

Entrenchment by Interpretation: Section 25 of the South African Constitution and the Failure of Socio-Economic Redress

Cwenga Mayekiso✉

Directorate of Research and Innovation (WSU), South Africa

✉ Corresponding email: cmayekiso@wsu.ac.za

Abstract

This article examines a paradox in South Africa's post-apartheid constitutional order: a Constitution drafted to dismantle racial dispossession has become a principal legal framework through which the holdings that dispossession generated are secured. Although the 1996 Constitution is widely regarded as among the world's most progressive, the property clause in section 25 and the doctrinal architecture built around it have narrowed the state's practical capacity to effect structural socio-economic change. The article argues that this outcome is not the product of judicial partiality toward landowners, which the case law does not support, but the cumulative effect of four mechanisms: an expropriation doctrine organised around state acquisition rather than distributive effect; a compensation practice anchored in market value despite the multi-factor standard in section 25(3); a division of constitutional labour under which tenure security and housing are justiciable while ownership remains outside redistribution; and an adjudicative method in which the historical provenance of title, though available as an interpretive consideration and listed among the compensation factors, is an element of no operative test. The study applies doctrinal legal analysis within a socio-legal frame, reading five leading Constitutional Court decisions against transformative constitutionalism and critical legal studies. It finds that entrenchment operates through interpretation and institutional design rather than through constitutional text, which relocates the object of reform: were the barrier textual, amendment would suffice. The article contributes to debates on transformative constitutionalism by specifying, at the level of doctrine, how a redistributive constitutional mandate is neutralised without ever being formally denied.

KEYWORDS: *Transformative constitutionalism; Land restitution; Constitutional property; Socio-economic redress*

Introduction

The Constitution of the Republic of South Africa, 1996 is founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.¹ Its preamble commits the new order to healing the divisions of the past and to establishing a society based on democratic values, social justice and fundamental human rights. Three decades after its adoption, however, the persistence of racialised poverty and asset inequality raises a serious question about the capacity of that framework to dismantle the structures it was designed to undo. The Department of Rural Development and Land Reform's 2017 land audit found that white individuals own 26,663,144 hectares, or seventy-two per cent, of the 37,031,283 hectares of farms and agricultural holdings held by individual landowners, while African individuals own approximately four per cent.² That distribution is not an accident of market outcomes. It is the sediment of the Natives Land Act 27 of 1913, the Native Trust and Land Act 18 of 1936, and the wider apparatus of racial dispossession those statutes inaugurated.³

The property clause sits at the centre of the resulting debate. Section 25 protects existing holdings against arbitrary deprivation, permits expropriation only for a public purpose or in the public interest and subject to compensation that is "just and equitable", and simultaneously mandates reforms to bring about equitable access to the nation's natural resources in subsection (4)(a), and land reform, tenure security and restitution in subsections (5) to (9). The clause thus contains, in a single provision, both a shield for accumulated holdings and a mandate to redistribute them. How that internal tension has been resolved in practice is the subject of this article.

Three bodies of literature converge on this problem without quite meeting. The first, running from Karl Klare's foundational account of transformative constitutionalism,⁴ treats the Constitution as a long-term project of social reconstruction and asks why that project has stalled. Sanele Sibanda has argued that transformation was configured from the outset as a "transitional site of compromise"

¹ Constitution of the Republic of South Africa, 1996, s 1(a).

² Department of Rural Development and Land Reform, *Land Audit Report Phase II: Private Land Ownership by Race, Gender and Nationality* (Pretoria: Department of Rural Development and Land Reform, November 2017), 2–5. The figure covers only farms and agricultural holdings registered to individual owners, which represent approximately thirty per cent of the country's surface area; land held by companies, trusts, the state and under communal tenure is excluded, and the audit records no race data for those categories. The report itself cautions that race was derived indirectly from names, surnames and identity numbers, "expos[ing] the land audit to the risk of under- or over-reporting". The figures are therefore used here as an indication of the racial concentration of individually held agricultural land, not as a measure of national asset distribution.

³ On the long-run relationship between political settlement and economic distribution in South Africa, see Terreblanche, *A History of Inequality*, 3–29; and Ntsebeza and Hall, *The Land Question in South Africa*, 1–23.

⁴ Karl E. Klare, "Legal Culture and Transformative Constitutionalism," *South African Journal on Human Rights* 14, no. 1 (1998): 146–88, <https://doi.org/10.1080/02587203.1998.11834974>.

whose court-centred form preserves rather than displaces economic hierarchy;⁵ Joel Modiri has pressed the more radical claim that the 1996 settlement represents a continuation of conquest rather than a rupture with it;⁶ and Tshepo Madlingozi has characterised the resulting order as a "neo-apartheid constitutionalism" that incorporates the dispossessed without altering the underlying social structure.⁷ This literature is theoretically powerful but operates largely at the level of constitutional self-understanding rather than at the level of property doctrine.

The second body of work is technical constitutional property scholarship. Ernst Marais has shown in detail how the state-acquisition requirement adopted in *Agri South Africa v Minister for Minerals and Energy* narrowed the concept of expropriation;⁸ W. J. (Elmien) du Plessis has demonstrated that market value has retained its position as the effective anchor of compensation notwithstanding the multi-factor standard in section 25(3);⁹ N.L. Sono has traced the Constitutional Court's unprincipled handling of the threshold question of what counts as constitutionally protected property since *First National Bank*;¹⁰ and Thomas Coggin has argued, against the grain, that section 25 confers no right to property at all but is properly read as a limitation on state power with a redistributive purpose.¹¹ This scholarship is doctrinally precise but tends not to connect its findings to the wider transformative-constitutionalism critique.

⁵ Sanele Sibanda, "When Do You Call Time on a Compromise? South Africa's Discourse on Transformation and the Future of Transformative Constitutionalism," *Law, Democracy and Development* 24, no. 1 (2020): 384–412, <https://doi.org/10.17159/2077-4907/2020/ldd.v24.16>.

⁶ Joel M. Modiri, "Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence," *South African Journal on Human Rights* 34, no. 3 (2018): 300–325, <https://doi.org/10.1080/02587203.2018.1550939>.

⁷ Tshepo Madlingozi, "Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution," *Stellenbosch Law Review* 28, no. 1 (2017): 123–47.

⁸ Ernst Jacobus Marais, "When Does State Interference with Property (Now) Amount to Expropriation? An Analysis of the *Agri SA* Court's State Acquisition Requirement (Part I)," *Potchefstroom Electronic Law Journal* 18, no. 1 (2015): 2983–3031, <https://doi.org/10.4314/pelj.v18i1.02>.

⁹ W. J. du Plessis, "Valuation in the Constitutional Era," *Potchefstroom Electronic Law Journal* 18, no. 5 (2015): 1726–59, <https://doi.org/10.4314/pelj.v18i5.16>.

¹⁰ N. L. Sono, "Re-examining the Constitutional Court's Approach to the Property Question Since *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC)," *Potchefstroom Electronic Law Journal* 25, no. 1 (2022): 1–30, <https://doi.org/10.17159/1727-3781/2022/v25i0a11756>.

¹¹ Thomas Coggin, "There Is No Right to Property: Clarifying the Purpose of the Property Clause," *Constitutional Court Review* 11, no. 1 (2021): 1–37, <https://doi.org/10.2989/ccr.2021.0002>.

The third body of work is empirical and policy-facing. Ruth Hall and Thembela Kepe have documented elite capture and state neglect in redistribution;¹² Farai Mtero and colleagues have shown that land redistribution beneficiaries under the State Land Lease and Disposal Policy are predominantly capitalists drawn from non-agrarian sectors;¹³ and Jackie Dugard has both interrogated whether section 25 in fact poses legal barriers to transformative land reform¹⁴ and, more recently, audited land-rights outcomes across the Land Claims Court, the Supreme Court of Appeal and the Constitutional Court between 1996 and 2024.¹⁵

The gap lies at the intersection. The theoretical literature asserts that the constitutional order preserves inherited privilege but rarely demonstrates the doctrinal mechanism; the doctrinal literature identifies the mechanisms but treats them as discrete interpretive problems; and the empirical literature documents the outcome without tracing it back to adjudicative method. What is missing is an account that specifies how particular doctrinal moves, taken together, produce the entrenchment that the theoretical literature describes — and that does so without the analytically convenient but factually inaccurate claim that the Constitutional Court simply decides property cases in favour of owners. As this article shows, it does not. The Court has restricted the concept of expropriation in the state's favour, read restitution legislation generously, and imposed positive obligations on private landowners. Entrenchment survives all of this, which is precisely what makes it worth explaining.

The study pursues five objectives: to reconstruct the negotiated origins of section 25 and the political trade-offs it encodes; to analyse how the Constitutional Court has interpreted the property clause and its adjacent socio-economic rights; to identify the doctrinal mechanisms through which existing holdings are insulated from redistributive claims; to assess the socio-economic consequences of that insulation; and to evaluate what follows for reform strategy after the failure of constitutional amendment in 2021 and the enactment of the Expropriation Act 13 of 2024.

Correspondingly, the article asks: (i) what political and legal compromises produced the property clause, and what did they preserve; (ii) how have the courts interpreted section 25 and the socio-economic rights in cases bearing on redistribution,

¹² Ruth Hall and Thembela Kepe, "Elite Capture and State Neglect: New Evidence on South Africa's Land Reform," *Review of African Political Economy* 44, no. 151 (2017): 122–30, <https://doi.org/10.1080/03056244.2017.1288615>.

¹³ Farai Mtero, Nkanyiso Gumede, and Katlego Ramantsima, "Emerging Patterns of Accumulation in Land Redistribution in South Africa," *Journal of Agrarian Change* 24, no. 1 (2024): e12570, <https://doi.org/10.1111/joac.12570>.

¹⁴ Jackie Dugard, "Unpacking Section 25: What, If Any, Are the Legal Barriers to Transformative Land Reform?," *Constitutional Court Review* 9, no. 1 (2019): 135–60, <https://doi.org/10.2989/ccr.2019.0006>.

¹⁵ Jackie Dugard, "Testing the Transformative Premise of the South African Land Claims Court: A Comparison of Land Claims Court, Supreme Court of Appeal and Constitutional Court Land Rights' Decisions, 1996–2024," *Constitutional Court Review* 15, no. 1 (2025): 429–54, <https://doi.org/10.2989/ccr.2025.0015>.

restitution and tenure; (iii) through which specific doctrinal mechanisms, if any, does the constitutional order shield holdings whose provenance lies in racial dispossession; and (iv) whether the redress deficit is best addressed through constitutional amendment, interpretive reorientation, or institutional reform.

The article's contribution is threefold. Analytically, it identifies four discrete mechanisms of entrenchment and shows that they operate cumulatively rather than through any single doctrinal choice. Methodologically, it insists on an accurate account of what the Court has actually held, and argues that the strongest version of the critique is available only once the case law is read correctly: the failure of redress cannot be attributed to judicial hostility, because the record does not support that attribution. Normatively, it relocates the object of reform from constitutional text to interpretive practice and institutional capacity, which has direct implications for the post-2024 policy agenda.

Method

This is a doctrinal legal study situated within a socio-legal frame. It is normative and analytical rather than empirical, and it makes no claim to generate new quantitative data.

Doctrinal analysis. The primary method is close textual and structural analysis of section 25 and its adjacent provisions, of the principal implementing statutes engaged by the decisions analysed — the Restitution of Land Rights Act 22 of 1994, the Extension of Security of Tenure Act 62 of 1997 and the Mineral and Petroleum Resources Development Act 28 of 2002 — and of the reasoning in five leading Constitutional Court decisions selected because each marks a distinct point at which the relationship between property and redress was doctrinally settled.

Case selection. The five decisions are *Government of the Republic of South Africa v Grootboom* (the reasonableness standard for socio-economic rights); *Department of Land Affairs v Goedgelegen Tropical Fruits* (the interpretation of statutory restitution); *Occupiers of 51 Olivia Road v City of Johannesburg* (the remedial turn to meaningful engagement); *Agri South Africa v Minister for Minerals and Energy* (the boundary between deprivation and expropriation); and *Daniels v Scribante* (the horizontal reach of constitutional obligations against private landowners). They were selected not because they share an outcome — as the analysis shows, they do not — but because together they map the doctrinal terrain on which the redress question is decided.

Socio-legal contextualisation. Doctrinal findings are read against the historical record of the 1990–1996 negotiations, official land audit and land reform documentation, and the peer-reviewed empirical literature on redistribution outcomes. The purpose is not to test a hypothesis statistically but to establish whether the doctrinal mechanisms identified are consistent with observed distributive outcomes.

Theoretical application. Each doctrinal finding is then interpreted through the two frameworks set out in the following Part, asking in each case whether the reasoning

advances the transformative mandate, is neutral toward it, or operates to insulate the existing distribution from it.

Limitations. Three limitations should be stated. First, the doctrinal analysis is confined to reported Constitutional Court jurisprudence and does not examine settlement practice in the Land Claims Court, administrative decision-making within the restitution process, or the body of unreported litigation; Dugard's comparative audit of Land Claims Court, Supreme Court of Appeal and Constitutional Court outcomes indicates that a fuller picture would require attention to all three fora.¹⁶ Second, the five decisions were selected because they settle the doctrinal relationship between property and redress, which means the sample cannot itself sustain a general claim about the frequency of outcomes in South African adjudication; the claims advanced in the discussion of the four mechanisms are accordingly claims about the structure of the operative tests, corroborated by the secondary literature, rather than inferences from case counts. Third, the discussion of institutional failure draws on empirical scholarship concerning departmental implementation that lies outside the doctrinal method; it is used to establish the limits of a doctrinal diagnosis, not to advance an independent empirical claim.

Transformative Constitutionalism and Critical Legal Studies as an Analytical Framework

The analysis draws on two complementary theoretical traditions. Transformative constitutionalism supplies the normative benchmark against which the constitutional order's performance is measured; critical legal studies supplies the explanatory apparatus for the gap between that benchmark and the observed outcome.

1. Transformative Constitutionalism

Klare's account describes a long-term project of inducing large-scale social change through non-violent political processes grounded in law, transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction.¹⁷ On that reading, the Constitution is not a settlement that ratifies an existing distribution but an instrument for its reconstruction. The textual support is substantial: the Bill of Rights entrenches justiciable rights to housing, health care, food, water and social security alongside civil and political guarantees,¹⁸ and section 25(4)(a) states expressly that the public interest includes the nation's commitment to land reform. Cathi Albertyn and Beth Goldblatt argued at the outset of the constitutional era that giving substantive content to the equality guarantee

¹⁶ Dugard, "Testing the Transformative Premise," 430–33.

¹⁷ Klare, "Legal Culture," 150.

¹⁸ Constitution of the Republic of South Africa, 1996, ss 26–27.

would require a jurisprudence attentive to the material conditions the Constitution inherited, rather than the importation of formal-equality models.¹⁹

Yet the transformative reading has been under sustained internal pressure for two decades. Sandra Liebenberg's foundational treatment of socio-economic rights adjudication set out both the promise of a transformative reading of those rights and the interpretive discipline it would require;²⁰ more recently she has reframed the jurisprudence in reparative terms, which is the register in which historical dispossession would have to be addressed if it were to be addressed at all.²¹ Catherine Albertyn's assessment of the Constitution's record on material inequality is candid about the distance between the equality guarantee and the distribution it presides over.²² Lourens du Plessis's distinction between transitional and transformative, and between monumental and memorial, constitutionalism supplies useful vocabulary for diagnosing why interpretive method so often defaults to the conservative pole of each pair.²³

2. Critical Legal Studies and Its South African Inflection

Critical legal studies contests the claim that legal reasoning is neutral, determinate or autonomous from the distribution of social power. Roberto Unger's programmatic statement located the movement's target in the pretension that a defensible scheme of human association is already latent in existing legal materials, requiring only technical elaboration.²⁴ Applied to South Africa, the point is not that judges consciously serve capital. It is that a legal order which takes the existing distribution of entitlements as its analytical starting point will reproduce that distribution even when its practitioners are acting in good faith and applying the law correctly.

The South African inflection of this critique is well developed. Sibanda's "Not Purpose-Made!" argued that transformative constitutionalism, framed within a liberal

¹⁹ Cathi Albertyn and Beth Goldblatt, "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality," *South African Journal on Human Rights* 14, no. 2 (1998): 248–76, <https://doi.org/10.1080/02587203.1998.11834979>.

²⁰ Sandra Liebenberg, *Socio-Economic Rights: Adjudication under a Transformative Constitution* (Cape Town: Juta, 2010).

²¹ Sandra Liebenberg, "Reparative Justice in South Africa's Socio-Economic Rights Jurisprudence," *Constitutional Court Review* 15, no. 1 (2025): 91–140, <https://doi.org/10.2989/ccr.2025.0005>.

²² Catherine Albertyn, "(In)equality and the South African Constitution," *Development Southern Africa* 36, no. 6 (2019): 751–66, <https://doi.org/10.1080/0376835X.2019.1660860>.

²³ Lourens du Plessis, "Theoretical (Dis-)Position and Strategic Leitmotifs in Constitutional Interpretation in South Africa," *Potchefstroom Electronic Law Journal* 18, no. 5 (2015): 1332–65, <https://doi.org/10.4314/pelj.v18i5.03>.

²⁴ Roberto Mangabeira Unger, "The Critical Legal Studies Movement," *Harvard Law Review* 96, no. 3 (1983): 561–675.

post-independence constitutional idiom, was never equipped to eradicate poverty;²⁵ Modiri's "Law's Poverty" recast poverty as a structural feature of racial capitalism that rights discourse depoliticises;²⁶ and Sibanda and Ngwako Raboshakga have advanced an economic reading of both the 1910 and 1996 constitutional moments, arguing that the distribution and property provisions bear the imprint of white economic interests.²⁷ Heinz Klug's account of decolonisation, compensation and constitutional sustainability makes the same point from the perspective of the negotiation itself.²⁸

3. Integrating the Two Frameworks

Read together, the two frameworks generate the analytical question that organises this article. Transformative constitutionalism tells us what the Constitution undertook to do. Critical legal studies tells us why an undertaking of that kind can fail without anyone repudiating it: because the doctrinal starting point — an existing lawful title, whose history the law does not inquire into — is itself the residue of the injustice to be corrected. The task of the analysis that follows is to show precisely where, in the reasoning of the Constitutional Court, that starting point does its work.

The Negotiated Settlement and the Making of Section 25

The property clause was the product of a negotiation, not of a constitutional convention deliberating on first principles. In the multi-party process that ran from 1990 to 1996, the African National Congress entered with a redistributive programme and the National Party with a mandate to secure existing holdings against it. The clause that emerged was a compromise that neither side regarded as a full statement of its position.

Klug's analysis of that process locates the compensation question at the centre of the transition's sustainability calculus: a settlement that offered no security to existing holders risked capital flight and the collapse of the negotiation itself, while a settlement that offered absolute security would have been unable to command majority political assent.²⁹ Sampie Terreblanche's long-run history of South African inequality situates the 1994 transition within a sequence of settlements in which political inclusion was

²⁵ Sanele Sibanda, "Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty," *Stellenbosch Law Review* 22, no. 3 (2011): 482–500.

²⁶ Joel M. Modiri, "Law's Poverty," *Potchefstroom Electronic Law Journal* 18, no. 2 (2015): 224–63, <https://doi.org/10.4314/pelj.v18i2.06>.

²⁷ Sanele Sibanda and Ngwako Raboshakga, "A Question of Underlying Interests: Economic Justice, Constitutional History and the Capture of the South African State by White Economic Interests," *Law, Democracy and Development* 27, no. 1 (2023): 539–70, <https://doi.org/10.17159/2077-4907/2023/ldd.v27.21>.

²⁸ Heinz Klug, "Decolonisation, Compensation and Constitutionalism: Land, Wealth and the Sustainability of Constitutionalism in Post-Apartheid South Africa," *South African Journal on Human Rights* 34, no. 3 (2018): 469–91, <https://doi.org/10.1080/02587203.2018.1550942>.

²⁹ Klug, "Decolonisation, Compensation and Constitutionalism," 472–78.

repeatedly decoupled from economic redistribution.³⁰ Mahmood Mamdani's analysis of the institutional legacy of late colonialism supplies the comparative frame: the bifurcated state survives the transfer of political power because its property and administrative structures are not themselves transferred.³¹ Lungisile Ntsebeza and Ruth Hall's edited collection on the land question remains the standard treatment of how that decoupling was reproduced in the specific field of land.³²

Two features of the resulting text matter for what follows. First, section 25 is structurally asymmetrical, though not in the crude sense that the reform provisions create no entitlements at all. Subsections (1) to (3) operate directly: they constrain state action and are justiciable at the instance of a holder without legislative mediation. The reform provisions operate differently. Section 25(5) obliges the state only to take "reasonable legislative and other measures" to foster conditions enabling equitable access to land. Sections 25(6) and 25(7) do confer entitlements — respectively to legally secure tenure or comparable redress, and to restitution or equitable redress — but each is expressly conditioned on legislation: the first applies "to the extent provided by an Act of Parliament", and the second operates on the terms of the restitution statute that section 25(9) directs Parliament to enact.³³ The shield is self-executing; the mandate is mediated by statute. That asymmetry is not neutral in litigation, because it determines whose claim must wait for Parliament.

Second, the clause takes existing title as given. Section 25 nowhere distinguishes between holdings acquired through ordinary market transactions and holdings whose provenance lies in racial dispossession, and it establishes no mechanism by which a court is required, or even permitted on its own motion, to inquire into that provenance. The restitution regime in section 25(7) creates a narrow and time-bounded exception, available only to those dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices, and only through the claims procedure established by the Restitution of Land Rights Act 22 of 1994, which set a lodgement deadline of 31 December 1998.³⁴ The attempt to reopen lodgement through the Restitution of Land Rights Amendment Act 15 of 2014 was declared constitutionally invalid in *Land Access Movement of South Africa v Chairperson of the National Council of Provinces*, on the ground that the National Council of Provinces had failed to facilitate reasonable public involvement; the Commission was interdicted from processing claims lodged after 1

³⁰ Sampie Terreblanche, *A History of Inequality in South Africa 1652–2002* (Pietermaritzburg: University of Natal Press, 2002).

³¹ Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, NJ: Princeton University Press, 1996).

³² Lungisile Ntsebeza and Ruth Hall, eds., *The Land Question in South Africa: The Challenge of Transformation and Redistribution* (Cape Town: HSRC Press, 2007).

³³ Constitution of the Republic of South Africa, 1996, s 25(5)–(9).

³⁴ Restitution of Land Rights Act 22 of 1994, s 2(1)(e).

July 2014 pending re-enactment.³⁵ The gate has therefore not merely remained narrow: the one attempt to widen it failed. Outside that exception, title is title. As the discussion of the four mechanisms below argues, this is the single most consequential feature of the clause, and it operates independently of how generously or restrictively any particular provision is interpreted.

Sanele Sibanda and Ngwako Raboshakga's reading of the constitutional negotiations as an episode in which economic interests shaped the distributive provisions is directly on point here.³⁶ So too is Nkanyiso Sibanda's argument that the social-obligation norm of ownership — the idea that property carries duties as well as entitlements — already inheres in section 25 and did not require constitutional amendment to be activated.³⁷ If that argument is correct, the clause was always more permissive than the practice built upon it. The question then becomes why the practice has been so much narrower than the text permits.

Judicial Interpretation of Section 25 and the Redress Mandate

This Part analyses five decisions. It is necessary to state at the outset a finding that runs against a common characterisation in the critical literature: the Constitutional Court has not systematically decided these cases in favour of property holders. In *Goedgelegen* the restitution claimants succeeded against the landowner; in *Daniels* the occupier succeeded against the landowner; in *Olivia Road* the occupiers resisted eviction; and in *Agri SA* the party asserting a constitutional property interest failed outright, albeit against the state rather than against a redistributive claimant. The significance of the case law lies elsewhere — in the doctrinal architecture the Court has built, which insulates the existing distribution of ownership even in judgments that rule against particular owners.

1. *Government of the Republic of South Africa v Grootboom* (2001): Reasonableness as a Measure of the State, Not of the Distribution

Grootboom established the interpretive framework for socio-economic rights.³⁸ The Court held that section 26 obliges the state to devise and implement a comprehensive and coordinated programme that is reasonable in both conception and implementation, and that a programme excluding those in the most desperate need cannot be reasonable. It declined to adopt a minimum core standard on the ground that it lacked sufficient information to determine such a core, expressly reserving the

³⁵ *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 (5) SA 635 (CC) at paras 67, 82–83 and the order at paras 2 and 4 thereof.

³⁶ Sibanda and Raboshakga, "A Question of Underlying Interests," 545–52.

³⁷ Nkanyiso Sibanda, "Amending Section 25 of the South African Constitution to Allow for Expropriation of Land without Compensation: Some Theoretical Considerations of the Social-Obligation Norm of Ownership," *South African Journal on Human Rights* 35, no. 2 (2019): 129–46, <https://doi.org/10.1080/02587203.2019.1628261>.

³⁸ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at paras 39–44, 66.

further question whether it is appropriate for a court to do so at all, and it framed the right as one of progressive realisation within available resources.³⁹ The institutional-competence rationale for that reticence was articulated later, in *Minister of Health v Treatment Action Campaign (No 2)*.⁴⁰

The doctrinal significance for the present argument is precise. Reasonableness review takes the *state's programme* as its object. It asks whether government has acted reasonably given the resources at its disposal; it does not ask how those resources came to be distributed as they are, and it generates no claim against any private holder. A successful applicant obtains a declaration that a programme is constitutionally deficient. She does not obtain an asset. Oliver Fuo and Anél du Plessis's analysis of judicial deference and the refusal of a minimum core traces the consequences of this choice for the enforceability of the rights concerned;⁴¹ Carol Chi Ngang's assessment of whether the human rights framework has delivered socio-economic transformation reaches a similarly qualified conclusion.⁴²

This is not a criticism of the outcome in *Grootboom*, which was favourable to the applicants. It is an observation about the *form* of the remedy. The reach of programme review is therefore bounded by what a programme can be ordered to do. Section 25(5) does render the state's own land-access measures reviewable for reasonableness, so the boundary is not absolute. But a reasonableness enquiry directed at the adequacy of a state programme yields, at its most demanding, an order that the programme be reconsidered; it generates no claim by any person against any existing holder. It is on that asymmetry, rather than on any incapacity in principle, that the argument here rests.

2. *Department of Land Affairs v Goedgelegen Tropical Fruits* (2007): Generous Interpretation within a Narrow Gate

Goedgelegen is frequently misdescribed as a restrictive decision. It was not. Moseneke DCJ expressly rejected a "but for" causation test for the statutory requirement that dispossession have occurred "as a result of past racially discriminatory laws or practices", holding that the phrase means "as a consequence of" rather than "solely as a consequence of", and that the enquiry must be conducted against the entire grid of apartheid land legislation.⁴³ The individual applicants succeeded. The claim advanced on behalf of the Popela community as a community failed on a narrower ground: by the date of dispossession, labour tenancy on the farm had become

³⁹ *Grootboom* at paras 26–33, esp. paras 32–33.

⁴⁰ *Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) at paras 34–39.

⁴¹ Oliver Fuo and Anél du Plessis, "In the Face of Judicial Deference: Taking the 'Minimum Core' of Socio-Economic Rights to the Local Government Sphere," *Law, Democracy and Development* 19, no. 1 (2015): 1–28, <https://doi.org/10.4314/ldd.v19i1.1>.

⁴² Carol Chi Ngang, "Human Rights and Socio-economic Transformation in South Africa," *Human Rights Review* 22, no. 3 (2021): 349–70, <https://doi.org/10.1007/s12142-021-00617-1>.

⁴³ *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) at paras 64–69, esp. para 69; on the individualisation of labour tenancy, paras 72–75.

individualised, so that no shared rules of communal access survived by reference to which a community-held right in land could be identified.

The decision therefore establishes that generous, purposive, historically informed interpretation is doctrinally available in this field, and has in fact been deployed. That finding is important because it forecloses a simple explanation of the redress deficit. If the courts were the binding constraint, *Goedgelegen* would not exist.

What *Goedgelegen* also demonstrates, however, is the significance of the gate through which such generosity must pass. The Restitution of Land Rights Act operates only on dispossessions after 19 June 1913, only where the claimant can establish a right in land, and only through a claims process. Anthony Diala and Sonya Cotton have shown how positivist definitions of "community" under that Act exclude claimants whose dispossession is historically real but legally illegible.⁴⁴ Generous interpretation inside a narrow statutory gate redistributes at the margin; it does not reach the seventy-two per cent.

3. *Occupiers of 51 Olivia Road v City of Johannesburg* (2008): The Remedial Turn to Process

In *Olivia Road* the Court, faced with an eviction affecting more than four hundred occupiers of two buildings in inner-city Johannesburg, issued an interim order requiring the parties to "engage with each other meaningfully", and subsequently endorsed the agreement they reached rather than imposing terms of its own; its final order declared section 12(6) of the National Building Regulations and Building Standards Act 103 of 1977 constitutionally invalid and read in a limiting proviso.⁴⁵ The occupiers were not evicted into homelessness; on any ordinary measure they succeeded.

Anashri Pillay's analysis of meaningful engagement identifies the structural cost of this remedial innovation: engagement converts a distributive question into a procedural one, can legitimate flawed processes, and shifts significant negotiating burdens onto communities with the least capacity to bear them.⁴⁶ Marius Pieterse has recently defended reasonableness review coupled with meaningful engagement as an adaptive form of adjudication well suited to urban governance, and that defence must be taken seriously.⁴⁷ But the two positions are compatible with the argument advanced here. Engagement may well be the best available judicial response to the urban housing

⁴⁴ Anthony C. Diala and Sonya R. Cotton, "Chained Communities: A Critique of South Africa's Approach to Land Restitution," *African Studies Quarterly* 20, no. 3 (2021): 73–86.

⁴⁵ *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC) at paras 1, 5, 14–21, 27–28 and 54.

⁴⁶ Anashri Pillay, "Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement," *International Journal of Constitutional Law* 10, no. 3 (2012): 732–55, <https://doi.org/10.1093/icon/mos021>.

⁴⁷ Marius Pieterse, "Justiciable Socio-Economic Rights as Adaptive Law for Urban Resilience," *Human Rights Law Review* 25, no. 3 (2025): ngaf019, <https://doi.org/10.1093/hrlr/ngaf019>.

crisis; it is nonetheless a response that operates *around* the distribution of ownership rather than upon it.

4. *Agri South Africa v Minister for Minerals and Energy* (2013): Expropriation Narrowed, Provenance Available but Not Required

Agri SA is the decision most often mischaracterised in the critical literature, and correcting the characterisation strengthens rather than weakens the critique. *Agri SA*, as cessionary of Sebenza's unused old-order coal rights, contended that the transitional provisions of the Mineral and Petroleum Resources Development Act had expropriated those rights. The Court dismissed the claim. Mogoeng CJ held that although the Act effected a deprivation, expropriation requires acquisition by the state of the property in question, and the state had not acquired the mineral rights; it had assumed the role of custodian of the nation's mineral resources, acting as "a facilitator or a conduit through which broader and equitable access to mineral and petroleum resources can be realised".⁴⁸ The state won.

The outcome was thus favourable to the reform agenda. The reasoning, however, has consequences that cut the other way. Marais has shown in a two-part analysis that the state-acquisition requirement produces an unstable boundary between deprivation and expropriation, and that acquisition alone cannot coherently police that line.⁴⁹ Where the boundary is drawn matters enormously for redistribution, because it determines when compensation is owed at all. B.V. Slade has examined the circumstances in which courts depart from the methodology established in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service*,⁵⁰ and Sono has argued that the Court's treatment of the threshold question — what is constitutionally protected property in the first place — has lacked a principled basis since *First National Bank*.⁵¹

For present purposes the decisive point concerns the *status* of historical provenance in the reasoning. The Court did not ignore it. Mogoeng CJ observed expressly that the previous minerals dispensation "regulated access to minerals and their exploitation within the context of the apartheid regime which was all about the exclusion of black people from access to private landownership" and the protection of the privileges of white South Africans, and deployed that observation to reject *Agri SA*'s

⁴⁸ *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at para 68; see also paras 58–62.

⁴⁹ Marais, "State Interference (Part I)," 3010–25; Ernst Jacobus Marais, "When Does State Interference with Property (Now) Amount to Expropriation? An Analysis of the *Agri SA* Court's State Acquisition Requirement (Part II)," *Potchefstroom Electronic Law Journal* 18, no. 1 (2015): 3032–69, <https://doi.org/10.4314/pelj.v18i1.03>.

⁵⁰ B. V. Slade, "The Effect of Avoiding the FNB Methodology in Section 25 Disputes," *Obiter* 40, no. 1 (2019): 36, <https://doi.org/10.17159/obiter.v40i1.11306>.

⁵¹ Sono, "Re-examining the Constitutional Court's Approach," 12–19.

reading of section 25.⁵² Provenance thus entered the judgment as an interpretive consideration supporting a particular construction of the clause. What it did not do — and what it is nowhere required to do — is operate as an element of the applicable test. The enquiry that decided the case was whether the state had acquired the property. Had that answer been affirmative, compensation would have followed irrespective of how the antecedent right had been acquired; because it was negative, the historical question did not need to be resolved at all. Provenance is thus available to a court that chooses to invoke it and dispensable to a court that does not, which is a materially different thing from forming part of the law to be applied.

5. *Daniels v Scribante* (2017): Burdens on Owners, but Not on Ownership

Daniels is the clearest counter-example to any claim of uniform judicial solicitude for owners. Yolanda Daniels, an occupier under the Extension of Security of Tenure Act, sought to make improvements to the dwelling she lawfully occupied on another's land, without the owner's consent. The Constitutional Court upheld her claim, holding that the right to human dignity and the security of tenure protected by ESTA entitle an occupier to make improvements bringing the dwelling to a standard consonant with human dignity, and that an owner's consent cannot be a precondition of doing so; the Court also confirmed that constitutional obligations may in appropriate circumstances be imposed horizontally on private landowners.⁵³ The holding was qualified: the occupier must engage meaningfully with the owner before effecting improvements, and the Court did not place the cost of those improvements on the owner. The owner nonetheless lost.

The decision demonstrates that the Court is willing to impose real burdens on private landowners, enforceable without their consent, in service of the constitutional project. Yet the burden imposed is of a specific kind. It concerns the *conditions of occupation* on land that remains, throughout, the owner's land. Sue-Mari Viljoen's analysis of the persistence of civil-law property in land reform and housing captures the pattern precisely: reform has proceeded by creating statutory, public-law rights alongside private ownership rather than by reconstituting ownership itself, with the result that the civil-law core of the property regime has passed through three decades of reform substantially intact.⁵⁴ Zsa-Zsa Boggenpoel and Sameera Mahomed's examination of the remaining gaps in the eviction and unlawful-occupation framework

⁵² *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at para 70.

⁵³ *Daniels v Scribante* 2017 (4) SA 341 (CC) at paras 38–49 (horizontal application), 59–60 (consent not a prerequisite) and 62–65 (prior meaningful engagement).

⁵⁴ Sue-Mari Viljoen, "Tracing Civil-Law Property in Land Reform and Housing: Tenacious Traditions and Divides," *Potchefstroom Electronic Law Journal* 29, no. 1 (2026): 1–31, <https://doi.org/10.17159/1727-3781/2026/v29i0a18577>.

shows how, in practice, the balance can tilt back toward owners at the level of implementation.⁵⁵

Daniels thus marks the outer boundary of the constitutional reach into private holdings: the Court will regulate what an owner may prevent an occupier from doing, but the question of who owns is left untouched.

6. The Pattern across the Five Decisions

Taken together, the decisions display a consistent structure that is invisible if attention is confined to outcomes. In *Grootboom* the Court reviews the state's programme; in *Goedgelegen* it interprets a restitution statute generously within a narrow statutory gate; in *Olivia Road* it converts a distributive conflict into a negotiated process; in *Agri SA* it adjudicates the deprivation/expropriation boundary, invoking historical provenance in support of its construction but not as an element of the test it applies; and in *Daniels* it regulates the incidents of occupation while leaving ownership itself in place. In two of the five — *Agri SA* and *Goedgelegen* — the Court engaged the history of dispossession directly and at length. In neither, however, did the historical legitimacy of an existing title operate as a condition of that title's constitutional protection. The distinction matters: provenance is not absent from the reasoning, but it is absent from the operative tests, and a consideration a court may invoke at its election does different work from an element a litigant must establish.

Four Mechanisms of Entrenchment

The analysis of the five decisions supports a more precise formulation of the article's central claim than the general proposition that the Constitution protects apartheid-era gains. Entrenchment operates through four identifiable mechanisms.

1. An Expropriation Doctrine Organised around Acquisition rather than Distributive Effect

By making state acquisition the criterion of expropriation, *Agri SA* fixed the compensation question to the form of a state's action rather than to its distributive consequence. As Marais demonstrates, the resulting boundary is doctrinally unstable and generates outcomes that track the legal characterisation of a measure rather than its actual impact on the distribution of assets.⁵⁶ A test insensitive to distributive effect cannot be used to reason about distributive justice, whichever way it is applied in a given case.

⁵⁵ Zsa-Zsa T. Boggenpoel and Sameera Mahomed, "Reflecting on Evictions and Unlawful Occupation of Land in South Africa: Where Do Some Gaps Still Remain?," *Potchefstroom Electronic Law Journal* 26, no. 1 (2023): 1–31, <https://doi.org/10.17159/1727-3781/2023/v26i0a14687>.

⁵⁶ Marais, "State Interference (Part II)," 3050–62.

2. Market Value as the Operative Anchor of “Just and Equitable” Compensation

Section 25(3) directs that compensation reflect an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances including five listed factors, of which market value is only one; the others are the current use of the property, the history of its acquisition and use, the extent of direct state investment and subsidy in its acquisition and beneficial capital improvement, and the purpose of the expropriation.⁵⁷ Elmien du Plessis's analysis of valuation practice shows that market value has nonetheless retained its position as the effective anchor, with the apparent objectivity of valuation technique concealing an underlying interpretive choice.⁵⁸ Hein Lubbe and du Plessis have mapped how much room section 25(3) and international law together in fact leave for below-market and nil compensation, and their conclusion is that the constraint is substantially interpretive rather than textual.⁵⁹ The practical effect is that redress is priced at the value that the dispossession itself created.

A Division of Constitutional Labour that Separates Tenure from Ownership

Daniels, Olivia Road and the ESTA and PIE frameworks establish a substantial body of enforceable protection for occupiers. Viljoen's account explains why this has not translated into redistribution: the reform project has built a public-law layer of statutory rights on top of an untouched civil-law conception of ownership.⁶⁰ Viljoen's proposal that human flourishing should calibrate the scrutiny applied to property regulation indicates one route by which that separation might be narrowed.⁶¹ As matters stand, the constitutional order has become highly capable of protecting people *on* land they do not own, and has remained largely incapable of transferring the land itself.

1. Provenance of Title as Consideration rather than Element

The fourth mechanism is the most fundamental and the least visible, because it consists not in a rule but in the absence of one. The claim must be stated precisely, because an overstated version is refuted by the case law itself. Provenance is not invisible to South African constitutional property law: *Agri SA* invoked the apartheid character

⁵⁷ Constitution of the Republic of South Africa, 1996, s 25(3)(a)–(e).

⁵⁸ Du Plessis, "Valuation in the Constitutional Era," 1740–52.

⁵⁹ H. J. Lubbe and W. J. du Plessis, "Compensation for Expropriation in South Africa, and International Law: The Leeway and the Limits," *Constitutional Court Review* 11, no. 1 (2021): 79–112, <https://doi.org/10.2989/ccr.2021.0004>.

⁶⁰ Viljoen, "Tracing Civil-Law Property," 8–17.

⁶¹ Sue-Mari Viljoen, "Property and 'Human Flourishing': A Reassessment in the Housing Framework," *Potchefstroom Electronic Law Journal* 22, no. 1 (2019): 1–27, <https://doi.org/10.17159/1727-3781/2019/v22i0a5619>.

of the antecedent minerals regime as a reason for its construction of section 25, *Goedgelegen* conducted an extended enquiry into the racial provenance of the landowner's acquisition, and section 25(3)(b) lists the history of acquisition and use among the compensation factors. The point is that in none of these settings does provenance function as an *element* — a matter that must be established, and whose absence has consequences for the protection a title receives. The arbitrariness enquiry under section 25(1), as structured in *First National Bank*, examines the relationship between means and ends in the state's conduct and the nature of the property and the extent of the deprivation, not the history of the holding.⁶² The expropriation enquiry examines acquisition. The compensation enquiry lists provenance but, as shown above, is anchored in practice to valuation method. In each case provenance is an available consideration rather than a required finding, and the difference between the two is the difference between a factor a court may weigh and a threshold a title must cross. Coggin's argument that section 25 confers no right to property but operates as a limitation on state power with a redistributive purpose offers a principled basis on which this could be otherwise;⁶³ AJ van der Walt and Sue-Mari Viljoen's account of the systemic links between property, land and housing rights within a constitutional social-welfare mandate supplies the doctrinal architecture.⁶⁴ Neither has yet reshaped the operative tests.

The consequence is that a title traceable to dispossession under the 1913 or 1936 Acts, or to the racially exclusive economic order those Acts constituted, presents itself to a court as *prima facie* equivalent to any other title, and remains so unless a litigant raises its history and a court elects to give that history weight. Sibanda and Raboshakga's reading of the constitutional negotiations helps explain how that came about;⁶⁵ Modiri's argument about the continuity of conquest explains why it is experienced as illegitimate by those it excludes.⁶⁶

2. Institutional Failure and the Limits of a Purely Doctrinal Diagnosis

Doctrine is not the whole explanation, and the article does not claim that it is. The relationship between the two levels requires statement, because it is easy to read the doctrinal and institutional accounts as competing. They are not. The doctrinal mechanisms determine the outer boundary of what redistributive law may do, the price at which it may do it, and the form redress must take; institutional failure explains why

⁶² *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at paras 46–68 and the summary of the methodology at para 100.

⁶³ Coggin, "There Is No Right to Property," 8–20.

⁶⁴ A. J. van der Walt and S. Viljoen, "The Constitutional Mandate for Social Welfare — Systemic Differences and Links between Property, Land Rights and Housing Rights," *Potchefstroom Electronic Law Journal* 18, no. 4 (2015): 1035–90, <https://doi.org/10.4314/pelj.v18i4.09>.

⁶⁵ Sibanda and Raboshakga, "A Question of Underlying Interests," 556–65.

⁶⁶ Modiri, "Conquest and Constitutionalism," 310–18.

even the space that plainly exists within that boundary has gone largely unused. A doctrinal constraint that is never reached because implementation collapses first is not thereby shown to be inoperative; it is shown to be untested. The two diagnoses are therefore sequential rather than rival, and reform that addresses only one of them will not produce redress. Dugard's direct examination of whether section 25 poses legal barriers to transformative land reform concludes that the barriers lie substantially outside the text.⁶⁷ Hall and Kepe document elite capture and state neglect in the redistribution programme;⁶⁸ Mtero and colleagues show that the beneficiaries of state leasehold redistribution are disproportionately non-agrarian capitalists;⁶⁹ Boggenpoel and Mahomed attribute reform failure across all three land reform sub-programmes to implementation, political will and undifferentiated policy design rather than to constitutional constraint;⁷⁰ and Andries du Toit argues that the land question remains politically unresolved because it functions as a displaced argument about political belonging.⁷¹ Matthew Evans's analysis of the limits of liberal legalism in transitional justice supplies the theoretical link between the doctrinal and institutional levels: a transitional justice framework organised around individual legal remedy is structurally unable to reach capitalist property relations, irrespective of the good faith of its operators.⁷²

3. Why the Amendment Debate Misdiagnosed the Problem

The four mechanisms explain an otherwise puzzling sequence of events. The Constitution Eighteenth Amendment Bill, which would have made explicit provision for expropriation without compensation, failed to secure the two-thirds majority required by section 74(2) of the Constitution when its second reading was rejected by the National Assembly on 7 December 2021, and the Bill accordingly lapsed.⁷³ The Expropriation Act 13 of 2024 was assented to on 23 January 2025. Its section 12(3) provides for nil compensation in defined circumstances and its section 29 repeals the Expropriation Act 63 of 1975 — but section 31(1) provides that the Act comes into operation on a date determined by the President by proclamation, and at the time of

⁶⁷ Dugard, "Unpacking Section 25," 150–58.

⁶⁸ Hall and Kepe, "Elite Capture and State Neglect," 124–28.

⁶⁹ Mtero, Gumede, and Ramantsima, "Emerging Patterns of Accumulation," 8–14.

⁷⁰ Z. T. Boggenpoel and S. Mahomed, "Viewing Land through a Social-Justice Lens: Why Land Reform Is Imperative to Social Justice," *Obiter* 46, no. 2 (2025): 364–92.

⁷¹ Andries du Toit, "The Land and Its People: The South African 'Land Question' and the Post-Apartheid Political Order," *Journal of Southern African Studies* 50, no. 2 (2024): 207–24, <https://doi.org/10.1080/03057070.2024.2403902>.

⁷² Matthew Evans, "Land and the Limits of Liberal Legalism: Property, Transitional Justice and Non-Reformist Reforms in Post-Apartheid South Africa," *Review of African Political Economy* 48, no. 170 (2021): 646–55, <https://doi.org/10.1080/03056244.2021.1987209>.

⁷³ Constitution Eighteenth Amendment Bill [B18–2021]; Constitution of the Republic of South Africa, 1996, s 74(2). The second reading was rejected by the National Assembly on 7 December 2021 and the Bill lapsed.

writing no such proclamation has been issued.⁷⁴ The 1975 Act therefore remains the operative expropriation statute, the nil-compensation provision is not yet available, and the Act is in any event the subject of pending litigation. Neither event, and neither outcome of that litigation, would alter any of the four mechanisms identified above. The acquisition-centred conception of expropriation survives, since it construes section 25(2) rather than any statute; valuation practice would not be displaced by a statutory possibility of nil compensation, since the question of what is just and equitable in a given case would remain to be determined; the separation of tenure from ownership is untouched; and no new test requires provenance to be established.

Nkanyiso Sibanda's argument that the social-obligation norm already inheres in section 25 anticipated exactly this outcome: if the clause was never the binding constraint, amending it could not have been the remedy.⁷⁵ Anele Mthembu's comparative assessment of expropriation-based reform in Southern Africa reaches a convergent conclusion.⁷⁶ Klug's analysis of the relationship between compensation and constitutional sustainability suggests why the political system nonetheless invested so heavily in the amendment route.⁷⁷ Luxien Ariyan and Khululekani Ntakana's recent assessment of expropriation and spatial justice under the post-2024 framework indicates that the implementation question has now displaced the textual one.⁷⁸

Conclusion

This article set out to explain how a Constitution mandating redress has come to preside over a distribution of assets that closely resembles the one it undertook to dismantle. The answer it offers is that entrenchment operates through interpretation and institutional design rather than through the constitutional text, and that it does so by way of four cumulative mechanisms: an expropriation doctrine keyed to state acquisition rather than distributive effect; a compensation practice anchored in market value notwithstanding the broader standard in section 25(3); a division of constitutional labour that has made tenure highly justiciable while leaving ownership outside redistribution; and, most fundamentally, the fact that the historical provenance of title, though available to a court as an interpretive consideration and formally listed among the compensation factors, is an element of no operative test.

⁷⁴ Expropriation Act 13 of 2024, ss 12(3), 29 and 31(1). The Act was assented to on 23 January 2025; at the time of writing no proclamation bringing it into operation had been published, and the Expropriation Act 63 of 1975 accordingly remained in force. [AUTHOR: please confirm the commencement position immediately before submission, as it may change.]

⁷⁵ Sibanda, "Amending Section 25," 138–44.

⁷⁶ Anele Mthembu, "Reflections on Expropriation-Based Land Reform in Southern Africa," *Town and Regional Planning* 75, no. 2 (2019): 54–65, <https://doi.org/10.18820/2415-0495/trp75i1.7>.

⁷⁷ Klug, "Decolonisation, Compensation and Constitutionalism," 485–90.

⁷⁸ Luxien Ariyan and Khululekani Ntakana, "Land Expropriation: A Necessary Step to Achieving Economic Inclusivity, Social Equity and Spatial Justice in South Africa," *Land* 15, no. 4 (2026): 573, <https://doi.org/10.3390/land15040573>.

Three findings follow. First, the redress deficit cannot be attributed to judicial hostility toward transformation. The case law does not support that attribution: in *Goedgelegen* the Court adopted an expressly generous and historically informed reading of the restitution legislation and the claimants succeeded; in *Daniels* it imposed obligations on a private landowner at the instance of an occupier; and in *Agri SA* it rejected a constitutional property claim outright. Second, precisely because the deficit is not a product of hostile adjudication, it is not curable by replacing judges or by amending the text they apply. The failure of the Constitution Eighteenth Amendment Bill in 2021 and the assent to the Expropriation Act 13 of 2024 — an Act that had not, at the time of writing, been brought into operation — leave the operative mechanisms intact. Third, the strongest formulation of the transformative-constitutionalism critique is a doctrinal one: the constitutional order does not defend inherited privilege; it declines to require that anyone inquire into it, which in a society constituted by dispossession produces a comparable result at a far lower normative cost.

Why this matters is that it relocates the object of reform. The following recommendations follow directly from the four mechanisms.

Interpretive reorientation of the provenance question. Section 25(3)(b) already directs attention to "the history of the acquisition and use of the property". That factor should be developed into an operative element of the compensation enquiry rather than remaining a formal listing, with courts required to make findings on provenance where the issue arises on the evidence, and with the weight of that factor made explicit rather than absorbed into an undifferentiated valuation exercise. Coggin's reading of section 25 as a limitation on state power with a redistributive purpose,⁷⁹ and van der Walt and Viljoen's systemic account of property within a social-welfare mandate,⁸⁰ supply the doctrinal foundation for such a development.

Compensation practice. The Expropriation Act 13 of 2024, once brought into operation, will create statutory room for nil compensation in defined circumstances; but the analysis above indicates that valuation practice, not statutory authority, has been the operative constraint. Reform should therefore address valuation methodology and the evidentiary framework within which compensation is determined, in line with the analysis offered by du Plessis and by Lubbe and du Plessis.⁸¹

Institutional capacity and beneficiary selection. The empirical literature reviewed above points consistently to implementation, rather than constitutional text, as the constraint that has bound in practice. As argued there, this does not displace the doctrinal diagnosis; the two operate at different margins, and a doctrinal constraint that implementation failure prevents a case from ever reaching is untested rather than inoperative. Strengthening the monitoring, evaluation and accountability framework

⁷⁹ Coggin, "There Is No Right to Property," 28–35.

⁸⁰ Van der Walt and Viljoen, "The Constitutional Mandate for Social Welfare," 1060–75.

⁸¹ Du Plessis, "Valuation in the Constitutional Era," 1752–58; Lubbe and du Plessis, "Compensation for Expropriation," 95–108.

of the Department of Agriculture, Land Reform and Rural Development, and reforming beneficiary selection to address the elite-capture patterns documented by Hall and Kepe and by Mtero and colleagues, would therefore do more for redress in the short term than further textual amendment, without making the interpretive reorientation proposed above unnecessary.⁸²

Closing the tenure–ownership gap. The ESTA and PIE frameworks have generated genuine protections for occupiers. Converting secure tenure into ownership where circumstances permit — an option the statutory architecture largely leaves unexplored — would address directly the separation between tenure and ownership identified above. Viljoen's work on the persistence of civil-law property indicates both the difficulty and the necessity of this step.⁸³

Judicial and professional education. Sustained engagement by the judiciary and the profession with the historical scholarship on dispossession, and with the critical literature on transformative constitutionalism, is a precondition for the interpretive reorientation proposed above. Liebenberg's reparative framing of socio-economic rights jurisprudence offers a register in which that engagement could proceed.⁸⁴

The Constitution's transformative mandate has not been repudiated. It has been left, in the field of property, without an operative doctrinal test through which it could be given effect. Until that gap is closed, the constitutional order will remain progressive in its commitments and conservative in its distributive consequences — not because it defends the inheritance of apartheid, but because it has never been obliged to ask where that inheritance came from.

References

- Albertyn, Catherine. "(In)equality and the South African Constitution." *Development Southern Africa* 36, no. 6 (2019): 751–66. <https://doi.org/10.1080/0376835X.2019.1660860>.
- Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC).
- Albertyn, Cathi, and Beth Goldblatt. "Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality." *South African Journal on Human Rights* 14, no. 2 (1998): 248–76. <https://doi.org/10.1080/02587203.1998.11834979>.
- Ariyan, Luxien, and Khululekani Ntakana. "Land Expropriation: A Necessary Step to Achieving Economic Inclusivity, Social Equity and Spatial Justice in South Africa." *Land* 15, no. 4 (2026): 573. <https://doi.org/10.3390/land15040573>.
- Boggenpoel, Zsa-Zsa T., and Sameera Mahomed. "Reflecting on Evictions and Unlawful Occupation of Land in South Africa: Where Do Some Gaps Still

⁸² Hall and Kepe, "Elite Capture and State Neglect," 126–29; Mtero, Gumede, and Ramantsima, "Emerging Patterns of Accumulation," 15–20.

⁸³ Viljoen, "Tracing Civil-Law Property," 20–28.

⁸⁴ Liebenberg, "Reparative Justice," 118–35.

- Remain?" *Potchefstroom Electronic Law Journal* 26, no. 1 (2023): 1–31. <https://doi.org/10.17159/1727-3781/2023/v26i0a14687>.
- Boggenpoel, Zsa-Zsa T., and Sameera Mahomedy. "Viewing Land through a Social-Justice Lens: Why Land Reform Is Imperative to Social Justice." *Obiter* 46, no. 2 (2025): 364–92.
- Coggin, Thomas. "There Is No Right to Property: Clarifying the Purpose of the Property Clause." *Constitutional Court Review* 11, no. 1 (2021): 1–37. <https://doi.org/10.2989/ccr.2021.0002>.
- Constitution of the Republic of South Africa, 1996.
- Constitution Eighteenth Amendment Bill [B18–2021].
- Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC).
- Department of Rural Development and Land Reform. *Land Audit Report Phase II: Private Land Ownership by Race, Gender and Nationality*. Pretoria: Department of Rural Development and Land Reform, November 2017.
- Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199
- Diala, Anthony C., and Sonya R. Cotton. "Chained Communities: A Critique of South Africa's Approach to Land Restitution." *African Studies Quarterly* 20, no. 3 (2021): 73–86.
- Dugard, Jackie. "Testing the Transformative Premise of the South African Land Claims Court: A Comparison of Land Claims Court, Supreme Court of Appeal and Constitutional Court Land Rights' Decisions, 1996–2024." *Constitutional Court Review* 15, no. 1 (2025): 429–54. <https://doi.org/10.2989/ccr.2025.0015>.
- Dugard, Jackie. "Unpacking Section 25: What, If Any, Are the Legal Barriers to Transformative Land Reform?" *Constitutional Court Review* 9, no. 1 (2019): 135–60. <https://doi.org/10.2989/ccr.2019.0006>.
- Du Plessis, Lourens. "Theoretical (Dis-)Position and Strategic Leitmotifs in Constitutional Interpretation in South Africa." *Potchefstroom Electronic Law Journal* 18, no. 5 (2015): 1332–65. <https://doi.org/10.4314/pelj.v18i5.03>.
- Du Plessis, W. J. (Elmien). "Valuation in the Constitutional Era." *Potchefstroom Electronic Law Journal* 18, no. 5 (2015): 1726–59. <https://doi.org/10.4314/pelj.v18i5.16>.
- Du Toit, Andries. "The Land and Its People: The South African 'Land Question' and the Post-Apartheid Political Order." *Journal of Southern African Studies* 50, no. 2 (2024): 207–24. <https://doi.org/10.1080/03057070.2024.2403902>.
- Evans, Matthew. "Land and the Limits of Liberal Legalism: Property, Transitional Justice and Non-Reformist Reforms in Post-Apartheid South Africa." *Review of African Political Economy* 48, no. 170 (2021): 646–55. <https://doi.org/10.1080/03056244.2021.1987209>.
- Expropriation Act 13 of 2024.
- Extension of Security of Tenure Act 62 of 1997.

- First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).
- Fuo, Oliver, and Anél du Plessis. "In the Face of Judicial Deference: Taking the 'Minimum Core' of Socio-Economic Rights to the Local Government Sphere." *Law, Democracy and Development* 19, no. 1 (2015): 1–28. <https://doi.org/10.4314/ldd.v19i1.1>.
- Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).
- Hall, Ruth, and Thembele Kepe. "Elite Capture and State Neglect: New Evidence on South Africa's Land Reform." *Review of African Political Economy* 44, no. 151 (2017): 122–30. <https://doi.org/10.1080/03056244.2017.1288615>.
- Klare, Karl E. "Legal Culture and Transformative Constitutionalism." *South African Journal on Human Rights* 14, no. 1 (1998): 146–88. <https://doi.org/10.1080/02587203.1998.11834974>.
- Klug, Heinz. "Decolonisation, Compensation and Constitutionalism: Land, Wealth and the Sustainability of Constitutionalism in Post-Apartheid South Africa." *South African Journal on Human Rights* 34, no. 3 (2018): 469–91. <https://doi.org/10.1080/02587203.2018.1550942>.
- Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 (5) SA 635 (CC).
- Liebenberg, Sandra. "Reparative Justice in South Africa's Socio-Economic Rights Jurisprudence." *Constitutional Court Review* 15, no. 1 (2025): 91–140. <https://doi.org/10.2989/ccr.2025.0005>.
- Liebenberg, Sandra. *Socio-Economic Rights: Adjudication under a Transformative Constitution*. Cape Town: Juta, 2010.
- Lubbe, H. J., and W. J. du Plessis. "Compensation for Expropriation in South Africa, and International Law: The Leeway and the Limits." *Constitutional Court Review* 11, no. 1 (2021): 79–112. <https://doi.org/10.2989/ccr.2021.0004>.
- Madlingozi, Tshepo. "Social Justice in a Time of Neo-Apartheid Constitutionalism: Critiquing the Anti-Black Economy of Recognition, Incorporation and Distribution." *Stellenbosch Law Review* 28, no. 1 (2017): 123–47.
- Mamdani, Mahmood. *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*. Princeton, NJ: Princeton University Press, 1996.
- Marais, Ernst Jacobus. "When Does State Interference with Property (Now) Amount to Expropriation? An Analysis of the *Agri SA* Court's State Acquisition Requirement (Part I)." *Potchefstroom Electronic Law Journal* 18, no. 1 (2015): 2983–3031. <https://doi.org/10.4314/pelj.v18i1.02>.
- Marais, Ernst Jacobus. "When Does State Interference with Property (Now) Amount to Expropriation? An Analysis of the *Agri SA* Court's State Acquisition Requirement (Part II)." *Potchefstroom Electronic Law Journal* 18, no. 1 (2015): 3032–69. <https://doi.org/10.4314/pelj.v18i1.03>.
- Minister of Health v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC).

- Mineral and Petroleum Resources Development Act 28 of 2002.
- Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg* 2008 (3) SA 208 (CC).
- Modiri, Joel M. "Conquest and Constitutionalism: First Thoughts on an Alternative Jurisprudence." *South African Journal on Human Rights* 34, no. 3 (2018): 300–325. <https://doi.org/10.1080/02587203.2018.1550939>.
- Modiri, Joel M. "Law's Poverty." *Potchefstroom Electronic Law Journal* 18, no. 2 (2015): 224–63. <https://doi.org/10.4314/pelj.v18i2.06>.
- Mtero, Farai, Nkanyiso Gumede, and Katlego Ramantsima. "Emerging Patterns of Accumulation in Land Redistribution in South Africa." *Journal of Agrarian Change* 24, no. 1 (2024): e12570. <https://doi.org/10.1111/joac.12570>.
- Mthembu, Anele. "Reflections on Expropriation-Based Land Reform in Southern Africa." *Town and Regional Planning* 75, no. 2 (2019): 54–65. <https://doi.org/10.18820/2415-0495/trp75i1.7>.
- National Building Regulations and Building Standards Act 103 of 1977.
- Native Trust and Land Act 18 of 1936.
- Natives Land Act 27 of 1913.
- Ngang, Carol Chi. "Human Rights and Socio-economic Transformation in South Africa." *Human Rights Review* 22, no. 3 (2021): 349–70. <https://doi.org/10.1007/s12142-021-00617-1>.
- Ntsebeza, Lungisile, and Ruth Hall, eds. *The Land Question in South Africa: The Challenge of Transformation and Redistribution*. Cape Town: HSRC Press, 2007.
- Pieterse, Marius. "Justiciable Socio-Economic Rights as Adaptive Law for Urban Resilience." *Human Rights Law Review* 25, no. 3 (2025): ngaf019. <https://doi.org/10.1093/hrlr/ngaf019>.
- Pillay, Anashri. "Toward Effective Social and Economic Rights Adjudication: The Role of Meaningful Engagement." *International Journal of Constitutional Law* 10, no. 3 (2012): 732–55. <https://doi.org/10.1093/icon/mos021>.
- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.
- Restitution of Land Rights Act 22 of 1994.
- Restitution of Land Rights Amendment Act 15 of 2014.
- Sibanda, Nkanyiso. "Amending Section 25 of the South African Constitution to Allow for Expropriation of Land without Compensation: Some Theoretical Considerations of the Social-Obligation Norm of Ownership." *South African Journal on Human Rights* 35, no. 2 (2019): 129–46. <https://doi.org/10.1080/02587203.2019.1628261>.
- Sibanda, Sanele. "Not Purpose-Made! Transformative Constitutionalism, Post-Independence Constitutionalism and the Struggle to Eradicate Poverty." *Stellenbosch Law Review* 22, no. 3 (2011): 482–500.
- Sibanda, Sanele. "When Do You Call Time on a Compromise? South Africa's Discourse on Transformation and the Future of Transformative

- Constitutionalism." *Law, Democracy and Development* 24, no. 1 (2020): 384–412. <https://doi.org/10.17159/2077-4907/2020/ldd.v24.16>.
- Sibanda, Sanele, and Ngwako Raboshakga. "A Question of Underlying Interests: Economic Justice, Constitutional History and the Capture of the South African State by White Economic Interests." *Law, Democracy and Development* 27, no. 1 (2023): 539–70. <https://doi.org/10.17159/2077-4907/2023/ldd.v27.21>.
- Slade, B. V. "The Effect of Avoiding the FNB Methodology in Section 25 Disputes." *Obiter* 40, no. 1 (2019): 36. <https://doi.org/10.17159/obiter.v40i1.11306>.
- Sono, N. L. "Re-examining the Constitutional Court's Approach to the Property Question Since *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC)." *Potchefstroom Electronic Law Journal* 25, no. 1 (2022): 1–30. <https://doi.org/10.17159/1727-3781/2022/v25i0a11756>.
- Terreblanche, Sampie. *A History of Inequality in South Africa 1652–2002*. Pietermaritzburg: University of Natal Press, 2002.
- Unger, Roberto Mangabeira. "The Critical Legal Studies Movement." *Harvard Law Review* 96, no. 3 (1983): 561–675.
- Van der Walt, A. J., and S. Viljoen. "The Constitutional Mandate for Social Welfare — Systemic Differences and Links between Property, Land Rights and Housing Rights." *Potchefstroom Electronic Law Journal* 18, no. 4 (2015): 1035–90. <https://doi.org/10.4314/pelj.v18i4.09>.
- Viljoen, Sue-Mari. "Property and 'Human Flourishing': A Reassessment in the Housing Framework." *Potchefstroom Electronic Law Journal* 22, no. 1 (2019): 1–27. <https://doi.org/10.17159/1727-3781/2019/v22i0a5619>.
- Viljoen, Sue-Mari. "Tracing Civil-Law Property in Land Reform and Housing: Tenacious Traditions and Divides." *Potchefstroom Electronic Law Journal* 29, no. 1 (2026): 1–31. <https://doi.org/10.17159/1727-3781/2026/v29i0a18577>.