - failed to complete the project related to water and sanitation at schools. When pressed for answers they acknowledged the delays in implementation but gave no reasons in some cases and in other cases blamed project procurement irregularities. Marula, another platinum mine, claimed in its most recent Environmental, Social and Governance (ESG) Report that it had completed an SLP project to build/rehabilitate a road, but site visits by the research team and interviews with community members contradicted this. The lack of adequate roads has resulted in mobile clinics avoiding affected villages and community members facing great difficulty in accessing clinics and hospitals. Sefateng was only in partial compliance with its community water support and schools support projects. Information received from the Department of Mineral Resources and Energy (DMRE) indicated that Sefateng had not been submitting annual compliance reports. This would indicate that the company is in non-compliance in relation to its reporting duties and in direct contravention of national mining legislation. However, in their response to the research team, Sefateng denied this was the case and noted that they have been complying with this obligation.

STATE OVERSIGHT FAILURES

In addition to the failures by mines to comply with SLPs, this report also found that the DMRE, as the state regulating body of mining rights and the enforcement of SLPs, failed to adequately regulate mines and carry out its oversight role to ensure the implementation of SLPs in the region. Researchers found that that the DMRE had a poor record management system and hindered access to information; had not given effect to the South African Human Rights Commission (SAHRC) directives regarding access to SLPs; and that the DMRE was unable to enforce compliance with SLP reporting obligations resulting in communities feeling abandoned and unable to enjoy human rights such as the rights to education, access to healthcare, livelihoods and water.

IMPACT ON MINE-AFFECTED COMMUNITIES

The lived experiences of communities in the region are inextricably linked to mining operations. While establishing a direct causal link between mining and the many challenges faced by communities in the area was outside the scope of the project, our research found that the failure by these mines to implement their SLPs was a compounding factor.

The overall picture painted by interviewees was a range of negative environmental, social and economic outcomes, gender inequality and a lack of adequate grievance mechanisms. Interviewees complained of polluted water sources and, while no formal medical link had been established, many suggested that they and livestock suffered serious health complications from using the water. They also stated that women in particular entered into transactional sex agreements with mine employees at management level in exchange for employment opportunities, and that communities lacked proper representation at the mines due to the co-option of their elected representatives by the mines.

However, SLPs are a mechanism intended to remedy the social, environmental, and economic impacts of mining, both historical and current. The failure to implement and monitor SLPs results in these harmful impacts being exacerbated, not mitigated or remedied, which negatively impacts the enjoyment of human rights by communities, such as the rights to education, access to healthcare, livelihoods, and water.

While the scope of the project and readily available information did not allow for definitive causal conclusions on the human rights impact of mining on surrounding communities, they nevertheless merit further investigation.

RECOMMENDATIONS

In light of these findings, the research team recommends that the three mines urgently comply with their legally binding obligations under their respective SLPs. This includes, but is not limited to, furnishing communities with all information required for transparent, informed and consent-based participation in consultation processes, including, but not limited to, SLPs, annual compliance reports, environmental impact assessments, all reports pertaining to environmental legislation, and any information relating to changes in the mining operation, licensing and conditions.

To the government of South Africa, we recommend, among others, to develop and implement an action plan outlining the steps that will be taken to ensure that the DMRE increases its capacity to monitor SLP compliance with clear timelines for their implementation, including supporting community-based monitors to supplement its compliance monitoring, and take any necessary action to ensure a more effective enforcement of the provisions of the SLPs. We further recommend that, whether through regulations or legislative measures, that all company SLP reports to the DMRE are publicly disclosed and made available and accessible to employees, communities and other stakeholders.

ACKNOWLEDGEMENTS

This publication was made possible by the generous financial support and grants from the Open Society Foundation South Africa (OSF-SA), the Raith Foundation, and Amnesty International.

6. LIVED EXPERIENCES OF COMMUNITY MEMBERS

Despite the mineral wealth running through FTLM, communities in immediate proximity to mines experience the impacts on their lived environment commonly associated with mining but see little to no tangible development. Across different mining regions there are significant commonalities in community members' experiences of mining – that mining companies, senior management, and often senior traditional leaders derive wealth from the minerals below the ground, while most communities directly affected, live in poverty and suffer a multitude of environmental, socio-economic and cultural injustices.

Several sources paint this overall picture of mining in South Africa. These include investigative reports of public institutions and officially mandated commissions and panels[115], public statements by networks of mining-affected communities,[116] research reports by civil society organisations[117], and in policy instruments such as the preamble to the Mining Charter of 2018.[118] These experiences are also reflected in this research.

LIMITATIONS

This section is informed by focus group discussions and individual interviews with community members living in FTLM. In total, 25 community members residing in 18 different villages across the region were interviewed. Several interviewees were community leaders with broader knowledge regarding the challenges of communities in the area. They all live in close proximity to various mining operations and represent a range of the community including women, young adults, elders, and cattle herders.

This section conveys the experiences of interviewees regarding mining in their areas, which includes multiple mines, with 18 identified in the Integrated Development Plan (IDP) of the FTLM as 'key actors'.[119]

The issues raised by the interviewees in most cases, are shared by many communities impacted by mining elsewhere but our findings are limited to the region under discussion. While the scope of this report and readily information did not allow for definitive causal conclusions on the human rights impact of mining on surrounding communities, they nevertheless merit further investigation. This project was co-developed by a community-based organisation, SCMAC, for whom it was very vital that the report would give expression to these lived experiences.

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[115] See The SAHRC Report; the High Level Panel Report, p. 59, 203, 264-271, 277, 448, 489-509.
[116] See The Peoples Mining Charter (2016) at macua.org.za/wp-content/uploads/2019/11/Peoples-Mining-Charter.pdf and macua.org.za/2020/11/26/re-macua-wamua-national-caravan-roadshow-to-deliver-50-000-signed-petitions-to-the-speaker-of-the-national-assembly-and-a-letter-to-the-portfolio-committee-on-natural-resources-and-energy-2/
[117] See Bench Marks Foundation, *Policy gap series*, bench-marks.org.za/policy-gap-series/
[118] The Mining Charter, 2018, gov.za/sites/default/files/gcis_document/201809/41934gon1002.pdf
[119] Fetakgomo Tubatse Local Municipality, *Draft IDP and Budget 2020/21*, p. 98.

6.1. IMPACTS ON LIVELIHOODS, CULTURE AND IDENTITY TIED TO LAND

> **"Some are sterilized by that water. In some other areas where the mine affects, the miners don't care about the livestock and the livestock drink that water from mines and as a result they don't produce offspring."**
>
> Focus group discussion interview, 19 October 2020

Mining has caused disruptions to the livelihoods, ways of life and identities of communities that are inextricably linked to the land. Some of the more severe impacts are through the removal of gravesites (culturally important for the performance of rituals and connection with ancestors)[120], the relocation from their ancestral and agricultural lands, and the pervasive impacts on livestock. Livestock and land are vital as a source of wealth, income, and food security in African rural economies.

Inhabitants of several villages suffered loss of livestock due to mining-related impacts according to interviewees.[121] These experienced impacts include soil and water pollution (which has in some instances caused declining livestock fertility stated by community members), and loss of previous sources of water and grazing land, both of which have exposed livestock to dangers such as attacks by wild animals as they have had to feed near mountains.[122] One researcher interviewed explained how the loss of cattle further impacts life prospects of rural communities, by limiting the ability to sell livestock to pay for education of their children.[123]

> **"Now there's no other way of making a living, because those farms are now polluted with mining rubble and waste from the mines, which was dumped on their farms and there's nothing they can do. We're trying to negotiate with the mine and they are not willing to listen to the plight of those families."[124]**

The overall sentiment was that mining companies did very little to remedy the effects of mining on the livelihoods of communities. Where there were initiatives, these frequently stalled without adequate explanation. For example, interviewees reported that following complaints from cattle herders regarding the loss of safe grazing land, one of the mining operations undertook to set up a cattle pen on land identified by the community through clearing vegetation, planting lucerne for the cattle to graze on, and building a fence. However, herders stated that while the company did indeed commence with the initiative, it soon stalled. They were told the

[120] See, for example, Dineo Skosana, 'Grave matters: dispossession and the desecration of ancestral graves by mining corporations in South Africa – working paper 11', 2019.
[121] Focus group discussion interview, 19 October 2020; interview with community member, 12 November 2020; interview with community member, 16 November 2020. The impacts of mining on the livestock of rural communities have been extensively documented across Africa. See for example WoMin, *Paper 3: Land and food sovereignty undermined: Impacts on peasant women*, no date, womin.africa/wp-content/uploads/2020/09/paper-three.pdf
[122] Focus group discussion interview, 19 October 2020.
[123] Interview with researcher, 12 November 2020.
[124] Focus group discussion interview, 20 October 2020

machinery broke and the project would be postponed until further notice. This is despite previously creating the impression that this project was budgeted for.[125]

To dispossess communities of their land, without putting in place measures to ensure that their economic, social and cultural rights are upheld, particularly to livelihood and food, is to put them at risk of hunger. This is in contravention of Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) which makes provision for adequate food and "continuous improvement of living conditions".[126]

6.2. LIMITED ACCESS TO HEALTHCARE

Some interviewees stated that they did not have a clear picture of the health impacts of mining, in part due to the limited access to healthcare.[127] Challenges described by interviewees included distance needed to travel[128] (clinics are approximately five to ten kilometres away from villages), the limited nature of the services offered by local clinics, mobile clinics and home-based care (often limited to people registered with chronic illnesses)[129], and shortages of medication.[130]

"It takes a long time to get to the clinic, it's far."[131]

They also do not have access to general health testing and screening to determine whether ill health is a consequence of mining activities. The general pattern based on the interviews suggests that mining companies confine testing to their employees and not communities directly exposed to the different forms of pollution.[132]

Interviewees from different villages reported that the lengthy time it takes to reach healthcare facilities is at least partly due to the poor state of roads.[133] They explained how companies' vehicles contributed towards the poor state of the roads, and road repair projects outlined in their SLPs did not adequately address this challenge.[134] Community members often have to walk if they cannot afford to take a taxi, or if taxis do not pass through the villages due to poor road conditions.[135] While the cost of taxis varies depending on village and clinic, one interviewee noted that it costs ZAR68 (US$4.50) for a round trip to the nearest hospital.[136] Once there, they wait for four to five hours to be seen by a doctor.[137] They are then given a prescription to buy medication from a hospital or pharmacy, as clinics often only stock painkillers. A shortage of medication is often cited by clinics, yet no reasons are given for this. This results in additional time and transportation costs. While mobile clinics pass through villages once a month, they, too, are only stocked with painkillers and contraceptives. Yet even this is not reliable according to interviewees.[138]

> **"For some people who have an emergency sickness, we are failing to rush them to those places. As a result of roads which are very damaged by rains and**

[125] Interview with community member, 12 November 2020.
[126] ICESCR, Article 11.
[127] Focus group discussion interview, 19 October 2020; interview with community member, 2 November 2020.
[128] Focus group discussion interview, 19 October 2020; interview with community member, 2 November 2020; interview with community member, 9 November 2020.
[129] Focus group discussion interview, 19 October 2020.
[130] Focus group discussion interview, 19 October 2020; interview with a community member, 9 November 2020.
[131] Focus group discussion interview, 22 October 2020
[132] Focus group discussion interview, 19 October 2020.
[133] Focus group discussion interview, 19 October 2020; Interview with community member, 2 November 2020.
[134] Focus group discussion interview, 19 October 2020.
[135] Focus group discussion interview, 19 October 2020; focus group discussion interview, 22 October 2020; interview with community member, 2 November 2020.
[136] Interview with community member, 9 November 2020.
[137] Focus group discussion interview, 22 October 2020.
[138] Focus group discussion interview, 19 October 2020.

ANNEXURE FA 7

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Ref: T Gabaphethe

13 October 2026

TO: MARWESHE INC

Attorneys for the Appellants

EMAIL: mabu@marwesheattorneys.co.za

AND TO: WERKSMANS ATTORNEYS

Attorneys for the Respondents

EMAIL: rmoitse@werkmans.com

Dear Colleagues,

RE: REQUEST FOR CONSENT: INTERVENTION AS *AMICUS CURIAE* – CENTRE FOR APPLIED LEGAL STUDIES IN *RE* BUTA & OTHERS V MAFUBE COAL MINING (PTY) LTD CCT CASE NUMBER CCT157/2025

INTRODUCTION

1. The Centre for Applied Legal Studies (CALS) writes to you for the purposes of seeking your respective clients' written consent to our admission as *amicus curiae* in respect of the above matter, as contemplated in Rule 10(1) of the Rules of the Constitutional Court, to make written and oral submissions to the Court on the topics discussed below.

2. CALS is a registered law clinic with the Legal Practice Council, housed within the University of the Witwatersrand's School of Law. Since its establishment in 1978, CALS has been at the forefront of human rights research, advocacy, and strategic impact litigation in South Africa. The organisation operates through five interconnected programmes: Business and Human Rights, Environmental Justice, Gender Justice, Home, Land and Rural Democracy, and Civil and Political Justice. Through these programmes, CALS remains committed to promoting human rights and advancing justice by leveraging research, advocacy, and litigation to drive meaningful change.

3. CALS works towards a society in which historical and social justice are achieved, state institutions are strengthened, and marginalised groups can hold powerful entities accountable. Its work includes expanding the agency of marginalised communities and advancing the horizontal application of the Bill of Rights. This recognises the impact that private entities can have on human rights and the constitutional obligations that may bind them under section 8(2) of the Constitution.

CALS' INTEREST IN THE MATTER

4. Throughout the years, CALS has been at the forefront of advocating for land justice in South Africa, even during the late apartheid era. As early as the 1990s, CALS produced critical research examining the legal and policy frameworks surrounding land ownership and redistribution. In February 1991, Aninka Claassens published Occasional Paper 11 at

CALS, titled *Who Owns South Africa? Can the Repeal of the Land Acts De-Racialise Land Ownership in South Africa?* which was presented in a joint session with Jacob de Villiers, then Minister of Agriculture. The paper critically analysed the government's land reform policies to determine whether they addressed historical injustices or merely reinforced existing inequities. It also explored the establishment of a land claims court to ensure that Black South Africans' claims to land were not marginalised.

5. Similarly, in October 1993, Heinz Klug authored *Defining Property Rights of Others: Political Power, Indigenous Tenure and the Construction of Customary Law* under CALS, which examined the role of indigenous land rights within South Africa's evolving legal framework. This paper highlighted the impact of colonialism on indigenous land ownership and the need to restructure the legal system to recognise and protect these rights.

6. These early contributions showcase our longstanding commitment to land justice and the fight for equitable access to land for all South Africans especially disenfranchised and *vulnerable communities.* This period was also an important period prior to the roll out of democratic South Africa's land reform project including on the enactment of the Extension of Security Tenure Act (ESTA) in 1997.

7. We have subsequently made several submissions to various institutions regarding socio-economic rights such as land and on tenure security. The following are examples of some of the submissions we have made:

   7.1 June 2018 – Submission to Parliament's Joint Constitutional Review Committee on Section 25 of the Constitution. In this submission we submitted that section 25's review should have in mind areas around the gendered approach and poverty reduction, as well as international and other sections of the Constitution which mandate land reform through expropriation and equitable access to land.

   7.2 March 2020 - Submission to the Minister of Agriculture, Land Reform and Rural Development on Beneficiary Selection and Land Allocation Policy. In this submission,

CALS made three broad comments on the a) the right to food, b) the appointment of members of the Land Allocation and Selection Panel, and c) persons convicted of crimes being disqualified from being allocated land under the policy.

7.3 May 2022 – Submission to the Speaker of the National Assembly on the Prevention of Illegal Evictions from Unlawful Occupation of Land Amendment Bill, B 6 2023. In this submission, CALS commented on the criminalisation and feminisation of poverty and landlessness through the imprisonment provisions in relation to unlawful occupation and the consideration of financial means, health and previous living arrangements.

7.4 April 2026 - Joint Submission to the United Nations (UN) Human Rights Council Advisory Committee on the Achievement of Social Justice through the Legal Enforcement of Economic, Social and Cultural Rights by National Courts. In this submission, a part of the comments included on the role of South African courts in ensuring that access to socio-economic rights is justiciable, vulnerable persons are protected, and the state is held accountable. The contributors to the joint submission noted concerns around access to the courts and how litigation may sometimes primarily assist those who have access to resources and use the courts to their advantage at the risk of those who may not be able to immediately access courts.

7.5 June 2026 – Joint Submission to the Department of Human Settlements on the Draft Prevention of Illegal Eviction from Unlawful Occupation of Land Amendment Bill, 2026. In this submission, comments were made about how the proposed amendments potentially criminalise landlessness as a mirror image of South Africa's racially motivated pre-democracy laws and how the proposed amendments prioritised fiscal considerations over the achievement of substantive equality and the protections of fundamental rights.

8. We also played a pivotal role in advancing housing rights through strategic litigation. We were involved in the 2011 landmark case, *City of Johannesburg Metropolitan Municipality*

v Blue Moonlight Properties 39 (PTY) Ltd and Another ('Blue Moonlight Case'), where the Constitutional Court extended municipalities' obligations to provide alternative accommodation to individuals evicted by private landowners, ensuring that evictions do not result in homelessness. Similarly, in the *Olivia Road* case of 2008, the Court mandated that municipalities must engage meaningfully with occupants before proceeding with evictions that could lead to homelessness.

9. At present, the CALS Home, Land & Rural Democracy Programme focuses on ensuring that socio-economic rights are realised by the State. The programme's theory of change includes ensuring that everyone has access to secure land rights and a home where they can live with dignity, with adequate water, food, sanitation, electricity, and other necessities, and rural residents are free to exercise their constitutional rights. The programme is therefore engaged in a range of activities aimed at realising its theory of change. These activities include:

9.1 Redefining the concept of "home" and secure equitable access to land.

9.2 Addressing the effects of colonial-apartheid spatial planning.

9.3 Advocating for the horizontal application of constitutional duties amidst privatisations.

9.4 Collaborating with social movements and organisations in rural areas and farm workers.

9.5 Providing legal representation to individuals facing insecure land rights and, ensuring that marginalised communities can assert their claims to land and housing.

THE POSITION TO BE ADOPTED BY CALS AND THE SUBMISSIONS TO BE MADE

10. CALS intends to support the granting of leave to appeal and the setting aside of paragraphs 2 to 5 of the Land Court's order. Its proposed submissions would address the constitutional and statutory requirements for balancing the competing rights and determining appropriate relief. CALS would approach these questions independently, recognising both the rights of ESTA occupiers and the rights of the owner. Its contribution would focus on the following three connected issues:

    10.1. The protection afforded by ESTA and the prohibition against prejudice for exercising legal rights. CALS would address the relationship between sections 5, 6 and 7 of ESTA, interpreted in light of the history of land dispossession and the constitutional protection of tenure security. In particular, it would address section 7(2), which prohibits an owner or person in charge from prejudicing an occupier where one of the reasons for that prejudice is the past, present or anticipated exercise of a legal right. CALS would explain the operation of the rebuttable presumption in section 7(3), including the facts necessary to engage it. Its submissions would examine the significance of these protections when restrictions on burial or access to graves place pressure on occupiers to relinquish protected rights or leave the land, and how those protections inform the balancing exercise required by section 6(2).

    10.2. Land, dignity, cultural identity and family autonomy. CALS would address the significance of land as a home and a place of familial, cultural and ancestral connection, and how those relationships inform the protection afforded by sections 5 and 6 of ESTA. Its submissions would explain how interference with burial practices and access to ancestral graves may affect dignity, religious and cultural identity, family autonomy and the substantive security of continued occupation. CALS would develop the considerations relevant to assessing those consequences within ESTA's balancing framework, including the family's established practices, its relationship with existing graves, continued access for visits and rites, and the practical and cultural implications of relocation. It would explain why the adequacy of an alternative burial site requires an assessment of

those circumstances and cannot be determined solely by the availability of another place of interment. CALS would draw on relevant international protections of family life, religion and participation in cultural life to inform that inquiry under section 39(1)(b) of the Constitution.

10.3. The separate justification required for exhumation and the appropriate remedy. CALS would address the exercise of the Court's remedial powers under section 172(1)(b) of the Constitution, read with ESTA's protective purposes. Its proposed submission is that a finding that a burial was unlawful does not, without a further inquiry, establish that exhumation is warranted. That inquiry must address the applicable legal requirements for exhumation, the interest sought to be protected, the prejudice established on the evidence, the gravity of the consequences for the family, and reasonably available alternatives. CALS would develop the relevance of meaningful engagement and safeguards protecting the family's dignity, religious and cultural practices, and continued exercise of its tenure rights. It would also address when the existing record permits an appellate court to determine appropriate relief and when remittal with directions is required. The exercise of remedial discretion must remain consistent with the parties' right to a fair hearing.

RELEVANCE AND DISTINCT CONTRIBUTION OF CALS'S SUBMISSIONS

11. CALS has considered the applicants' heads of argument dated 8 October 2026. Those heads address the historical and constitutional context of burial rights, the requirements of section 6(2)(dA) of ESTA, the procedural challenges to the Land Court's order, and the contention that exhumation does not follow automatically from a finding of unlawfulness. CALS's proposed contribution would develop the protection of the right to a grave and burial as a distinct incident of protection under ESTA and against prejudice under sections 7(2) and 7(3), the considerations relevant to assessing the adequacy of alternative burial arrangements, and the structured inquiry necessary to determine whether exhumation is justified and what relief is appropriate.

12. These submissions are relevant to the substantive and remedial questions already raised in the proceedings. They would assist the Court in identifying the considerations necessary to give practical effect to occupiers' rights when balancing those rights against the interests of an owner and provide guidance for future disputes concerning burial rights on privately owned land. CALS would confine its factual submissions to the existing record and refine its argument in light of the respondent's written submissions to ensure that its contribution remains useful and distinct, as required by Rule 10.

13. CALS accordingly requests your clients' written consent to its admission as amicus curiae on this basis. Please confirm by close of business on Friday, **16 October 2026** whether consent is granted, including any proposed terms for CALS's participation. Please also provide the current court directions and confirm the date on which the respondent's written submissions were lodged or are due. If consent is not secured, CALS intends to seek admission under Rule 10(4), subject to the applicable timelines and directions. CALS's written submissions and any oral participation would remain subject to the Court's directions and permission. Correspondence may be addressed to Thuto.gabaphethe@wits.ac.za and Aqeela.bean@wits.ac.za.

Yours faithfully,

Centre for Applied Legal Studies

PER: Mr Thuto Gabaphethe

Attorney and Acting Head of Home, Land and Rural Democracy Programme: Centre for Applied Legal Studies

Direct Tel: 078 459 5259/ 011 7178 302 / 011 7178 600

Email: Thuto.gabaphethe@wits.ac.za / Aqeela.bean@wits.ac.za

ANNEXURE FA 8

From: mabu@marwesheattorneys.co.za
To: Thuto Gabaphethe; rmoitse@werkmans.com
Cc: Aqeela Bean
Subject: Re: AMICUS CURIAE REQUEST IN RE: BUTA & OTHERS V MAFUBE COAL MINING CASE NO: CCT 157/2025
Date: Tuesday, 13 October 2026 16:45:14

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Good day,

We acknowledge receipt of your letter.

We hereby grant you consent.

Regards,
Mabu

From: Thuto Gabaphethe <thuto.gabaphethe@wits.ac.za>
Date: Tuesday, 13 October 2026 at 16:32
To: mabu@marwesheattorneys.co.za <mabu@marwesheattorneys.co.za>; rmoitse@werkmans.com <rmoitse@werkmans.com>
Cc: Aqeela Bean <aqeela.bean@wits.ac.za>
Subject: AMICUS CURIAE REQUEST IN RE: BUTA & OTHERS V MAFUBE COAL MINING CASE NO: CCT 157/2025

Dear Colleagues,

The matter in the subject has reference.

Kindly see attached letter for your attention regarding CALS' request to intervene as amicus curiae.

Please confirm receipt thereof.

Kind regards,

Thuto Gabaphethe (he/him)
Attorney
Centre for Applied Legal Studies
University of The Witwatersrand
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ANNEXURE FA 9

From: Siphamandla Dhlamini
To: Thuto Gabaphethe
Cc: Bulelwa Mabasa; Refilwe Moitse; Samkelo Ntuli
Subject: RE: AMICUS CURIAE REQUEST IN RE: BUTA & OTHERS V MAFUBE COAL MINING CASE NO: CCT 157/2025 [IMAN-LITIGATION.FID573917]
Date: Sunday, 18 October 2026 14:00:39
Attachments: CCT 157-25 Constitutional Court Directives.pdf

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WERKSMANS ATTORNEYS

This email and its attachments are private, confidential, may be subject to legal professional privilege and are only for the use of the intended recipient.

Dear Mr Gabaphethe

We refer to your letter dated 13 October 2026, the contents of which have been noted.

We confirm that we represent the Respondent in the appeal.

Our client has no issues with The Centre for Applied Legal Studies being admitted as *amicus curiae* in the matter.

Furthermore, please find attached the Directions issued by the Court. Kindly note that the Applicants filed their written submissions on 9 October 2026, and we intend to file our written submissions tomorrow.

Kind regards

Siphamandla Dhlamini
Associate
T +27 11 535 8211 E sdhlamini@werksmans.com

The Central, 96 Rivonia Road, Sandton, Johannesburg, 2196
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From: Thuto Gabaphethe <thuto.gabaphethe@wits.ac.za>
Sent: 14 October 2026 16:58 PM
To: Bulelwa Mabasa <bmabasa@werksmans.com>; Siphamandla Dhlamini <sdhlamini@werksmans.com>; rmoitse@werkmans.com; tkarberg@werksmans.com
Subject: FW: AMICUS CURIAE REQUEST IN RE: BUTA & OTHERS V MAFUBE COAL MINING CASE NO: CCT 157/2025

Dear Colleagues,

The matter in the subject line has reference.

Kindly see attached for your attention regarding CALS' request to intervene as amicus curiae.

Please may you confirm receipt.

Kind regards,

Thuto Gabaphethe (he/him)
Attorney

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From: Thuto Gabaphethe
Sent: Tuesday, 13 October 2026 16:31
To: 'mabu@marwesheattorneys.co.za' <mabu@marwesheattorneys.co.za>; 'rmoitse@werkmans.com' <rmoitse@werkmans.com>
Cc: Aqeela Bean <aqeela.bean@wits.ac.za>
Subject: AMICUS CURIAE REQUEST IN RE: BUTA & OTHERS V MAFUBE COAL MINING CASE NO: CCT 157/2025

Dear Colleagues,

The matter in the subject has reference.

Kindly see attached letter for your attention regarding CALS' request to intervene as amicus curiae.

Please confirm receipt thereof.

Kind regards,

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