THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 742/2020

In the matter between:

GRAHAM ROBERT HERBERT N.O.	**First Appellant**
KEVIN LAWRENCE COTTERELL N.O.	**Second Appellant**
DAWN EARP N.O.	**Third Appellant**
JAMES THOKOANA MOTLATSI N.O.	**Fourth Appellant**
STEWART STRAUSS TRUSWELL N.O.	**Fifth Appellant**

and

SENQU MUNICIPALITY	**First Respondent**
REGISTRAR OF DEEDS, MTHATHA	**Second Respondent**
MINISTER OF RURAL DEVELOPMENT AND LAND REFORM	**Third Respondent**

Neutral citation: *Graham Robert Herbert N.O. and Others v Senqu Municipality and Others* (Case no 742/2020) [2021] ZASCA 177 (17 December 2021)

Coram: ZONDI, VAN DER MERWE and MOKGOHLOA JJA and MEYER and WEINER AJJA

Heard: 9 November 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 17 December 2021.

Summary: Land - Upgrading of Land Tenure Rights Act 112 of 1991 – upgrading and conversion into ownership of Permission to Occupy granted in respect of erf in Sterkspruit – interpretation of s 3(1) of Upgrading Act – whether TEBA Property Trust as a holder of Permission to Occupy granted in terms of Native Trust and Land Act 18 of 1936 falls within class of persons in whose interest Upgrading Act was enacted – TEBA Property Trust was not disadvantaged by Native Trust and Land Act or racially discriminatory laws and thus may not apply for conversion of its Permission to Occupy into a full title.

ORDER

On appeal from: Eastern Cape Division of the High Court, Grahamstown (Roberson J) sitting as court of first instance:

The appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

Zondi JA (Van der Merwe and Mokgohloa JJA and Meyer and Weiner AJJA concurring)

[1] This is an appeal against the judgment and order of the Eastern Cape Division of the High Court, Grahamstown (the high court). In that judgment the high court (Roberson J) dismissed the appellant's application for the conversion of its Permission to Occupy granted in respect of Erf 88 Sterkspruit (the property) into a formal title in terms of s 3 of the Upgrading of the Land Tenure Rights Act 112 of 1991 (the Upgrading Act) as read with Item 2 of Schedule 2 thereto. The appeal concerns the interpretation of s 3 of the Upgrading Act and Item 2 of Schedule 2 thereto and it is with leave granted by Roberson J. I shall return to a discussion of these provisions in some detail. Broadly stated for present purposes, however, s 3(1) of the Upgrading Act makes provisions for the upgrading and conversion into ownership of certain rights granted in respect of land.

[2] The principal issue for consideration in this appeal is whether s 3 of the Upgrading Act, properly interpreted, excludes the appellant, the TEBA Property Trust (the Trust) from the category of persons who may apply for conversion of its Permission to Occupy into ownership, and, if it does not, whether the failure to do so renders s 3 unconstitutional. The Trust is the holder of a Permission to Occupy in respect of the property, which was granted to its predecessors in title by the Governor-General in terms of the Native Trust and Land Act 18 of 1936 (the Native Trust and

Land Act). Over the years the Trust had engaged officials of the first respondent, Senqu Municipality (the Municipality), with a view to requesting it to submit to the second respondent, the Registrar of Deeds, its application to convert its Permission to Occupy into ownership. When its attempt failed, the Trust, on 25 May 2016, approached the high court for relief in the following terms:

'1. Declaring that the Permission to Occupy (annexure TPT1 to the Founding Affidavit) held by the Applicants constitutes a land tenure right referred to in Item 2 of Schedule 2 of the Upgrading of Land Tenure Rights Act, 112 of 1991 in respect of Erf 88 Sterkspruit;

2. Directing the First Respondent within 14 days of such Order as may issue, to submit to the Second Respondent a deed of transfer made out in the names of the Applicants for conversion of the right referred to above into ownership of Erf 88 Sterkspruit in the names of the Applicants by the Second Respondent;

3. Alternatively to 2 above, directing the First Respondent within 14 days of such Order, through its authorised signatory, to sign a deed of transfer made out in the names of the Applicants providing for conversion of the right referred to above into ownership of Erf 88 Sterkspruit in the names of the Applicants as well as any other requisite documentation submitted to it by the Applicants, for submission to the Second Respondent to effect the aforesaid conversion.'

[3] The Municipality resisted the Trust's claim. It raised a point of law in terms of rule 6(5)(d)(iii) of the Uniform Rules of Court in which it contended, among other things, that the Upgrading Act, had no legislative effect in the then independent territory of Transkei, in which the property is located.

[4] The Municipality's defence was informed by the historic development of the Upgrading Act. This Act was enacted to provide for the upgrading and conversion into ownership of certain rights granted in respect of land. It permitted the holders of such rights to convert their occupational rights into ownership. But the difficulty was that its operation was limited to the area that comprised the old South Africa and excluded the territory of Transkei, in which the property is located. In 1998, the operation of the Upgrading Act was extended to cover the entire South Africa. The extension was done in terms of the Land Affairs General Amendment Act 6 of 1998 (the Amendment Act), which amended the Upgrading Act by introducing s 25A thereto. The operation of the

provisions of the Upgrading Act, except ss 3, 19 and 20, was extended to Transkei. The extension did not entirely solve the problem because of the exclusion of ss 3, 19 and 20 from application to persons located in Transkei. It is therefore not surprising that when the Municipality raised this defence, the Trust responded by challenging the constitutional validity of the Amendment Act in terms of which the extension of the Upgrading Act was effected because it was excluded from the legislative regime under the Amendment Act as it stood then.

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

[6] After the Trust raised the constitutional challenge to s 25A of the Upgrading Act and s 1 of the Amendment Act, the Municipality delivered a supplementary answering affidavit in response to the challenge, in which it raised a further defence which it pleaded as follows:

'10. The [Trust], conveniently so, in trying to attack the relevant statutory provisions, play down or ignore:

10.1 the historic and legislative background against which the trust acquired the permission to occupy the property;

10.2 the fact that the trust (any reference to the trust includes a reference to its predecessors in title) acquired the permission to occupy the property in order to profit greatly financially from the system of migratory labour, which has variously been described as the cornerstone of apartheid and the greatest 'cancer' to afflict South African Society;

10.3 the fact that the trust was the beneficiary of pernicious and racially discriminatory legislation in terms of which it acquired permission to occupy the property to advance its recruitment business for recruiting migratory labour for the mines of South Africa and was a party to perpetrating, for profit, one of the greatest social evils inflicted on the people of South Africa. Significantly the applicants now, opportunistically so, seek to portray the trust as being a victim of this racially discriminatory legislation rather than its beneficiary, which it was.'

[7] In the high court the issue of the invalidity of the Amendment Act was dealt with on a separated basis and was considered before other issues, which were postponed for later determination. In the event, the high court held that the exclusion of s 3 from the extended geographical application of the Upgrading Act was inconsistent with ss 9 and 25(1) of the Constitution, as the exclusion denied the Trust an opportunity to convert its right into ownership and constituted deprivation of property. The high court accordingly declared that s 1 of the Amendment Act and s 25A of the Upgrading Act were inconsistent with the Constitution to the extent that they excluded s 3 of the Upgrading Act from applying to the entire Republic of South Africa.

[8] The proceedings were referred to the Constitutional Court for confirmation of the declaration of invalidity order of the high court. The declaration of invalidity of the Amendment Act and s 25A of the Upgrading Act was confirmed by the Constitutional Court in the judgment reported as *Herbert N.O. and Others v Senqu Municipality and Others* [2019] ZACC 31. After the confirmation of constitutional invalidity of s 1 of the Amendment Act and s 25A of the Upgrading Act, the proceedings in the high court resumed on the remaining issues.

[9] The application served before Roberson J and she dismissed it with costs. She held that the Trust did not fall into a class or group in whose interest the Upgrading Act was enacted, and accordingly, that it is not entitled to claim conversion in terms of s 3 read with Item 2 of Schedule 2 of the Upgrading Act. She considered it unnecessary to deal with the further arguments raised by the Municipality, because of the conclusion she reached. In coming to the conclusion that the Trust did not fall within the class of persons in whose interest the Upgrading Act was enacted, the learned Judge relied on dicta in judgments of the Constitutional Court.[1]

[10] The question is whether the high court was correct to conclude that, properly interpreted, the Upgrading Act excludes the Trust from the class of persons, who are

[1] *Western Cape Provincial Government and Others: In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* [2000] ZACC 2; 2001 (1) SA 500 (CC) paras 2-3; paras 76-78; para 103; paras 105-106; *Rahube v Rahube and Others* [2018] ZACC 42; 2019 (2) SA 54 (CC) para 38; *Herbert NO and Others v Senqu Municipality and Others* [2019] ZACC 31; 2019 (6) SA 231 (CC) paras 10, 24 and 25; *Tongoane v Minister of Agriculture and Land Affairs* [2010] ZACC 10; 2010 (6) SA 214 (CC) paras 1-2, 27-28.

entitled to claim conversion rights. The issue involves the interpretation of the Upgrading Act and this must be considered in terms of the principles of interpretation as enunciated in *Endumeni*[2] and as recently restated in *United Manganese*.[3] The starting point is the text of s 3 of the Upgrading Act, but from the outset it must be viewed in the context in which it appears and of the apparent purpose to which it is directed, as well as the material known to those responsible for its production, so that the process is both textual and contextual. The context within which the text must be viewed, must include the entire Upgrading Act, its legislative history and s 39(2) of the Constitution which enjoins the courts, when interpreting legislation, to promote the spirit, purport and objects of the Bill of Rights.[4] *Endumeni* reminds us that in the process of interpreting legal instruments, judges should not cross the divide between the legislative and judicial powers. Their role is to interpret legislation and not make laws.

[11] In *Novartis*[5] this Court quoted with approval the statement in *Bothma-Batho Transport*[6] that the approach taken by courts to only look at surrounding circumstances when there is an ambiguity in language, is 'no longer consistent with the approach to interpretation now adopted by the South African courts in relation to contracts or other documents, such as statutory instruments or patents.'

[12] Before I deal with the Trust's submissions, it is necessary to sketch the applicable legal framework. Section 25(5) of the Constitution provides:

'The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.'

[13] Section 25(6) provides:

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[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA).
[3] *Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd* [2020] ZASCA 16; 2020 (4) SA 428 (SCA) paras 10, 16-17.
[4] M Wallis 'Interpretation Before and After Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA)' PER / PELJ 2019(22).
[5] *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* [2015] ZASCA 111; 2016 (1) SA 518 (SCA) para 29.
[6] *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA) para 12.

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

[14] The Trust correctly conceded that although the Upgrading Act predates the Constitution, it is indeed a legislative measure that was taken by the state to enable citizens to gain access to land on an equitable basis, as it provides for the means by which persons or communities whose tenure of land is insecure by virtue of past racially discriminatory laws may obtain tenure which is legally secure.

[15] Section 3(1) of the Upgrading Act provides as follows:

'(1) Subject to subsection (1B), any land tenure right mentioned in Schedule 2 and which was granted in respect of any erf or other piece of surveyed land shall, upon the submission by the owner of such erf or piece of land at the deeds registry of a deed of transfer on the form prescribed for that purpose under the Deeds Act and made out in the name of the person who is the holder of the relevant land tenure right, be converted into ownership by the registrar of deeds by the registration of such erf or piece of land in the name of such person: Provided that-

(a) where the State is the owner of an erf or piece of land situated outside a formalised township, the relevant land tenure right need not be converted into ownership, and a deed of transfer shall not be submitted unless-

(i) the Minister is satisfied, on the basis of a report by a person assigned or appointed by him or her, that the rights or interests of putative holders are being protected; and

(ii) where such land is lawfully occupied or has been allocated for the use of a tribe or community a tribal or community resolution has been obtained;

(b) where a tribe is the owner of the land, the decision to convert the relevant land tenure right into ownership shall be taken by way of a tribal resolution.

(1A) For the purposes of an investigation referred to in subsection (1) *(a)*, the designated or appointed person shall have all the rights and duties referred to in section 24D (7).

(1B) If an owner of an erf or piece of land is requested to submit a deed of transfer of land in terms of subsection (1), the Minister may on request of such owner, or if the State is the owner of such land, of his or her own accord-

(i) impose conditions in respect of the use of such land, but if the State is the owner of such land and it is lawfully occupied by or has been allocated for the use of a tribe or community, in consultation with such tribe or community;

(ii) from moneys appropriated by Parliament or at the cost of an affected person and on such conditions as he or she may determine, cause such land to be surveyed;

(iii) order that an amount to be determined by him or her be paid by an affected person to the owner of the erf or other piece of land, or if the erf or other piece of land falls within an area lawfully occupied or allocated for use by a tribe or community, to the tribe or community concerned;

(iv) provide for a method for determining the amount to be paid in terms of paragraph (iii).'

[16] Item 2 of Schedule 2 dealing with 'Rights to the Occupation of Land' provides that:

'[A] permission to occupy any allotment within the meaning of the Black Areas Land Regulations, 1969 (Proclamation No. R.188 of 1969)', is a land tenure right.'

[17] Regulation 47(1)(a) of the Black Areas Land Regulations, 1969 provides as follows:

'Notwithstanding the provisions of any other law, every permission in writing granted or deemed to have been granted in terms of any law, prior to the commencement of these regulations, to occupy any specified piece of Trust land for arable, residential, church, school or trading purposes, shall notwithstanding anything contained in such law or written permission, be deemed to have been granted in terms of these regulations, under permission to occupy substantially in the form prescribed in Annexure 27 and . . . in the case of a trading allotment to be subject to the general and special conditions prescribed in Annexures 28 and 30 respectively.'

[18] Section 1 of the Upgrading Act defines the phrase 'land tenure right' to mean 'any leasehold, deed of grant, quitrent or any other right to occupation of land created by or under any law and, in relation to tribal land, includes any right to the occupation of such land under the indigenous law or customs of the tribe in question.'

[19] The following factual context is important in interpreting s 3(1) of the Upgrading Act. The Trust acquired the Permission to Occupy in respect of the property, which it now seeks to convert into ownership under these circumstances. TEBA Limited (TEBA), by agreement with and on behalf of a number of mining houses conducting mining operations throughout South Africa, manages the recruitment of staff and the post-employment personnel matters of the staff so recruited. The directors of TEBA

are also the trustees of the Trust. The Trust was originally established on 28 September 1978 to hold and administer the various property rights under which TEBA now occupies and conducts business on various properties in different centres.

[20] TEBA and the Trust conduct business in the Eastern Cape from the Trust's office building in Sterkspruit, located on the property, which falls within the area of the Municipality. The property is currently registered in name of the Municipality, but has been occupied by the Trust or its predecessors in title in terms of a right of occupation for a period in excess of 75 years. On 6 September 1940, in terms of a written '*Permission to Occupy*' permission was granted to the Native Recruiting Corporation by the then Secretary for Native Affairs to occupy Lot No. 1, Village of Sterkspruit, District of Herschel, measuring 942 square roods.

[21] The Native Recruiting Corporation was incorporated as the Native Recruiting Corporation Limited on 27 September 1912 and its shareholders were various mining companies. During November 1966, the Native Recruiting Corporation Limited, by special resolution dated 9 November 1966, changed its name to Mine Labour Organisations (N.R.C.) Limited. This was confirmed in a letter issued by the Department of Commerce and Industries dated 25 November 1966.

[22] On 7 December 1989, Mine Labour Organisations (N.R.C.) Limited ceded its rights among others, in and to the Permission to Occupy to the Trust in terms of the Deed of Cession. At that time, Sterkspruit fell within and under the jurisdiction of the then Republic of Transkei. On 18 December 1990 the Director General for Local Government and Land Tenure of the Republic of Transkei (the Director General) consented to the cession of the rights as aforesaid.

[23] The following legislative history is important. It is common cause that the Permission to Occupy held by the Trust was granted pursuant to the provisions of the then Native Trust and Land Act. Section 4 of this Act provided for the establishment of a corporate body to be known as the South African Native Trust. In terms of s 6 of the Native Trust and Land Act, all land '*which has been reserved or set aside for the occupation of natives*' (including additional areas defined in that Act) vested in the

South African Native Trust. The village of Sterkspruit fell within the area so defined and under the administration of the South African Native Trust.

[24] The Native Trust and Land Act provided further that the affairs of the South African Native Trust would be administered by the Governor-General as Trustee with power, subject to the provisions of the Act, to delegate any of his powers and functions as Trustee to the Minister of Native Affairs who would act in consultation with the Native Affairs Commission.

[25] Section 18(3) of the Native Trust and Land Act authorised the Governor-General as Trustee, subject to the approval of Parliament, for the support, advantage or well-being of Africans, to grant, sell, exchange, lease or otherwise dispose of trust land to persons other than Africans and s 18(4) empowered the Trustee to authorise the grant to or occupation by any person, Board of Trustees, educational authority or religious body for church, school, mission or trading purposes of such areas of land, the property of the trust as he may deem necessary. The Trust's predecessors in title acquired the Permission to Occupy in respect of the property in terms of s 18(3).

[26] The Trust asserted that the Permission to Occupy is a land tenure right referred to in Schedule 2 of the Upgrading Act in that it is a permission to occupy an allotment within the meaning of the Black Areas Land Regulations, 1969 and that it constitutes a permission referred to in regulation 47(1)(*a*) to occupy a specified piece of land of the South African Native Trust. It accordingly asserted that the property falls to be registered in the name of its trustees. This assertion by the Trust that its Permission to Occupy is a land tenure right cannot be disputed. However, the entitlement to have it registered in the name of its trustees is disputed.

[27] The Trust argued that, on the plain meaning of s 3(1) of the Upgrading Act, it is entitled to the conversion of the Permission to Occupy into ownership by means of the procedures contained in that section. In making this submission the Trust placed great emphasis on the word 'any' appearing in s 3(1) and Item 2 of Schedule 2, which it argued, indicates that the exercise of a right to convert land tenure rights is not limited to any defined category or group of persons. Its tenure in the property, the Trust

argued, is based solely on the Permission to Occupy. It argued that by virtue of the provisions of the Native Trust and Land Act, its predecessor in title was precluded from acquiring cadastral title to property within the area regulated by the provisions of that Act and was limited to the mechanisms provided in that Act to obtain the right to occupy the property. It accordingly claimed that it is a person whose tenure of land is legally insecure as a result of the Native Trust and Land Act, a past racially discriminatory law.

[28] The Trust submitted that the interpretation of s 3(1) by the high court, that the Upgrading Act excluded it from a class of persons who qualifies to apply for conversion of their tenuous title, was incorrect. In developing this argument, the Trust argued that in order to arrive at this conclusion it would require one to read words into the Upgrading Act, to provide for the exclusion of defined classes of persons from its ambit. The Trust submitted that this was impermissible in the absence of a finding that the Upgrading Act was inconsistent with the Constitution to the extent that it failed to exclude certain classes of persons from exercising the rights afforded to the holders of 'any' land tenure right by s 3(1) of the Upgrading Act.

[29] The Trust's argument must be rejected for the simple reason that it is based solely on the text of the Upgrading Act and ignores its context, purpose and the role it is intended to play in the transformation of our society. The construction of s 3(1) of the Upgrading Act contended for by the Trust would lead to a result that could never have been contemplated by the legislature when it enacted it. It could not have been intended to allow persons such as the Trust and its predecessor in title to apply for conversion under the Upgrading Act. In terms of s 18 of the Native Trust and Land Act the Trust's predecessor in title was not precluded from acquiring full title. The Governor-General from whom it acquired the Permission to Occupy the property, could with the permission of Parliament, sell the land to which the Permission to Occupy relates, to the Trust's predecessors in title. The Native Trust and Land Act in no way disadvantaged it. A special regime for the acquisition of full title to trust land

under s 18(3) of that Act applied to persons such as the Trust's predecessors in title, who were not classified as Africans.[7]

[30] In *Hanekom*[8] this Court held that a court is justified in departing from the literal meaning of the section to avoid absurdity and in support of that proposition cited with approval the following statement by Innes CJ in *Venter v R*[9] that a court will do so:

'(W)hen to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account. . . .'

[31] Scott JA, who wrote for the court, went on to say:

'This approach has since been consistently followed. Over the years courts have repeatedly warned of the dangers of departing too readily from the ordinary meaning of the words of the statute and have stressed that the absurdity must be "utterly glaring" or the true intention quite clear and not merely a matter of surmise or probability. On the other hand, as accepted in *Venter v Rex*, ambiguity in the provision in question is not a requirement for departure from its literal meaning. It has also been accepted that to avoid the absurdity or give effect to the true intention of the Legislature, it is permissible not only to cut down or restrict the language used but also to expand it. See, for example, the comments of Corbett J in *S v Burger* 1963 (4) SA 304 (C) at 308A-309B (cited with approval by Friedman J in *De Villiers v Kinsale Properties Share Block Ltd* 1986 (2) SA 592 (D) at 594G-595E).'

[32] Section 3(1) must be interpreted purposively. As already stated, the Upgrading Act was intended to provide restitution to those who were affected by the apartheid legislation, mainly Black families, whose full title to land was replaced with tenuous land rights. The section provides a mechanism through which the freehold title could be restored to those families who were the victims of the apartheid legislation.

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[7] Section 18(3) of the Native Trust and Land Act provided:
'With the approval of Parliament signified by resolutions of both Houses the Trustee may for the support, advantage or well-being of [Africans] or purposes connected therewith, grant, sell, lease or otherwise dispose of land the property of the Trust to persons other than [Africans].'

[8] *Hanekom v Builders Market Klerksdorp (Pty) Ltd and Others* [2006] ZASCA 2; 2007 (3) SA 95 (SCA) para 7.

[9] *Venter v R* 1907 TS 910 at 914-915.

[33] The text of s 3(1) must be viewed against the following contextual background which provides the broad purpose underlying its enactment. Since 1913 the notorious apartheid government enacted various pieces of legislation that generally had the cumulative effect of dispossessing the black majority of their land and putting their security of tenure over the remnants of such lands, or the reserves, in a precarious position. The principal legislative instruments of land dispossession included, inter alia, the Native Land Act 27 of 1913 and the Native Trust and Land Act 18 of 1936, both of which restricted the African population to 13% of the total land area of South Africa; the Group Areas Act 41 of 1950, which allocated certain areas to specific race groups; the Natives Laws Amendment Act 54 of 1937, which served to prohibit Africans from buying land in urban areas; the Bantu Authorities Act 68 of 1951, which allowed the establishment of tribal, regional, and territorial authorities; the Prevention of Illegal Squatting Act 52 of 1951, which allowed the government to establish resettlement camps for surplus people evicted from white farms; the Blacks Resettlement Act 2 of 1954, to give the state the authority to remove Africans from any area in the magisterial district of Johannesburg and adjacent areas; the Promotion of Bantu Self-Government Act 46 of 1959, to establish the independent homelands and make the reserves the political homeland of black South Africans.[10]

[34] The minority in *DVB Behuising* had this to say regarding the historical context of the Upgrading Act (at para [105]):

'In 1991, during the period of transition from apartheid to democracy, Parliament passed the Upgrading of Land Tenure Rights Act. The express purpose of this legislation, as its name suggests, was to provide for the conversion into full ownership of the tenuous land rights which had been granted during the apartheid era to Africans.' (Footnote omitted)

[35] As to the judgments of the Constitutional Court,[11] upon which the high court relied in reaching the conclusion that it did, the Trust submitted that these judgments are neither binding on the high court or this Court, nor do they constitute authority for the proposition relied on by the high court.

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[10] D Mailula *Customary (Communal) Land Tenure in South Africa: Did Tongoane overlook or avoid the core issue?* (2011) 4 CCR 73 at 78.
[11] Ibid.

[36] It was submitted by the Trust that the statement by Ngcobo J at para 9 in *DVB Behuising* as to the purpose of the Upgrading Act, which was repeated by the Constitutional Court in *Rahube CC* at para 38, is an obiter dictum and does not constitute a finding which is binding on this Court. It argued that the statement by Ngcobo J had nothing to do with the issue which was before the court, namely the repeal by the North West Provincial Legislature of portions of Proclamation R293 of 1962 and whether it had the constitutional competence to do and accordingly whether the Act providing for the repeal of the said Proclamation was constitutional.[12] It contended that Ngcobo J did not say that the purpose of the Upgrading Act was limited to the conversion of tenuous rights held by Africans.

[37] The Constitutional Court held in *Camps Bay Ratepayers' and Residents' Association v Harrison*[13] that 'it is trite that the binding authority of precedent is limited to the *ratio decidendi*, (rationale or basis of deciding) and that it does not extend to obiter dicta or what was said 'by the way'. But the fact that a higher court decides more than one issue, in arriving at its ultimate disposition of the matter before it, does not render the reasoning leading to any one of these decisions obiter, leaving lower courts free to elect whichever reasoning they prefer to follow.

[38] The important point is contained in what the high court had to say at para 36 of the judgment regarding the statements of the Constitutional Court in *DVB Behuising and Herbert NO*:

'Firstly, one cannot ignore the Constitutional Court's express statements concerning the purpose of the Upgrading Act. They are unequivocal pronouncements on its purpose, in the context of past injustice and inequality. I should mention that it was submitted that O'Regan J's reference to the "express purpose" of the Upgrading Act was in the minority judgment in *DVB Behuising*, whereas Ngcobo J had only referred to the "purpose". I think there is little difference between the two statements'.

[39] The statements made by the Constitutional Court in *DVB Behuising* and subsequently adopted in *Herbert NO* and *Rahube* dealt with the purpose of the

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[12] *DVB Behuising* paras 2 and 3.
[13] *Camps Bay Ratepayers' and Residents' Association v Harrison* [2010] ZACC 19; 2011 (4) 42 (CC) para 30.

Upgrading Act. The statements made in each of these three judgments regarding the purpose of the Upgrading Act were part of their *rationes decidendi*. For the Constitutional Court to reach the conclusion on the issues that were before it in each of the judgments, it was necessary for it to determine the purpose of the Upgrading Act. The high court could not ignore these statements emanating from the Constitutional Court.

[40] The Upgrading Act must be understood as responding to our painful history and facilitating the transformation of our society so as to heal the divisions of the past. The interpretation of the section contended for by the Trust, places too much emphasis on the text with the result that it undermines the objective of the Upgrading Act. Thus, as a matter of interpretation of s 3(1) in accordance with its clear purpose, it is only applicable to persons who were prejudicially affected by past racially discriminatory laws and practices.

[41] It is clear from this contextual background and the history of the Upgrading Act that the conclusion of the high court that the Trust does not fall within the category of persons in whose interest the Upgrading Act was enacted, cannot be faulted. It was not disadvantaged by racially discriminatory laws, in particular the Native Trust and Land Act in terms of which its predecessors in title obtained a Permission to Occupy. In fact, to use Jafta J's words at para 24 in *Herbert NO*[14] '[What] was clear though is that the Trust and its predecessors were actively involved in the implementation of shameful policies of the apartheid government by recruiting workers to provide cheap labour for the mining industry. Those workers travelled long distances from their homes and families and were obliged to work under the most appalling conditions, while living in single-sex hostels, which exposed them to all sorts of illnesses and dangers associated with mining operations and arising from their migrant status'.

[42] In light of the conclusion I have reached on the interpretation of s 3(1) of the Upgrading Act, it becomes unnecessary to deal with further defences raised by the Municipality.

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[14] Footnote 1.

[43] In the result the appeal is dismissed with costs, such costs to include those consequent upon the employment of two counsel.

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D H ZONDI
JUDGE OF APPEAL

APPEARANCES:

For the appellants:	I J Smuts SC with J G Richards
Instructed by:	Lexicon Attorneys, Port Elizabeth
	Honey Attorneys, Bloemfontein
For the first respondent:	O Ronaasen SC with M Ndamase
Instructed by:	Whitesides Attorneys, Makanda
	Webbers Attorneys, Bloemfontein

For the second respondent:	–	Not participating in the appeal
For the third respondent:	–	
Instructed by:	–	The State Attorney, Port Elizabeth
		The State Attorney, Bloemfontein