

Constitutional Court fleshes out meaning in an unapologetically pro-redress ruling, writes Franny Rabkin

Expropriation judgment may be 'Pandora's box'

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THE latest Constitutional Court judgment on expropriation is a potential "Pandora's box", says mining law guru Peter Leon of Webber Wentzel attorneys.

Property expropriation is a divisive and emotive issue in SA — with its history of land dispossession and colonialism — and section 25 of the constitution, which deals with property rights, is one of the most misunderstood sections in the bill of rights.

Section 25 unequivocally gives the state the power to expropriate — a potent tool for redress and redistribution — but balances it with crucial safeguards, including the proviso that an expropriation may not be arbitrary, must be in the public interest or for a public purpose and with "just and equitable" compensation — determined by agreement or by the courts.

For many years, the expropriation provisions of section 25 were left largely untested because the government was coy about flexing its expropriation muscle. An Expropriation Bill was hastily withdrawn from Parliament in 2008 amid concerns about its constitutionality.

But now there is a new

Expropriation Bill on the cards. And the Constitutional Court, in a recent judgment, has fleshed out the meaning of expropriation in section 25 — in a ruling that is unapologetically, even stridently, pro-redress.

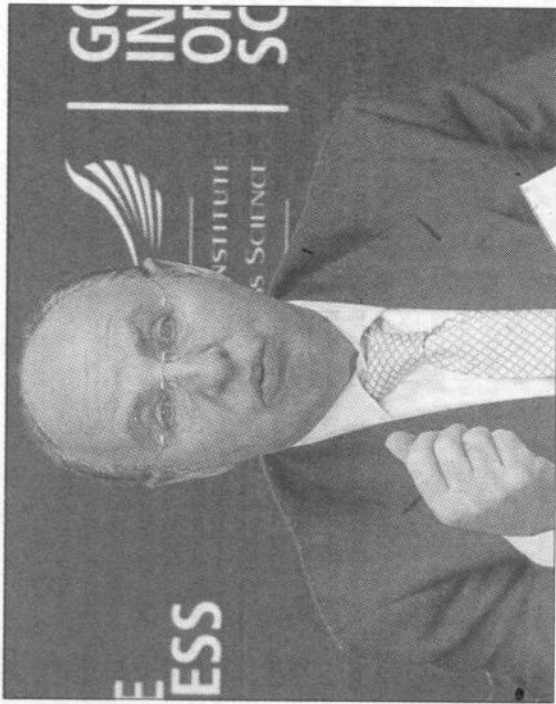
The Agri SA case dealt with a claim for compensation by the farmers' organisation, which said its mineral rights had been expropriated with the coming into effect of the Mineral and Petroleum Resources Development Act.

But the court held that those who failed to convert their "old-order" unused mineral rights were not entitled to compensation, because their loss did not amount to expropriation.

In his majority judgment, Chief Justice Mogoeng Mogoeng says the expropriation provisions of section 25 have to be read looking at the "special role"

the section must play in "facilitating the fulfilment of our country's nation-building and reconciliation function" — by recognising the need to open economic opportunities to all.

"We must therefore interpret section 25 with due regard to the gross inequality in relation to wealth and land distribution in



RIGHTS ISSUE: The idea of the state as a custodian is an 'invitation to the government to use the cloak of custodianship, and the courts, to deny expropriation claims', says Peter Leon. Picture: FINANCIAL MAIL

this country," he says. He distinguishes between deprivation of property and expropriation, saying expropriation is a form of deprivation. But for a deprivation to amount to an expropriation, the deprived property must be "acquired" by the state.

Where the state is only a "facilitator or conduit" — through which others acquire the rights — there is no expropriation, says the chief justice. Studies head Bonita Meyersfeld says the judgment is a "measured step" in the direction of changing economic inequality in SA.

"You've got to change things if you're serious about changing

economic inequality," she says. The idea of the state as a custodian, holding property on behalf of the people, serves to "expand the realm" of those who own SA's mineral rights, says Prof Meyersfeld.

When the state takes custodianship, it is important how it does so. "It must be fair and it must be transparent," she says. But it is this idea of the state as a custodian that troubles Mr Leon. He says the judgment is "problematic" because it is an "invitation to the government to use the cloak of custodianship, and the courts, to deny expropriation claims" and therefore circumvent the requirements of the constitution as well as the legislation — should the bill be passed into law.

"If you put rights under state custodianship, you will never bring about an expropriation — because there's no taking by the state, the state is simply acting as a public trustee," he says. The "elusive" nature of expropriation has long been recognised in international investment law, Mr Leon adds.

Jeanette Russell, also a partner at Webber Wentzel agrees, saying the principle that when

property is taken into state custodianship it falls outside of expropriation could "resonate in the context of land reform". Applying the court's concept of expropriation to land reform would probably require changes to the land expropriation laws, she says.

"But the court has opened the door for these changes to be made. If they are, landowners who lose their land under land reform laws may find themselves excluded from the procedural protections and compensation to which expropriation is subject."

Professor of property law at the University of Cape Town Hanri Mostert puts the concern differently: the problem is not the idea of the state as custodian as such, but the fact that the courts have not given it any content, she says.

What kind of duties are imposed on the state when it holds property as custodian on behalf of the people — especially when it is dealing with "transformative legislation" or laws that are meant to provide redress for past injustice — was left unanswered by the court, says Prof Mostert.

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