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**From the Selected Works of Bernadette Atuahene**

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2018

# From Reparations to Dignity Restoration: The Story of the Popela Community.

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## From reparations to dignity restoration: The story of the Popela community

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### Summary

*In certain circumstances property takings are part of a larger strategy to further subjugate a certain group within the polity by denying their humanity or their capacity to reason. These takings involve more than the confiscation of property; they also involve the deprivation of dignity. In her book, We want what's ours: Learning from South Africa's land restitution program, Atuahene has called these dignity takings. The Popela people are a resource-poor, but culturally-rich African community from South Africa's Limpopo region that the colonial and apartheid regimes subjected to dignity takings. The post-apartheid state was interested not only in providing compensation for property taken from the Popela community and others, but also facilitating dignity restoration – a comprehensive remedy that addresses the deprivations of property as well as dignity. At the end of a protracted legal battle, the Constitutional Court ruled that the Popela community was entitled to reparations requiring the post-apartheid state to purchase the disputed land from its current owners and return it to the community. However, the state went above and beyond the Court-ordered remedy and tried to facilitate dignity restoration by expanding the number of community members entitled to land and increasing the amount of land transferred. The problem, however, is that over ten years since the much-celebrated court victory, the state has failed to deliver the more modest reparations mandated by the Constitutional Court as well as the more ambitious remedy designed to bring about dignity restoration. This article charts the consequences of the state's failed move from reparations to dignity restoration.*

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**Key words:** *property taking; confiscation; dignity; restoration; reparations; post-apartheid state*

## 1 Introduction

In August 2008 several South African newspapers carried a story about a desperately poor woman in her forties who had died in her shack.<sup>1</sup> She was not the victim of some cruel crime, nor had she been reported to be involved in any criminal conduct. In fact, the news reports all stated that she had succumbed to a short illness. There is nothing remarkable or spectacular in that. So who was this woman and why did the South African popular media believe that the public needed to know of her demise? This woman was Irene Grootboom.

Ms Grootboom was the woman behind the now internationally-renowned South African Constitutional Court case of *Grootboom*.<sup>2</sup> In this case the Court handed down a decision against the government for failing to vindicate Ms Grootboom's right to housing, a socio-economic right enshrined in the Bill of Rights. At the time, *Grootboom* represented a watershed jurisprudential moment in the judicial enforcement of socio-economic rights. In fact, *Grootboom* is widely acknowledged as having played a pioneering role in shaping how the law and discourse around socio-economic rights in South Africa has developed.<sup>3</sup> However, the favorable Constitutional Court order had little practical impact on Ms Grootboom's life, and most certainly did not save her from the ignominy of living the rest of her life still residing in a shack. If anything, Ms Grootboom's ultimate plight well illustrates the sometimes illusory nature of court victories where rights are vindicated, but poor claimants must patiently await executive action in order to receive an effective remedy.<sup>4</sup> Unfortunately, in the instance of Ms Grootboom her wait was in vain.

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1 P Joubert 'Grootboom dies homeless and penniless' *Mail & Guardian Online* 8 August 2008, <https://mg.co.za/article/2008-08-08-grootboom-dies-homeless-and-penniless> (accessed 11 December 2018).

2 As above; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 26 (CC).

3 M Pieterse 'Coming to terms with the judicial enforcement of socio-economic rights' (2004) 20 *South African Journal on Human Rights* 415; S Liebenberg 'The interpretation of socio-economic rights' in S Woolman (ed) *Constitutional law of South Africa* (2008); D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for the future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1; DB Bilchitz *Poverty and fundamental rights: The justification and enforcement of socio-economic rights* (2007) 135-152; C Scott & P Alston 'Adjudicating constitutional priorities in a transnational context: A comment on Soobramoney's legacy and Grootboom's promise' (2000) 16 *South African Journal on Human Rights* 206.

4 S Liebenberg 'The implications of Grootboom for current social security policy in South Africa' (2001) 17 *South African Law Journal* 211; C Mbazira 'Non-implementation of court orders in socio-economic rights litigation in South Africa: Is the cancer here to stay?' (2009) 9 *ESR Review* 2. There are numerous examples of rights being vindicated but with subsequent delays in the implementation.

The land restitution matter of the *Popela Community* is another example of how an important judicial pronouncement has been undermined by the executive's inability or unwillingness to enforce a potentially life-changing court order. The article will discuss the community's 12-year legal battle to regain their land stolen under the permissive watch of the colonial and apartheid regimes. Despite a court victory, their battle is still ongoing. The reality is that it was nothing short of a miracle that impoverished communities such as Popela and Ms Grootboom's were ever able to secure the intellectual and monetary resources to litigate. After emerging victorious from the lengthy, taxing litigation processes, not surprisingly the communities expected that the state would implement the decisions in short order and that, consequently, their lives would improve. However, for Ms Grootboom and the people of Popela, the government's failure to enforce the judgments in a timely manner undermined the legal victory. In the *Popela* case, the judiciary deemed it unnecessary to put in place a mechanism to monitor the executive's compliance with its orders; and the community no longer has the resources to bring the case before the court again for contempt proceedings.<sup>5</sup>

Relying primarily upon 28 semi-structured interviews that were conducted in Limpopo, South Africa, with members of the Popela community in 2008, the article explores the impact of the failure to implement court-ordered legal remedies provided to individuals and communities dispossessed of their land. We will explore the relationship between takings, restoration and dignity in the context of a state that is attempting to (re)constitute a society.

In her contribution to the takings literature, Atuahene has argued that, in certain instances, takings are part of a larger strategy to further subjugate a certain group within the polity by denying their humanity or their capacity to reason. She calls this type of dispossession a dignity taking, which occurs when a state directly or indirectly destroys property or confiscates various property rights from owners or occupiers and the intentional or unintentional outcome is dehumanisation or infantilisation.<sup>6</sup> Atuahene argues that a comprehensive remedy for dignity takings involves more than providing compensation for things taken because the wrong involved

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Most notable in the US context is *Brown v Board of Education* 347 US 483 (1954) which faced resistance from southern state governments to successfully implement. However, desegregation and bussing were eventually implemented in part due to a slew of subsequent litigation; *Holmes v City of Atlanta* 350 US 877 (1955); *Swann v Charlotte-Mecklenberg Board of Education* 402 US 1 (1971).

5 *Department of Land Affairs & Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 10 BCLR 1027 (CC); 2007 (6) SA 199 (CC) (*Goedgelegen*); confidential interview with Ali, member of the Popela Community, Gauteng, South Africa (2008).

6 B Atuahene 'Dignity takings and dignity restoration: Creating a new theoretical framework for understanding involuntary property loss and the remedies required' (2016) 41 *Law and Social Inquiry* 796; B Atuahene 'Takings as a socio-legal concept: An interdisciplinary examination of involuntary property loss' (2016) 12 *Annual Review of Law and Social Science* 171; B Atuahene 'From reparations to restoration: Moving beyond restoring property rights to restoring political and

more than this. The wrong also involved the denial of the dispossessed individual or community's dignity and their subjugation within the polity. She creates the concept of dignity restoration, which is a remedy that seeks to provide dispossessed individuals and communities with material compensation through processes that affirm their humanity and reinforce their agency.<sup>7</sup>

International law remedies for past property seizures have focused on reparations rather than dignity restoration.<sup>8</sup> Reparation is 'the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately or any such property that cannot be restored to them'.<sup>9</sup> While reparations involve compensation for the property taken, dignity restoration is based on principles of restorative justice and thus seeks to rehabilitate the dispossessed.<sup>10</sup> As Braithwaite states, restorative justice is interested in 'restoring property loss, restoring injury, restoring a sense of security, restoring dignity, restoring a sense of empowerment, restoring deliberate democracy, restoring harmony based on a feeling

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economic visibility' (2007) 60 *SMU Law Review* 1419; 'property-induced invisibility' was the term I used in my prior work. Through empirical interrogation, property-induced invisibility evolved into dignity takings. An earlier iteration of the definition can be found in B Atuahene *We want what's ours: Learning from South Africa's land restitution program* (2014) ('when a state directly or indirectly destroys or confiscates property from owners or occupiers who it deems to be sub-persons without paying just compensation or without a legitimate public purpose').

- 7 Atuahene 'Dignity takings' (n 6) 796. A prior iteration of the definition can be found in Atuahene *We want what's ours* (n 6) ('a comprehensive remedy that compensates people for the physical assets confiscated through a process that affirms the dignity of the dispossessed and confirms that they are full citizens).
- 8 Atuahene (2007) (n 6) 1444. The human right that most directly deals with the confiscation of property is found in the Universal Declaration of Human Rights, GA Res 217A, UN GAOR, 3d Sess, 1st Plen Mtg, UN Doc A/810 (1948), which asserts that a person arbitrarily deprived of her property with no just compensation is entitled to an effective remedy. Art 17(2) states: 'No one shall be arbitrarily deprived of his property.' Art 8 states: 'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.' S Leckie 'Housing and property issues for refugees and internally displaced persons in the context of return: Key considerations for UNHCR policy and practice' (2000) 2 *Refugee Survey Quarterly* 5.
- 9 Report of the Committee on the Elimination of Racial Discrimination, UN Doc A/51/18 (1996), sec 2(c).
- 10 L Magarrell 'Reparations in theory and practice' (2007) *International Centre for Transnational Justice*, <https://www.ictj.org/sites/default/files/ICTJ-Global-Reparations-Practice-2007-English.pdf> (accessed 11 December 2018), defining reparations to 'include, in some combination and as appropriate, restitution, compensation for harm, and rehabilitation in mind, body and status'. CJ Ogletree 'The current reparations debate' (2003) 36 *University of California Davis Law Review* 1051 1055. Ogletree emphasizes four features of reparations: '(i) a focus on the past to account for the present; (ii) a focus on the present, to reveal the continuing existence of race-based discrimination; (iii) an accounting of past harms or injuries that have not been compensated; and (iv) a challenge to society to devise ways to respond as a whole to the uncompensated harms identified in point three'. EA Posner & A Vermeule 'Reparations for slavery and other historical injustices' (2003) 103 *Columbia Law Review* 689 691, asserting that 'paradigmatic examples of reparations typically refer to schemes that (1) provide payment (in

that justice has been done, and restoring social support'.<sup>11</sup> Atuahene argues that when reparations and restorative justice are married, dignity restoration is the offspring of this formidable union.

Most states that have addressed past property violations have not undertaken dignity restoration as it is a more time-consuming, complicated, and expensive remedy than reparations.<sup>12</sup> South Africa's colonial and apartheid era land dispossessions are a quintessential example of dignity takings, and the post-apartheid government is unique because it has tried to facilitate dignity restoration. It understood its land restitution programme as an opportunity to restore wealth as well as dignity to its black citizens.<sup>13</sup> South Africa is thus an ideal place to examine the concept of dignity restoration. Using the Popela community as a case study, the research question explored in this article is the following: When there is a dignity taking and a legal victory securing property restitution, what are the consequences of a state's failed attempt to move from reparations to dignity restoration? This research question is important and timely for three primary reasons.

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cash or in kind) to a large group of claimants; (2) on the basis of wrongs that were substantively permissible under prevailing law when committed; (3) in which current law bars a compulsory remedy for the past wrong ... and (4) in which the payment is justified on backward-looking grounds of corrective justice, rather than forward looking grounds such as the deterrence of future wrongdoing'.

- 11 J Braithwaite 'Restorative justice: Assessing optimistic and pessimistic accounts' (1999) 25 *Crime and Justice* 16.
- 12 UN Committee on Economic, Social and Cultural Rights 'Property return and restitution, Kosovo' prepared for review of Covenant law issues in Kosovo (2008), <https://www2.ohchr.org/english/bodies/cescr/docs/info-ngos/COHREUNMIK.pdf> (accessed 11 December 2018); *Handbook on housing and property restitution for refugees and displaced persons* (2007); H Das 'Restoring property rights in the aftermath of war' (2004) 53 *International and Comparative Law Quarterly* 429-436; D Isser & P van der Auweraert *United States Institute of Peace special report: Land, property, and the challenge of return for Iraq's displaced* (2009) 3; M Everingham 'Agricultural property rights and political change in Nicaragua' (2001) 43 *Latin American Policy and Society* 61; F Rainer 'Privatization in Eastern Germany: A comprehensive study' (1994) 27 *Vanderbilt Journal of Transnational Law* 809; RW Crowder 'Comment: Restitution of the Czech Republic, problems and Prague-nosis' (1994) 5 *Indiana International and Comparative Law Review* 237; NJ Gutierrez 'Righting old wrongs: A survey of restitution schemes for possible application to a democratic Cuba' (1995) 4 *University of Miami Yearbook of International Law* 111 (providing a review of restitution programmes used in the Baltic Republics, Bulgaria, Czech Republic, East Germany, Hungary, Nicaragua, Poland, Romania, and Slovakia); M Karadjova 'Property restitution in Eastern Europe: Domestic and international human rights law responses' (2004) 29 *Review Centre of Eastern and European Law* 235; B Atuahene 'Property rights and the demands of transformation' (2010) 31 *Michigan International Law Journal* 765.
- 13 Land Affairs Department: Annual Report 2001-2002, Department of Land Affairs (2002) 7. Former Minister of Agriculture and Land Affairs, Thoko Didiza, explains that 'the struggle for dignity, equality and a sense of belonging has been the driving force behind our work as the Land Claims Commission'; Our Land: Green Paper on South African Land Policy, Department of Land Affairs, 1996) I. The Green Paper states that in addition to redressing the wrongs of the past, the goals of land reform policy are to 'foster national reconciliation and stability; underpin economic growth; and to improve household welfare and alleviate poverty'.

First, the failure to remedy past land theft and redistribute land can increase the potential for political instability. Due to apartheid and colonial era land theft, when South Africa transitioned from apartheid to a non-racial democracy in 1994, whites (who constituted less than 10 per cent of the population) owned approximately 87 per cent of the fertile agricultural land.<sup>14</sup> By 2012 the state had redistributed less than 10 per cent of this land.<sup>15</sup> A governmental audit report on land revealed that in 2017 whites held approximately 70 per cent of South Africa's agricultural land.<sup>16</sup> The High-Level Panel on the Assessment of Legislation and the Acceleration of Fundamental Change led by former South African President, Mr Kgalema Motlanthe, recently attributed the failure of land reform to a toxic combination of defective legislative schemes, inept governance, bureaucratic failure, corruption and systemic malaise.<sup>17</sup>

The lack of redistribution is particularly unfair considering the constitutional bargain the apartheid government entered into with the African National Congress (ANC) and other liberation movements during the transition from apartheid to democracy.<sup>18</sup> According to the constitutional bargain inscribed in section 25 of the South African Constitution, in 1994 existing property owners (who were primarily white) received valid legal title to property acquired under prior apartheid and colonial era regimes despite the historically-tainted circumstances of acquisition.<sup>19</sup> In exchange, dispossessed blacks were promised land reform. In effect, the existing property rights of whites were immediately secured while blacks had to wait for land reform. However, nearly 25 years later most blacks are still waiting.<sup>20</sup> Most importantly, there is evidence that there could be potentially disastrous political consequences if land redistribution does not occur.<sup>21</sup>

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14 Atuahene (n 12) 765-767.

15 Department of Rural Development and Land Reform, Annual Report: Rural Development and Land Reform, 1 April 2012-31 March 2013 (Department of Rural Development and Land Reform, 2013) (Annual Report) 19-20-25.

16 Department of Rural Development and Land Reform: Land Audit Report: Phase II: Private Land Ownership by Nationality (Department of Rural Development and Land Reform, 2017).

17 Report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change (2017), Foreword. The Report provides a detailed examination of the legislation enacted to advance South Africa's land reform process and its implementation in fulfilment of the government's constitutional mandate. The report presents a toxic combination of gaps in legislation, often inept governance, bureaucratic failure, corruption and generally systemic malaise.

18 H Clung *Constituting democracy: Law, globalism, and South Africa's political reconstruction* (2000) 110-115.

19 The Constitution of the Republic of South Africa, 1996 ch 2 sec 25.

20 E Lahiff *Land reform in South Africa: A status report 2008* (Programme for Land and Agrarian Studies 2008) 2-4; Annual Report (n 15) 25; Atuahene (2014) (n 6) 15.

21 Atuahene (n 12); B Atuahene 'Things fall apart: The illegitimacy of property rights in the context of past property theft' (2009) 51 *University of Arizona Law Review* 829.

In one of the most impressive public opinion studies done on land reform in South Africa to date, Gibson surveyed 3 700 South Africans and found that 85 per cent of black respondents believed that 'most land in South Africa was taken unfairly by white settlers, and they therefore have no right to the land today'.<sup>22</sup> Only 8 per cent of whites held the same view.<sup>23</sup> His most revealing finding is that two out of every three blacks agreed that 'land must be returned to blacks in South Africa, no matter what the consequences are for the current owners and for political stability in the country'.<sup>24</sup> Ninety-one per cent of whites disagreed with this statement.<sup>25</sup> Gibson's data suggests that if South Africa's unjust property distribution is not transformed, this may increase the chance of political instability.

Second, unenforced court victories can have a negative economic, political and psychological impact, especially on vulnerable plaintiffs who do not have resources to hold the executive accountable for its failure to enforce court judgments. Since litigation is expensive and consumes limited resources that social activists or movements could use for political advocacy and community mobilisation, activists must carefully weigh its costs and benefits before employing this tool. When vulnerable plaintiffs decide to engage in costly litigation, unfortunately it is not uncommon for the executive to delay or renege altogether on the enforcement of court victories involving socio-economic rights.<sup>26</sup> The negative impact of unenforced court decisions that reinscribed indignity has thus far been understudied.

Third, when the executive fails to implement judicial decisions, the separation of powers is violated and democracy imperilled. Socio-economic rights cases usually involve poor claimants, buttressed by civil society organisations, who are challenging an executive action that usually involves resource allocation.<sup>27</sup> Consequently, socio-economic rights decisions serve as an important check on executive power. However, the catch is that courts have no enforcement powers of their own and thus rely on the executive to enforce decisions that, ironically, the executive went to court to fight against. When the executive fails to enforce court orders in a timely manner, this severely undermines the checks and balances that enliven democracy. Also, if the court order was handed down in favour of vulnerable plaintiffs,

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22 J Gibson *Overcoming historical injustices: Land reconciliation in South Africa* (2009) 31.

23 As above.

24 Gibson (n 22) 32.

25 As above.

26 Bilchitz (n 6) 135-152; D Brinks 'Solving the problem of (non)compliance in socio-economic rights litigation' presented at the International Symposium on Enforcement of ESC Rights Judgments, Bogotá, Colombia, 6-7 May 2010).

27 D Bilchitz 'Towards a reasonable approach to the minimum core: Laying the foundations for the future socio-economic rights jurisprudence' (2003) 19 *South African Journal on Human Rights* 1; DM Brinks & V Gauri *Courting social justice: Judicial enforcement of social and economic rights in the developing world* (2008).



then the executive's lack of enforcement may further ossify their marginal status within the democracy.

The article proceeds in five parts. In part 2 we describe the methodology used to empirically investigate the consequences of a state's failed attempt to move from reparations to restoration. In part 3, we discuss the history of the Popela community and demonstrate that they, indeed, were the subjects of dignity takings. In part 4 we describe the South African state's attempt to remedy the Popela community's land dispossession. We briefly explain the land restitution process, chronicle the community's journey through the courts, and explain the executive's failed attempts to implement the Constitutional Court decision in favour of the community. Part 5 examines the impact that the state's prolonged delay in restoring land had on members of the community. While the plaintiffs' successful litigation was the cause of much hope and celebration, the executive's failure to implement the court order has precipitated a deep sense of hopelessness extending beyond the plaintiffs and including their broader community. We find that instead of dignity restoration, the land restitution process led to dignity deterioration.

## 2 Methodology

To empirically explore the impact of a state's failed attempt to move from reparations to dignity restoration, we first obtained human subjects' approval to conduct interviews. We then undertook one trip to Limpopo, South Africa, in July and another in August of 2008 to interview members of the Popela community. We conducted 28 semi-structured interviews with community members, which lasted between 30 to 90 minutes, were audio-taped, and done with the promise of confidentiality. We use pseudonyms to mask the identity of respondents.

To collect our primary interview data, we first obtained a list from the Commission of all members of the community eligible to receive compensation under the Act, and randomly selected people from the list to interview. Locating people was a challenge as members of the Popela community live primarily in the town of Sekgopo (which neighbours the land forming the subject matter of the claim) where few people have formal residential addresses. In addition, simultaneous translation was necessary because members of the community spoke Sepedi – a language in which the authors are not fluent. Thus, on the first trip we used community leaders to help us locate the people we had randomly chosen and also to perform simultaneous translation. After having exhausted the list of randomly-selected names, we then used referrals from initial respondents to generate additional respondents – the snowballing method. In total, we interviewed 28 community members of which 15 were women and 13 were men.

The vast majority of these interviews took place at respondents' homes. In the same year we also interviewed employees of the Land Claims Commission (Commission), which is the administrative body charged with implementing the Land Restitution Act of 1994 (Act). These interviews with public officials were audio-taped and not confidential. In August 2008 we also had an introductory meeting with two senior representatives of the current owner of the land in question – the Westfalia group. Before answering any substantive questions, the representatives requested the questions in writing so that the Westfalia compliance division could vet them. The authors duly supplied these questions and made numerous unsuccessful attempts to have a substantive meeting with representatives of Westfalia.

Ten years after the court decision, the authors conducted follow-up interviews telephonically with a community leader (who had been interviewed in the original study) and a manager in the Commission's legal unit. The interviews sought to understand why the Commission had not yet transferred the land to the Popela community.

The methods we employed had certain limitations. First, although we needed a community leader to locate respondents, there was also the possibility that people would not be as forthcoming with the leader present. To adjust for this, on the second trip we hired local people who were not members of the Popela community to help us locate respondents and do the simultaneous translation. There was no significant difference in the topics discussed or answers given by respondents when the community leader was present versus when he was not. Consequently, we concluded that the bias added by using a community leader was nominal.

Second, one strength of this study is that we rely heavily on the words of our respondents, but when using simultaneous translation it is important to be critical of whose voice comes through. We posed questions in English to a translator who purportedly translated what we said (or meant to say) to the respondents in Sepedi, who in turn tried to understand our translated questions and replied to the translator in Sepedi, which was translated back to us in English. The entire conversation was recorded; the English translations of the respondents' answers were transcribed *verbatim* and may be interpreted as the 'voice of the voiceless'. To partially address this concern and to scrutinise the authenticity of the data, after the interviews were completed we asked the transcribers (who were not present at the actual interview) to note when the simultaneous translation was not in line with what respondents said and the transcribers found that the simultaneous translation was highly accurate.

Third, the Popela community consists of about 1 200 members and we conducted interviews with 28 of them, which amounts to approximately 2 per cent of the total population. The virtue of conducting in-depth interviews with a relatively small portion of the

total population is that, unlike large 'N' quantitative studies, we can locate new variables and relationships by identifying and describing the meanings that people have of themselves and of the situation. Our primary contribution in this article is to examine the Commission's attempt to provide a remedy for past land dispossession and describe how successful litigants understand and interpret the executive's failure to comply with a court order in their favour.

### 3 Dignity takings: The Popela community deprived of land and dignity

Most constitutional democracies have expropriation or, as we refer to them here, takings clauses (that is, eminent domain provisions) that require forced deprivations of land to be for a public use or a public purpose, and require the state to pay fair or just compensation.<sup>28</sup> The takings literature has focused extensively on routine takings where the primary controversy surrounds the definition of just compensation and public purpose.<sup>29</sup> There is, however, an under-theorised class of extraordinary takings that have accompanied revolutions, warfare or other upheavals and resulted in a massive restructuring of existing property rights. Rose has recognised an extraordinary class of takings in American law, which includes property taken from native Americans, slave holders, and British loyalists. She argues that in these instances the 'denial of property is denial of membership in a community; it is a part of a radical othering'.<sup>30</sup> Atuahene builds upon Rose's theoretical contribution and focus on the subset of extraordinary takings where the state takes property from a class of people that has also been dehumanised or infantilised.

This category of extraordinary takings includes the Nazi expropriations of Jewish property; the US expropriation of Japanese property during World War II; the Australian, New Zealand, Canadian and US expropriation of property from native peoples; and the colonial and apartheid governments' expropriation of property from

28 AJ van der Walt *Constitutional property clauses: A comparative analysis* (1998).

29 T Merrill 'The economics of public use' (1986) 72 *Cornell Law Review* 61; DB Kelly 'The public use requirement in eminent domain law' (2006) 92 *Cornell Law Review* 1; R Epstein *Takings: Private property and the power of eminent domain* (1985); FI Michelman 'Property, utility and fairness: Comments on the ethical foundations of "just compensation"' (1967) 80 *Harvard Law Review* 1165; L Blume & DL Rubinfeld 'Compensation for takings: An economic analysis' (1984) 72 *University of California Law Review* 569; C Serkin 'The meaning of value: Assessing just compensation for regulatory takings' (2005) 99 *Northwestern University Law Review* 679.

30 C Rose 'Property and expropriation: Themes and variations in American Law' (2000) 2000 *Utah Law Review* 6, stating: 'Type III disruptions are what I will call "extraordinary". These are the rights alterations that accompany revolutions and warfare or other or other upheavals that create massive overthrowings of existing property rights and resource uses.' This is in contrast to property disruptions classified as Type I and Type II, which are of the 'housekeeping' and 'regulatory' varieties respectively.

blacks in South Africa, Zimbabwe, Namibia and beyond. In these examples, the taking of an individual or community's property moved beyond the mere confiscation of things and instead entailed something more damaging – disdain for a group's humanity or mental capacity, leading to their subordination within the social contract.<sup>31</sup> These are all examples of dignity takings.

The erosion of the Popela community's land rights is also a quintessential example of a dignity taking. The Popela community is made up of a large extended family who generally share the surname Maake, or somehow trace their lineage to the Maakes. They trace their origins to a lush fertile valley in Limpopo where they reportedly lived from as far back as the 1800s, herding cattle and tilling the soil. They married, raised children, laughed, bickered, and buried their dead undisturbedly until the advent of colonialism and apartheid. One respondent remembered that the community ploughed the land 'from the river up to the mountain'.<sup>32</sup> Another respondent tenderly reminisced that in the 'olden times we were freely living on the farm, so we could also catch different types of wild animals and the birds you know which are very delicious, which today you can't'.<sup>33</sup>

Under white minority rule, the Popela community's rights to their ancestral lands were progressively eroded as successive governments unjustly transferred their land to whites. The record shows that the first such transfer occurred in 1889 to PDA Hattingh. Members of the community remained on the land, but with the passage of time were transformed from land owners into labour tenants with limited occupancy rights. As a result of this dispossession, the entire community was forced to work for the white landowner for half the year to pay rent for land they rightfully owned, and the other half of the year they were free to cultivate the land and graze their animals. If community members rejected this labour tenancy arrangement, then they had to leave the land. One community elder explained:<sup>34</sup>

While I'm still young I was working at the farm as a shepherd [clears throat] if I want to go to school, I was supposed to, my family was supposed to move there from the farm. Therefore we were forced to stay at the farm and work for the white people, six months a year, six months working at home.

Although colonialism and apartheid progressively eroded the community's rights to the land and disrupted their way of life, it is notable that members of the community continued to live what was

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31 Atuahene (n 12).

32 Confidential interview with 3, member of the Popela community, Limpopo, South Africa (2008).

33 Confidential interview with 13, member of the Popela community, Limpopo, South Africa (2008).

34 Confidential interview with JM, member of the Popela community, Limpopo, South Africa (2008).

described by a respondent as a comparatively 'good life'.<sup>35</sup> Many respondents stressed that the living conditions on the farm were better when they were labour tenants than in subsequent years. According to one respondent, the community was permitted to rear their own livestock as well as 'cultivate maize, peanuts, pumpkins and so on'.<sup>36</sup> Another said that '[w]e were living better because we were cultivating our land for maize and had livestock farming and we were able to support our children, to feed them properly'.<sup>37</sup> One younger member of the Popela community remembered stories that his grandparents told him about how his parents

had cows, sheep and goats and they were also ploughing mealie meals [maize] at that farm and other groups of people from different places came to buy maize because at that time of the apartheid there was starvation. There was drought, but this land was good to us.<sup>38</sup>

Life worsened when the land changed hands again and was transferred in 1963 to HMJ Altenroxel, who in about 1969 unilaterally terminated the labour tenancy arrangements prevailing at the time. Altenroxel consequently extinguished any residual rights the members of the Popela community had in the land, with devastating effects on the Popela community. Altenroxel robbed the community of their freedom to use their land. One community member lamented that

we were more treated like animals, you know. So and literally we were just like a donkey on a donkey cart you know because you will report even a simple thing like I'm going to slaughter a chicken or a goat, or a sheep, or a cow you need to get permission.<sup>39</sup>

Many members of the community rejected the new dehumanising conditions, quit the farm, and sought employment in Sekgopo, Johannesburg, and elsewhere in South Africa. One elder regretted that the new labour arrangement forced him 'to go and work in other areas because I was no longer a farmer and what we used to produce was no longer coming and the money that we were supposed to earn here was not even enough'.<sup>40</sup> There is little doubt that although the then prevailing conditions forced many to leave, their deep connection to the land was not attenuated. With a heavy heart, one community member explained that although he left, 'I still love that place because my fathers, mothers, and grandparents are still there,

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35 Confidential interview with BM, member of the Popela community, Limpopo, South Africa (2008).

36 Confidential interview with M, member of the Popela community, Limpopo, South Africa (2008); confidential interview with MM, member of the Popela community, Limpopo, South Africa (2008).

37 As above.

38 Confidential interview with 18, member of the Popela community, Limpopo, South Africa (2008).

39 Confidential Interview (n 33).

40 As above.

they died there and we buried them there. That's why I love that place.<sup>41</sup>

The conditions prevailing on the farm for those who stayed on as workers were harsh and exploitative as they had to endure meager wages and the threat of physical abuse if they did not follow orders. A community leader described the typical work cycle on the farm under Altenroxel, which entailed working for two days in order to pay 'rent' and then three days for wages at the rate of 20 cents per day. Workers would only be paid after having accumulated 30 working days. The white farm owner had total control and his poor black farm workers had no rights. In an unsettling description of the extent to which workers were subjugated, a community leader explained:<sup>42</sup>

During those times they would make you shit. If you left the farm, they would look for you until they find you and kill you they would even kill you. It was painful, but there's nothing you can do, but it was not only the Popela people. All around our area they've just been treated the same, so there was nothing they can do. If you raised your concern, you'll be beaten.

Eventually Altenroxel decided to terminate the labour tenancy arrangement and families were forcibly separated if certain members did not opt to take up full employment with the farm owner. The termination of the labour tenancy led to the destruction of family life, the division of the community and the weakening of valuable social bonds. According to one community member, after her husband had left the farm to take up employment in Johannesburg, he was not allowed on the farm to visit his family as this was against the regulations. When he did visit he was subjected to beatings and even arrested for being unlawfully present on the farm. Explaining the severely unfair power dynamic that led to these abusive practices, she said:<sup>43</sup>

There's nothing we can do because it was force, it's not like it's a choice. It was force because there was no other alternative ... to resist is either you have to move out of the farm. So, the best thing is to, if you don't have alternative, is to comply.

One community member perfectly and succinctly articulated what we heard over and over in the interviews about the termination of the labour tenancy agreements: 'We felt powerless.'<sup>44</sup>

In 1993, shortly before the beginning of the democratic dispensation, a subsidiary of a German multinational corporation

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41 Confidential interview with 15, member of the Popela community, Limpopo, South Africa (2008).

42 Confidential interview with AM, member of the Popela community, Limpopo, South Africa (2008).

43 Confidential interview with MMM, member of the Popela community, Limpopo, South Africa (2008).

44 Confidential interview with 1, member of the Popela community, Limpopo, South Africa (2008).

called Goedgelegen Tropical Fruits (Pty) Ltd, now called Westfalia Fruit Estate (Pty) Ltd (Westfalia) purchased the Popela community's land from Altenroxel. When apartheid officially ended in 1994, many families did not leave Sekgopo to reoccupy their ancestral land because, as one respondent explained, 'I stay here in Sekgopo because even though I can go back to staying there while they are still there, the land is still owned by the hands of the white people. It will be difficult for me to make plans.'<sup>45</sup> According to various respondents, life for members of the Popela community living or working on the farm had not become any easier since the end of apartheid, and ownership in the farm was transferred to Westfalia.<sup>46</sup>

The graves located on the farm were a constant source of conflict between Westfalia and the Popela community. It was very important culturally for members of the Popela community to bury their dead on their ancestral land, but Westfalia has often prevented the Popela community from accessing their graves.<sup>47</sup>

Normally every year we have this thing of ritual sacrifices where you have to do something on the grave. So, then you are not allowed. You have to beg, so sometimes it's difficult to beg. Even now for us to go there like we have to phone the current owner to unlock the gate because it's four gates from my place to the cemetery. So, you have to ask them to unlock the gate. Tomorrow we'll be burying my sister, my sister here. I don't know how these people are going to manage to go to the funeral because if they don't find him we are going to have a problem.

Many respondents reported that they felt that Westfalia's blockade of the graves was dehumanising.

This brief history of the Popela community's dispossession has demonstrated that they were subjected to dignity takings. The colonial government was directly responsible for confiscating the community's property in 1889 when they were downgraded from having full control over their land to being labour tenants for Mr Hattingh. The further erosion of the community's rights due to the subsequent transfers in 1969 and 1993 was allowed under racially-discriminatory, apartheid-era laws. Historian Leonard Thompson explained how whites justified the appropriation of African lands.<sup>48</sup>

Virtually all the whites in the region, in common with their contemporaries in Europe and the Americas, regarded themselves as belonging to a superior, Christian, civilized race and believed that, as such, they were justified in appropriating native land, controlling native labour and subordinating native authorities.

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45 Confidential interview with 14, member of the Popela community, Limpopo, South Africa (2008).

46 Confidential interview with PM, member of the Popela community, Limpopo, South Africa (2008); confidential interview with JM, member of the Popela community, Limpopo, South Africa (2008); confidential interview with PM; confidential interview with AM.

47 Confidential interview with ALM, member of the Popela community, Limpopo, South Africa (2008).

48 L Thompson *History of South Africa* (2001) 122.

The historical record shows that the Popela community indeed was subject to a dignity taking because dehumanisation and infantilisation were deeply intertwined with the dispossession of their land.

#### 4 Dignity restoration: A comprehensive remedy for dignity takings

Whereas the previous section established that the Popela community was subject to dignity takings, this section discusses the appropriate remedy. When a state takes the private property of an individual or community, the appropriate remedy is just compensation, which is most commonly calculated based on the market value of the property rights confiscated.<sup>49</sup> However, when a dignity taking has occurred, the state has done more than confiscate property – it has also denied the dispossessed their dignity. As a result, dignity restoration – a comprehensive remedy that addresses both the deprivation of property and dignity – is required.<sup>50</sup> South Africa's post-apartheid government is unique because it understood its land restitution programme as an opportunity to restore wealth as well as dignity to its black citizens.<sup>51</sup> That is, through the land restitution programme, the post-apartheid government sought to achieve dignity restoration.

The Popela community's involvement with the land restitution programme began in 1996 when the legal position of the members of the Popela community who remained on the farm was placed in question when an adjoining farmer started bulldozing black-occupied houses on his property after the owner had learned of the Extension of Security Act 62 of 1997.<sup>52</sup> The farmer wanted to ensure that occupants would not gain rights to the land through the impending Extension of Security Act. Fearful that they would be next, members of the Popela community who remained on the land sought the help of the Nkuzi Development Association – a non-governmental organization (NGO) primarily aimed at assisting historically-disadvantaged communities in accessing and protecting their land rights. Nkuzi secured an interdict that disallowed any evictions until the community had filed their land restitution claim.<sup>53</sup> Westfalia

49 Y-C Chang 'Economic value or fair market value: What form of takings compensation is efficient?' (2012) 20 *Supreme Court Economic Review* 35; R Innes 'Takings compensation and equal treatment for owners of developed and undeveloped property' (1997) 40 *Journal of Law and Economics* 403-430-432.

50 Atuahene (n 12) 4-5; Atuahene (n 6 above).

51 Annual Report (n 15) 7; see also *Our land* (n 13) i.

52 Extension of Security Act 61 of 1997. This Act was designed to, amongst other things, facilitate long-term tenure security; regulate the terms and conditions under which occupiers of certain categories of land could be evicted; and balance the interests of land occupiers with those of landowners.

53 According to the Act, sec 11(7)b states: 'Once a notice has been published in respect of any land ... no claimant who was resident on the land in question at the date of commencement of this Act may be evicted from the said land without the written authority of the Chief Land Claims Commissioner.'



fought back by legally challenging the Popela community's right to restitution of their land under the Act. Nkuzi initially served as the community's legal representative, with the Legal Resources Centre stepping in after Nkuzi had been forced to quit due to funding constraints.

#### 4.1 The land restitution process explained

The land restitution process has five phases which run concurrently. In the first of the five phases, an individual or community had to lodge a claim by 31 December 1998 in order to become eligible for compensation. These people were called claimants.<sup>54</sup> In the second phase the Commission determined whether the claims were valid by researching whether the claims met certain statutory requirements. Each claim had to involve (i) a person, community or a deceased estate or direct descendant of a person or a community; (ii) dispossessed of a right in land; (iii) after 19 June 1913; (iv) as a result of past racially-discriminatory laws or practices; and (v) without the receipt of just and equitable compensation.<sup>55</sup>

Once the Commission had determined that a claim fulfilled the five statutory requirements, it verified in the third phase that the claimant was either the prior owner or occupant of the property in question or the descendant of the prior owner or occupant.<sup>56</sup> The Commission accepted various forms of evidence to validate and verify claims, including deeds, oral testimony, aerial maps, ruins, tombstones and baptismal records. During the fourth phase, called the negotiation phase, the Commission was supposed to give claimants a choice between financial compensation, land restitution or some other equitable remedy.<sup>57</sup> During the fifth and final (valuation) phase, the Commission determined the amount it would spend on each claim.<sup>58</sup> If claimants chose land, then the Commission would have to purchase the land. However, if the claimants instead chose financial compensation, then the Commission paid most claimants using a

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54 As above.

55 Restitution of Land Rights Act of 1994.

56 Sec 1(11) Restitution of Land Rights Act (n 55).

57 South African Department of Land Affairs, White Paper on South African Land Policy of 1998 sec 2(1). The White Paper on Land Policy, the government's definitive policy on land matters, states that choice is to be central to the restitution process: 'Solutions must not be forced on people.' But, in truth, almost no one had the opportunity to craft his or her own equitable remedy because giving claimants choice and allowing them to craft their own remedies would have involved taking time to consult with claimants and devise workable arrays of options. The Commission had no such time; it had resolved very few claims from 1995 to 1999 and so from 2000 to 2008 was under extreme pressure to settle claims rapidly. From its inception to 2008, the Commission has settled 65 642 urban claims: 73% financial compensation; 24% land restitution; and 4% other equitable remedy. Annual Report (n 15), noting that of the total claims settled, financial compensation accounted for 51 973 claims; land for 19 862 claims; and alternative remedies for 2 912 claims.

58 Atuahene (2014) (n 6) 103.

standard settlement offer (SSO) ranging from R17 000 to R60 000 (approximately \$2 428 to \$8 571), depending upon the SSO amount adopted by each Regional Land Claims Commission, which over time changed to account for inflation.<sup>59</sup>

Typically, the Commission played conflicting roles in the restitution process. Individuals and community claimants had a constitutional right to restitution, but the Commission is both the agency representing the claimant through the process and the adjudicator that determines the amount the claimant would receive. Although the Act establishes a Land Claims Court, the Commission often has the final word on compensation as the majority of claimants were poor and could not afford to litigate even when they were dissatisfied with the final award.<sup>60</sup> The Popela community had a unique experience because Nkuzi was the community's advocate from the moment it filed its restitution claim all the way through the Constitutional Court case victory. The community never had to directly deal with the Commission until after the court case when Nkuzi's involvement waned due to a lack of funding. One community leader confirmed: 'We started to communicate with the Land Claims Commission directly as from [2007], but previously we were communicating with Nkuzi.'<sup>61</sup>

In the following section we will explain the legal journey of the Popela community, which began in the Land Claims Court, then progressed to the Supreme Court of Appeal, ultimately ending up in the Constitutional Court, South Africa's highest court on all constitutional matters.

## 4.2 The journey through the courts

### 4.2.1 Land Claims Court

The legal battle commenced at the Land Claims Court. The Court first had to decide whether the Popela case involved a community or individual claim because according to Section 1 of the Act, each claim had to involve 'a person, community, or a deceased estate or direct descendant of a person or a community'.<sup>62</sup> Determining whether it was a community or individual claim affected the size of the claimant group as well as the nature of the relief sought. The Commission declared that the claimants qualified as a community in terms of section 1 of the Restitution Act, but this view was ultimately challenged by Westfalia and rejected by the Court. The Court

59 Atuahene 105.

60 Atuahene 108-109 & 146; R Hall 'Reconciling the past, present and future: The parameters and practices of land restitution in South Africa' in C Walker et al (eds) *Land, memory, reconstruction, and justice: Perspectives on land claims in South Africa* (2010) 27.

61 Confidential interview with member of the Popela Community, Limpopo, South Africa (2008).

62 Sec 1 Land Restoration Act.

concluded that the Popela community's sole statutory basis for restitution was as individual labour tenants.<sup>63</sup> Therefore, the Land Claims Court only considered the legal claims of the nine individuals who lived on the land and had a labour tenancy agreement with the former landowners. The extent of each claim was 800 square meters of individually-owned land where their homesteads were or used to be, and the balance of the farm was claimed collectively by the nine claimants to be held in undivided shares.<sup>64</sup>

The Court then considered whether the nine claimants met the statutory requirements for a successful restitution claim. Section 2(1) of the Act provides that a person or community shall be entitled to restitution if dispossessed of any right in land after 19 June 1913 as a result of past racially-discriminatory laws or practices.<sup>65</sup> Central to this inquiry was the question of whether labour tenant rights qualified as a right in land worthy of restitution. The Court accepted that in 1969 the claimants did have rights in the land and, further, assumed without deciding that the claimants were in fact dispossessed of these rights.<sup>66</sup> Therefore, the Court favourably decided the question of whether labour tenants qualified for restitution.

The Court then proceeded to decide whether the claimants' dispossession was a result of a past racially-discriminatory law or practice. Although in 1970 the state prohibited further labour tenant contracts in the then Northern Transvaal where the Popela community lived, the land owners had phased out the labour tenant system approximately one year before the state promulgated this law.<sup>67</sup> The Court took the view that racially-discriminatory practices had to be attributable to a public functionary or state department, with the result that the main issue was whether or not the claimants' rights to land were actually terminated as a result of legislation or some other state-sanctioned action on the part of the farm owner.<sup>68</sup> The Court concluded that there were no laws at the relevant time that either abolished labour tenancy or compelled the farm owner to terminate the labour tenancy agreements, but that instead the farmer had been motivated by 'economic and business considerations'.<sup>69</sup>

Given the respondents' descriptions of how their freedom was drastically curtailed and their ability to earn a livelihood was

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63 *Popela Community v Department of Land Affairs and Another In Re: Restitution Claim Boomplaats 408LT Presently Consolidated into Goedgelegen* [2005] ZALCC 7 (*Popela Community*) para 55.

64 *Popela Community* (n 63) para 8.

65 Sec 2(1) Restitution of Land Rights Act.

66 *Popela Community* (n 63) para 58.

67 *Popela Community* paras 59-61.

68 *Popela Community* paras 67-69.

69 *Popela Community* para 76.

eviscerated by the labour tenancy revocation, in the most controversial passage of the judgment Justice Gildenhuys argued:<sup>70</sup>

They [the claimants] continued living on the farm. The *only* change in their circumstances was that they received monthly wage in lieu of their cropping and grazing rights. *There are strong indications that the change actually benefited them.*

On 27 June 2005 the Court dismissed the claim concluding that the claimants had failed to show that the dispossession was a result of a discriminatory law or practice.<sup>71</sup> The Popela claimants lost the first court battle.

#### 4.2.2 Supreme Court of Appeal

Undeterred, the Popela community and their representatives pressed on and took their matter on appeal to the Supreme Court of Appeal.<sup>72</sup> This Court agreed with the Land Claims Court that the claimants would have to show that any racially-discriminatory practices were as a result of any direct or indirect conduct by a public official or state department.<sup>73</sup> In this respect the Court held that there was no evidence of involvement of any public official or authority in the former landowner's decision to terminate the labour tenancies.<sup>74</sup> According to the Court, in order to be successful the claimants would have to prove that the farm owners acted as an instrument of the state.<sup>75</sup> The Court accepted the farm owners' argument that the system of labour tenancy had become inefficient and ill-suited to modern farming methods.<sup>76</sup> The Supreme Court of Appeal ruled that the farm owner was not acting as an instrument of the state.<sup>77</sup> The Popela community lost the second court battle.

#### 4.2.3 Constitutional Court

The defeat at the Supreme Court of Appeal coupled with an adverse cost order did not deter the claimants who, with the continuing support from Nkuzi, took their matter on final appeal to the Constitutional Court. Justice Moseneke wrote the unanimous Constitutional Court decision that overturned the lower court

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70 *Popela Community* paras 76 & 79 (our emphasis). To gain some perspective as to just how patronising, reductionist and insensitive Gildenhuys J's take is on the impact of the nature and termination of the labour tenancy agreements, it is worth contrasting his views with those of Moseneke DCJ in *Popela Community* (n 63) paras 17-18 & 46 of the Constitutional Court appeal of this matter; *Popela Community* (n 63) para 12.

71 *Popela Community* (n 63) paras 83-85.

72 *Goedgelegen* (n 5) para 5 (providing the procedural history of the case).

73 *Popela Community & Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2006 SCA 124 (RSA) para 8 (*Popela Community Appeal*).

74 *Popela Community Appeal* (n 73) para 15.

75 *Popela Community Appeal* para 8.

76 *Popela Community Appeal* para 12.

77 *Popela Community Appeal* paras 18-19.

decisions.<sup>78</sup> The approach of the Constitutional Court differed from the lower courts in its willingness to engage in greater depth and with greater sensitivity with the history of the claimants' connection to the land.<sup>79</sup> More specifically, the Constitutional Court gave careful consideration to the residual power that the colonial and apartheid super-structure brought to bear even on seemingly private relations between a farm owner and his employees.<sup>80</sup>

The Court first had to decide whether the claimants at the time of dispossession in 1969 were a 'community', meaning that they derived their possession and use of the land from common rules.<sup>81</sup> The Court concluded that at the time of the dispossession in 1969, the claimants' possession and use of the land were fragmented with each individual family subject to individualised relations with the farm owner that determined their presence on the land.<sup>82</sup> Therefore, confirming the decision of the lower courts, the Constitutional Court determined that the community claim could not succeed.<sup>83</sup>

The next major question was whether the dispossession was as a result of past racially-discriminatory laws or practices.<sup>84</sup> The Court stated the phrase needed to be construed in light of the Act in its entirety, its purpose to provide restitution for the dispossession of land rights and, more generally, in the full context of the history of land dispossessions in South Africa.<sup>85</sup> Moseneke recognised that '[i]n enacting the Restitution Act the legislature must have been aware that apartheid laws on land were a labyrinth and mutually supportive and in turn spawned racist practices. And vice versa.'<sup>86</sup>

On 6 June 2007 the Court concluded that the former owner's termination of the claimants' rights was as a result of the apartheid laws and practices.<sup>87</sup> The Court reasoned that had it not been for apartheid laws and practices, the farm owners would never have been able to unilaterally terminate the labour tenancy agreements and dispossess the claimants of their rights.<sup>88</sup> The nub of the Court's reasoning is well captured by Moseneke when he writes:<sup>89</sup>

The racially-discriminatory laws in force and the racially-discriminatory practices that prevailed materially affected and favoured the ability of the [farm owners] to dispossess the [claimants] of their labour tenancy rights. In a normal society based on dignity and equality, a truly representative

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78 *Goedgelegen* (n 5).

79 *Goedgelegen* paras 6-19.

80 *Goedgelegen* paras 48-50.

81 *Goedgelegen* paras 43-47.

82 *Goedgelegen* para 45.

83 *Goedgelegen* para 47.

84 *Goedgelegen* paras 48-50.

85 *Goedgelegen* para 63.

86 *Goedgelegen* para 66.

87 *Goedgelegen* para 81.

88 *Goedgelegen* paras 79-80.

89 *Goedgelegen* para 71.

government would have had a duty to protect and respect existing rights. It would have cared about the effect that any unilateral change in those rights would have had on the labour tenants and their families. The [farm owners] would have been compelled by law and practice not to take away any vested rights in land of others as at 1913, particularly because the original rights of the people concerned preceded the first land registration and went back generations. Simply put, without the effect of apartheid laws, policies and practices on land rights of black people, the [farm owners] would never have had the power to do what they did.

In the final analysis, the Court held that the nine applicants had been dispossessed of a right in land after 19 June 1913 as a result of a past racially-discriminatory law and practice and that accordingly they were entitled to restitution under the Act.<sup>90</sup> Nine members of the Popela community arose victorious after the Constitutional Court litigation.

The Constitutional Court deferred the specifics of how their decision was to be implemented to the Commission, which was to act in accordance with the provisions of the Act.<sup>91</sup> The Court deemed it inappropriate to fashion a more precise remedy beyond a declaratory order as the claimants had not requested a more precise remedy, and neither had the Department of Land Affairs.<sup>92</sup> Due to the vast range of possible remedies for resolving this land dispute, the Constitutional Court did not consider it appropriate to venture into the terrain of deciding what an appropriate remedy should be, especially as a court of last instance.

### 4.3 Implementation of the Constitutional Court decision

After the Constitutional Court's decision, the state conceivably had two options. The first was to provide reparations, which required giving the nine named plaintiffs the 800 square meters of land mandated by the Court. The other option was dignity restoration, which was a more robust remedy requiring the state to go beyond vindicating legal rights to property and included efforts to restore dignity as well. In an effort to move from reparations to dignity restoration, rather than to simply focus solely on the nine claimants, the state decided to purchase 2 000 hectares of land for the whole community.<sup>93</sup> Consequently, the Popela community finally basked in the sweet smell of victory after so many years of struggle and uncertainty.

The Commission's first task after the Constitutional Court decision was to identify the legitimate members of the community. The Commission verified that 11 families qualified as part of the Popela

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90 *Goedgelegen* paras 81 & 82.

91 *Goedgelegen* para 84; Land Restitution Act of 1994.

92 *Goedgelegen* para 85.

93 See sec 2(1)(d) of the Land Restitution Act of 1994.

community.<sup>94</sup> The Commission then required the members of the 11 families to register as a legal entity called a Community Property Association (CPA), to form a constitution and to hold elections. The Commission also had to hire a service provider to value the land that the Court had given to the Popela community. If the Commission concluded that the valuation was done in good faith, then the valuation would serve as the basis for the offer it presented to the current landowner. However, if there were mistakes or disagreements, then the Commission and the valuer had to go back and forth until an acceptable valuation was reached.<sup>95</sup> Prior to transfer of the land to the CPA, the Commission had to draft a sale agreement, obtain various internal approvals to purchase the land required by section 42(d) of the Act, survey the land, and the newly-formed CPA would have to sign the deed of sale.<sup>96</sup>

The Commission faced numerous challenges.<sup>97</sup> First, valuers were not delivering their valuations in a timely manner.<sup>98</sup> Second, due to various bureaucratic obstacles, the Commission had not spent money allocated for prior projects and consequently could neither get additional money for new projects (including the Popela project) nor could it transfer monies allocated for the old projects to the new ones.<sup>99</sup> Third, negotiating with the current landowner, Westfalia, was a long, arduous process.<sup>100</sup>

#### 4.3.1 The Popela community and Westfalia

The Constitutional Court judgment states that the nine named claimants are entitled to restitution for the gradual erosion of their rights to 800 square meters of land that they each occupied.<sup>101</sup> However, this land has since become aggregated with other parcels and disaggregating the land is not a simple task. More specifically, the community's land became an extension of a farm called Boomplaas, which in turn was consolidated into a larger farm called Goedgelegen. Goedgelegen and Deilkraal operated as one business unit. Therefore, when faced with the court order and the Commission's proposed redistributive scheme, Westfalia preferred to sell both properties and not only one.<sup>102</sup>

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94 Interview with Nkatingi, Commissioner of the Department of Land Affairs, Pretoria, South Africa (2008).

95 Atuahene (2014) (n 6) 103-105.

96 Interview with Nkatingi, Commissioner of the Department of Land Affairs, Pretoria, South Africa (2008).

97 Interview with Letseja, member of the Land Commission, Pretoria, South Africa (2008).

98 Interview with Mulaudzi, manager, Legal Services, Office of the Regional Land Claims Commissioner for Limpopo Province, Johannesburg (2018).

99 As above.

100 As above.

101 *Goedgelegen* (n 5) paras 89 & 91.

102 Interview with Nkatingi (n 96).

At the time Westfalia operated a large, capital-intensive agribusiness producing avocados, tomatoes and other produce. The Commission wanted to purchase the entire business unit and transfer the 2 000 hectare Boomplaas farm to the Popela community as part of its dignity restoration scheme, involving the entire community. However, the Commission had to ensure that the farm's productivity would not decline, jobs were not lost, and economic development was not retarded. While the Popela community does have extensive farming skills, it does not have the capital or management skills to maintain the existing high-technology, large-scale operation established by Westfalia. To resolve this dilemma, the Commission had at one point recommended that Westfalia become the community's strategic partner.<sup>103</sup> At that time, Commissioner Miyelani Nkatingi said that

as the Commission we are saying and the community is agreeable, we are saying the nine individuals and also the community should be able to be given land to benefit out of it and also be able to see if they cannot benefit in the economic spin-offs within the Westfalia group.<sup>104</sup>

However, before approaching Westfalia and spending significant time negotiating the potential strategic partnership, the Commission did not investigate whether this was something the Popela community wanted.<sup>105</sup> Consequently, the respondents' primary complaint was that the Commission had prioritised negotiations with Westfalia and treated them like second-class citizens. One respondent complained: 'We were never consulted. The Commission wants to hold the meetings with the Westfalia, but we were not invited. They just got the meeting on. We were not invited.'<sup>106</sup> Another lamented that '[the Commission] start to go to Westfalia and see exactly what is Westfalia feeling about the farm and so on. I mean I'll say they are treating them much better than us.'<sup>107</sup> As one community leader poignantly articulated, the Commission's downfall was its total disregard for process.<sup>108</sup>

I think we should be involved and know exactly how it works and who should be our strategic partners even if it's Westfalia, but if the people of Popela can sit down and discuss the whole process and start to feel that maybe they don't have that skill and that capacity to run the farm and they think the best partner will be Westfalia through votes then there's no problem. I'll be happy with that if they agree or not. It is not like somebody has to dictate to us and tell us who should be our strategic partner and so on.

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103 Interview with Letseja (n 97).

104 Interview with Nkatingi (n 96).

105 Confidential interview with 15 (n 41); confidential interview with 11, member of the Popela Community, Limpopo, South Africa (2008).

106 Confidential interview with 16, member of the Popela Community, Limpopo, South Africa (2008).

107 Confidential interview with ALM (n 47).

108 As above.



Although they knew that partnering with Westphalia was untenable, there was no consensus in the community on how to move forward. Some of the nine named plaintiffs wanted the Commission to immediately give them the court-ordered 800 square meters of land so that they could begin earning from the land. Given their experience with the Commission, they did not believe it had the integrity or capacity to deliver the promised 2 000 acres. One said that 'as things are standing we really want the title deed for the small land. So, there is no need to go for the title deed for the whole property whereas there is still a problem on that small land.'<sup>109</sup> If given only the limited land ordered by the Court instead of Westphalia's entire business unit, community members would have been able to use farming methods familiar to them and operate without a strategic partner. On this score, respondents stated that 'we will plough tomatoes, oranges, and cabbages, onions. All these things that we've been planting before.'<sup>110</sup> Another stated that 'we are going to plant and do everything because of I've grown up here and I know all the corners and everything'.<sup>111</sup>

On the other hand, some respondents were more hopeful that the Commission would deliver the 2 000 hectares. However, they were amenable to maintaining the existing capital-intensive farming operation if only they could find a partner who would teach them how to run it while not trying to control them. As one respondent said, 'I will feel very much happy if government brings someone to volunteer to run our place whereby that person will not abuse us and work with us properly. We will feel very much happy.'<sup>112</sup>

For several reasons, respondents' resounding conclusion was that Westphalia was not a suitable strategic partner.<sup>113</sup> First, respondents reported that Westphalia had a history of treating its labourers very poorly, subjecting them to sub-standard working conditions. One community member emphatically declared: 'No, no I say no, I say no, I don't want them because even those who are working at the farm, they are working just like slaves.'<sup>114</sup> Second, Westphalia had disrespected the community and had done irreparable damage to the relationship by systematically blocking access to the graves. One

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109 Confidential interview with 16 (n 106).

110 Confidential interview with 2, member of the Popela Community, Limpopo, South Africa (2008).

111 Confidential interview with 3 (n 32).

112 Confidential interview with 20, member of the Popela Community, Limpopo, South Africa (2008).

113 Confidential interview with P1, member of the Popela Community, Limpopo, South Africa (2008); confidential interview with P16, member of the Popela Community, Limpopo, South Africa (2008); confidential interview with P26, member of the Popela Community, Limpopo, South Africa (2008), confidential interview with P27, member of the Popela Community, Limpopo, South Africa (2008); confidential interview with P30, member of the Popela Community Limpopo, South Africa (2008).

114 Confidential interview with 7, member of the Popela Community, Limpopo, South Africa (2008).

community member recently failed to bury her sister in the community's sacred graveyard because the gates were locked, and 'if you can go and ask them to go and open the gates or to unlock the gates, it is another war with the white people'.<sup>115</sup>

Third, given the tense history between the Popela community and Westfalia, respondents were extremely suspicious of Westfalia's motives for wanting to become a strategic partner. One respondent was concerned: 'I think they will take all over the farm. Why are they, for the first time, why are they willing to help us for the first time, that is why I don't trust them.'<sup>116</sup> Another said:<sup>117</sup>

No, we can't work together with them because they will also, they will again chase us from the land. I don't think it's, I think it will be impossible because we are, those people they don't like us because they are the whites and from a long time the white people are chasing people from our farms.

Fourth, respondents were concerned that the existing asymmetry of power between them and Westfalia would undermine any potential strategic partnership. Many respondents were certain that a strategic partnership between two unequal partners was bound to result in the domination of the stronger partner over the weak. One respondent stated that 'Westfalia will take over. They will keep on leading and it will just go back as in old ages whereby he will take the land back and it will be like nothing has changed.'<sup>118</sup> Another said that '[t]he only thing that I want is the land, it is our land, not the former owner of the land. What is the most important thing is if Westfalia is under our control, but I'm doubting whether it is possible.'<sup>119</sup>

### 4.3.2 Moving beyond Westfalia

The Commission gave up trying to force the Popela community to enter into a strategic partnership, and purchased the 2 000 hectares of land from Westfalia. However, the land was transferred to the state rather than to the nine Popela claimants or the broader community. According to a legal manager employed at the Commission, there is an internal dispute within the community about how to partition the farm. A community leader, however, contradicted this view. He stated that the community was ready to take the land and there were no internal disputes. What is certain is that the Popela community continues to wait for their land, and the excessive waiting has rendered them marginal. The land reform process intended to achieve

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115 Confidential interview with 9, member of the Popela Community, Limpopo, South Africa (2008).

116 Confidential interview with 5, member of the Popela Community, Limpopo, South Africa (2008).

117 Confidential interview with 10, member of the Popela Community, Limpopo, South Africa (2008).

118 Confidential interview with 20 (n 112).

119 Confidential interview with Albert Maake, member of the Popela Community, Limpopo, South Africa (2008).

dignity restoration lamentably seems to have instead produced dignity deterioration.

## 5 A failed attempt to move from reparations to dignity restoration

When the state purchased the 2 000 hectares of land for the whole community instead of the Court-mandated 800 square meters of land for each of the nine families, this was an attempt to include a people who had been excluded and denigrated under prior white regimes. While this was an important step towards dignity restoration, it was not sufficient because dignity restoration is contingent upon the experience of dispossessed communities and individuals in the restitution process and not only the material outcome of the process.<sup>120</sup>

In her book *We want what's ours*, Atuahene uses 150 interviews with urban claimants in the South African land restitution process to identify the main obstacles to dignity restoration.<sup>121</sup> First, the restitution process undermined dignity restoration when it transformed poor claimants into marginalised members of the polity unable to assert their rights and challenge the Commission. This happened because the Commission gained overwhelming power in the restitution process after the legislature had removed the court's power to review all the Commission's settlement decisions and limited the court's review to instances where claimants filed a case in court.<sup>122</sup> Since the majority of poor claimants did not have the resources to bring a complaint before the Land Claims Court, the court's ability to monitor the Commission was greatly reduced and the Commission's decisions, in effect, were final. More detrimentally, civil society organisations did not adequately fill the monitoring role that the court once had. As a result, like a private defence attorney, the Commission protected the interests of claimants; like a prosecutor, the Commission defended the interests of the state; and like a judge, the Commission decided what type of compensation each claimant received. With the Commission's overwhelming power, acting as the prosecutor, defence and judge, many claimants were left powerless.<sup>123</sup>

Second, for many respondents the Commission did not facilitate dignity restoration because the process did not establish them as full citizens with voices capable of demanding the state's attention. When respondents and Commission officials were able to sustain a conversation throughout the five phases of the restitution process, the

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120 Atuahene (2014) (n 6) 191-192.

121 Atuahene 16-17.

122 Atuahene 68-70.

123 Atuahene 71.

Commission was able to more effectively address the deprivations of wealth, agency, and community caused by the dignity takings.<sup>124</sup> A sustained conversation occurred when respondents attended meetings and responded to requests for documentation, and when Commission officials were able to explain the process, respond to inquiries, and proactively address concerns. Unfortunately, several obstacles prevented Commission officials and claimants from sustaining a conversation.<sup>125</sup> More importantly, the failure of Commission officials to give respondents the attention they deserved signalled that their status in the political community had not been fully upgraded with the end of apartheid.<sup>126</sup> The *Popela* case confirms Atuahene's findings because no access to the courts as well as communication breakdowns undermined the Commission's attempts at dignity restoration.

The prolonged wait and resulting pervasive disappointment among respondents from the Popela community transformed a potential moment of dignity restoration into a moment of dignity deterioration. The majority of respondents thought that their day of redemption had come and that they would immediately be free to walk and farm again on their land after, literally, a lifetime of waiting. As one respondent said: 'What I know about the court's decision regarding Popela is that those men who were claiming that this is their land [Westfalia], they should know that we also belong here. This is also our land.'<sup>127</sup> No one expected that more than ten years later they would still be waiting for their land. Mr Maake and the other members of his community have all been gravely disappointed.<sup>128</sup>

We were expecting someone to come, to tell us that we will own the land again and we can do anything we want so there will be no one interfering with our movement on the land, on our graveyards, our farming and all these things ... It was supposed to be a very big party, then and from that day on they were expecting they can now have the access to that land. We did not expect that delay of the government process. They just expecting well from that 6th of June onwards they can still (makes a sound and accompanying hand motions like a vehicle taking off) just take the car, hey my son take me to the grave I want to see A, B, C then no restriction, just drive straight, so we were not expecting we were going to experience this.

At the time of the interviews in 2008, the prolonged wait to receive their land brought about a sense of despondency, anxiety, helplessness, exclusion, marginalisation and resignation. For example, one respondent declared that he was happy with the court victory but said that 'the delay is so unbearable'.<sup>129</sup> Other respondents said that

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124 Atuahene 140.

125 Atuahene 122.

126 Atuahene 193.

127 Confidential interview with 3 (n 32).

128 Confidential interview with 2 (n 110).

129 Confidential interview with PhM, member of the Popela Community, Limpopo, South Africa (2008).

the delay has been 'painful'<sup>130</sup> and they feel 'doomed because we don't know where we are going now'.<sup>131</sup> After about ten years of waiting, one of the leaders of the Popela community reported that the community found it incredible that things were effectively at a standstill and without any clarity as to the source of the continuing delay. He said that it proved that the Commission believed that the Popela community did not matter. He believes that there is some form of corruption occurring, although he could not prove it.

The main finding that emerged from the interviews conducted for this study was that the executive's delayed implementation has led the majority respondents to two conclusions. Prior to the Constitutional Court victory in 2007, community members believed that rich whites were above the law and, in this sense, apartheid was still alive and well. To explain this, one community member recounted a chilling story:<sup>132</sup>

White people hey [laughs] be careful when you want to talk too much, they will beat you. Even now, even if you are in the new government [continues laughing] don't just stand up and say you can just do whatever you want, be careful. Sometimes it's good for you to sit down. There's another guy [more laughter] the nearest farm there. This guy was just walking around the farm from there. He was looking for a toilet, he didn't see the toilet so he just passes his things next to the road. So, the white guy came and found him while sitting there. Hey you, they forced him to eat his own waste [more laughter]. Never arrested! He's rich! Ja, Westfalia is rich, it's like government they are on top of the law and you can't arrest them.

There was a prevalent feeling among respondents that many things had yet to change from the dark days of apartheid, and as one community member poignantly put it, 'freedom is still coming'.<sup>133</sup>

During apartheid, respondents, like other blacks, occupied a marginal space in the polity, and were routinely dehumanised and denied their dignity. The Constitutional Court's decision signalled that the post-apartheid state was actively attempting to restore the Popela community's land rights, celebrate their humanity, and aid them in gradually restoring their dignity that had been robbed in past years. Consequently, the executive's failure to implement the decision in a timely manner was also thick with symbolism and meaning for respondents. To many respondents the executive's failure to implement means that the owners of Westfalia and other whites are still above the law – the same as during apartheid.<sup>134</sup> The Commission's attempts to negotiate with Westfalia without conferring

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130 Confidential interview with PuM, member of the Popela Community, Limpopo, South Africa (2008).

131 Confidential interview with Renkie Maake, member of the Popela Community, Limpopo, South Africa (2008).

132 Confidential interview with 3 (n 32).

133 Confidential interview with 13 (n 33).

134 Confidential interview with Jan Maake, member of the Popela Community, Limpopo, South Africa (2008).

with the community added fuel to the fire and signalled that blacks were still not equals – the same as under apartheid.<sup>135</sup>

After the Constitutional Court decision, community members are convinced that some form of corruption is occurring. They are having a difficult time understanding why they do not have their land after an unequivocal court decision from the highest court in the land. One respondent put it succinctly:<sup>136</sup>

We can categorise it [the problem] into two. First, the people who implemented the rules [the ANC] are working for us, but the public servants [at the Commission] are not working for us because they are not doing enough for the community.

From the respondents' perspective, the Commission has failed to deliver on the Court's promise and, surprisingly, both the ruling party (the ANC) and the Constitutional Court are held blameless.

In sum, this study advances our current understanding of dignity restoration. The *Popela* case teaches us that if in its efforts to move from reparations to dignity restoration the state overpromises, then these unfulfilled expectations can have both political and psychological consequences. Politically, South Africa's nascent democracy is weakened by the pervasive belief among respondents that whites are above the law. Also, the strongly-held suspicion that there is some form of corruption delegitimises the Commission, which is an important institution in South Africa's democracy. On a psychological front, respondents interpreted the executive's failure to implement the Court order as an affirmation of their low worth and status in society.

## 6 Conclusion

Like many blacks in South Africa, under colonialism and apartheid the *Popela* community was subjected to dignity takings through the confiscation of their property rights. The post-apartheid state decided to move beyond the Court-mandated reparations and to facilitate dignity restoration by increasing the number of community members entitled to land and also increasing the area of land transferred. The state, however, underestimated the difficulties it would encounter in acquiring and transferring land to the community. Consequently, the community has neither the more modest remedy mandated by the Constitutional Court nor the more ambitious remedy intended to facilitate dignity restoration. More detrimentally, respondents have come to believe that this is because wealthy whites are above the law and beyond the reach of the post-apartheid state. Also, respondents have come to believe that Commission officials are corrupt, and their faith in this important democratic institution has been eroded.

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135 As above.

136 As above.

The Popela story is important as it is the first empirical case to illustrate the consequences of a failed move from reparations to dignity restoration. While a state's decision to provide a comprehensive remedy for dignity takings is noble, it is not a decision that should be taken lightly. Dignity restoration is a resource-intensive, complex remedy that some bureaucracies do not have the capacity to implement, leaving dispossessed individuals and communities in a vulnerable position. Since the fall of apartheid in 1994, the Popela community has been waiting patiently to once again occupy their land as owners. Many respondents believed that the land is worth the wait because it 'will never come to an end and our children will cultivate even the coming generations'.<sup>137</sup> The Commission will hopefully in the near future be able to deliver on its promise for the Popela community's legacy to be restored.

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137 Confidential interview with 10 (n 117).