

FEATURE

'A House All My Own': An Intersectional Reflection on the Failures of Post-Apartheid Law and Policy to Provide Tenure Security for Black Women in Urban South Africa

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Introduction

'Not a flat. Not an apartment in back. Not a man's house. Not a daddy's. A house all my own. With my porch and my pillow, my pretty purple petunias. My books and my stories. My two shoes waiting beside the bed. Nobody to shake a stick at. Nobody's garbage to pick up after. Only a house quiet as snow, a space for myself to go, clean as paper before the poem.'
Sandra Cisneros, The House on Mango Street

Apartheid has remained one of the most pervasive systems of institutionalised racism in the world. A pillar of the system was the categorisation of people into different racialised groups (white, black and coloured people) and the use of this racialisation to deprive them of land and economic resources. This was effected through laws such as the Natives Land Act, which reserved merely 13 per cent of South Africa's land for over 80 per cent of the population.

For those burdened with apartheid's enduring consequences, its economic aftermath is especially significant. In 2019, Time magazine pointed out that, more than two decades after the legal and political emancipation of black citizens, South Africa was still the world's most unequal society. This stark reality affects all historically disadvantaged groups in the country.

'The land question' has consequently become an indelible part of South African political discourse. The question highlights the systemic deprivation of land access for black people during and after apartheid. One of the arguments associated with it is that while land is intrinsically linked to dignity, belonging, and economic mobility, policies that have tried to rectify past injustices have failed to see land through a gendered lens.

This article thus delves into the tenure discrimination that black women face in securing housing tenure nearly three decades after the end of apartheid, and looks at how the laws that have been put in place to rectify past injustices have not adequately addressed the effects of apartheid.

Historical background

Pre-apartheid

Claims about the position of women in regard to property ownership in pre-colonial or pre-apartheid South Africa are contentious. On the one hand, scholars such as Claassens & Ngubane (2008) argue that women, even single women, could acquire land in their own right and not in the name of a man or their family. They maintain that the rights women had to land ownership were all diminished by apartheid-era legislation, which restricted land rights to men.

On the other hand, some argue that women's right to land was usufructuary in nature. Primary access to land was through marriage rather than inheritance. The system of primogeniture, which was argued to be a part of African culture or custom, allowed only the first-born son of the family to control land or be able to inherit it. The system of primogeniture was still a part of South African law until the 2004 Constitutional Court case of *Bhe v Khayelitsha Magistrate and others*, in which the Court struck down regulations that allowed only men to inherit intestate estates.

Many scholars argue that laws deriving from African customary law were distorted by native administrators who did not understand communal structures and used the doctrine of repugnancy to strike down provisions of customary law that sought to empower women. For instance, our understanding of primogeniture is that while it excludes women from land ownership, there has been a failure to recognise that, in pre-colonial Africa, everyone under the household head was a minor, including unmarried men and married men who had not established separate households.

Nonetheless, it is also a distortion to pretend that African customary law was free of gender inequities. Customs such as *ukungena*, which are still practised today

in parts of the Eastern Cape and KwaZulu-Natal, force women to marry the relative of the deceased husband, or else be expelled from their homes and lose their inheritance as well as custody of their children.

Apartheid

The apartheid housing policy aimed to use housing as a tool to create labour reserves by confining black people to specific areas, thereby ensuring that the white-dominated economy could utilise a readily available work force when needed.

This policy was undermined by country-wide urbanisation due to the mining boom in the late 19th and early 20th century, which led to industrialisation and mining in the Witwatersrand region as well as to increased migration to the cities of Durban and Cape Town given the employment opportunities available at their ports. Through the requirement that black men had to have work permits or 'passes' in order to move around the country lawfully, apartheid formalised a system of migrant labour.

In this shift of black people from rural to urban areas, young black men were predominant. With a few exceptions – related to domestic work, working as laundress, cooking traditional African food, or brewing alcohol in urban areas – the vast majority of black women were relegated to the Bantustans.

When black people did secure housing in urban areas, they were denied the right to own property. The sole housing options for them were available in townships, also known as 'locations', which were situated in outlying areas. Indeed, in the 1980s, the government enforced a resettlement policy to move black people into urban townships or rural homelands. As a move to prevent urbanisation, it also extended the pass system to black women and increased arrests for pass-law offences.



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Black people were thus meant to move through urban areas with insecure housing and an inability to own property. In the late 1980s, the apartheid government introduced a barrage of inconsistent housing rights, usufructs, and 99-year leases and deeds that did not amount to property ownership rights. The revolving door of legislation made it impossible for black people to own land. Furthermore, the government did not allow black women to own or hold any of these subsidiary rights.

In sum, the apartheid housing policy reduced black people to the status of temporary migrants in urban areas; family accommodation for African people was limited to small match-box housing in planned townships located far from city centres. Unemployed African men, as well as most African women and children, were excluded from cities through mass arrests, prosecutions, and deportations. The townships themselves were provided with little infrastructure and service delivery.

Post-apartheid

South Africa today has a higher urbanisation rate than most other African countries: 63 per cent (UN-habitat) of its population lives in urban areas, given that cities are attractive for the many opportunities they offer.

In this context, the government has adopted policies such as the Reconstruction and Development Programme (RDP), which aims to enable all South Africans to enjoy a decent standard of living underpinned by the democratic values of human dignity, equality, and freedom. On paper, the state seeks to rectify past injustices through, for instance, laws that give the government the authority to expropriate land subject to paying ‘just and equitable compensation’. Furthermore, section 25 of the Constitution provides that the state must take reasonable legislative and other measures, within its available resources, to foster conditions that enable citizens to gain access to land on an equitable basis.

Indeed, since 1994, the government has, among other things, built more than three million housing units.

However, South Africa continues to face a housing crisis in which large parts of the black population live in inadequate and overcrowded informal settlements. The South African land reform initiative, which the government launched to facilitate land restitution, has focused on rural or commercial farming contexts, notwithstanding the scale of the urban racially-based land dispossession that occurred under apartheid. Urban land restitution processes have been long, arduous, and ineffective. Most claims for urban land are settled by compensation, and many remain incomplete.

The significance of urban land reform was highlighted in 2019 in the report of the Expert Advisory Panel on Land Reform and Agriculture (RSA 2019). This was followed by a report that recommended the formulation of an urban land-reform policy, the fostering of more equitable urban spatial patterns, the targeted use of state-owned land, and the recognition of the diverse tenure rights that were provided by the apartheid government.

Yet although the post-1994 government recognises the existence of spatial inequality in cities, its policies have not been able to bring about a significant restructuring of settlement. For instance, some of its pro-poor policies have instead reinforced people’s exclusion by subsidising the cost of living on the periphery rather than by supporting better location decisions.

Notably, the state’s interventions often lack gender sensitivity. Laws such as the Upgrading of Land Tenure Rights Act (ULTRA) 112 of 1991 and the Interim Protection of Informal Land Rights Act 31 of 1996 seek to rectify past injustices on the basis of race alone. In regard to gender, this has led to blind spots that have caused further disenfranchisement.

The case of *Rahube v Rahube and Others*

The historical legal landscape helps to shed light on why black women continue to be marginalised in regard to access to housing even under a democratic dispensation. Parliament promulgated ULTRA and the Conversions of Certain Rights To Leasehold Act of 1988 to better enable black people to acquire ownership of the land they occupy. At the outset, it seemed that the legislature was compliant with the requirements of subsections 25(5) and 25(6) of the Constitution. However, there was no equality, as black men were the only ones who acquired ownership – this was because, under apartheid, they were the sole holders of tenure rights, and thus the only people whose situation could be improved.

The case of *Rahube v Rahube and Others* demonstrates that, even in a democratic South Africa, black women face inequality in access to property due to their gendered, racialised, and socio-economic position in society.

Briefly, the facts of the case are that, in 1970, eight people (including Ms. Rahube and her brother) occupied a house in the township of Mobopane. Ms. Rahube left in 1973 to live with her husband, but returned to the house in 1977. All of the occupants had moved out by 2000, leaving her as the only original occupier. She resided there with her immediate family. Her brother instituted the eviction, alleging that he was the owner because the Deed of Grant was issued to him in terms of the provisions of Proclamation R293 of 1962 in terms of the Native Administration Act 38 of 1927 (later called the Black Administration Act).

Ms. Rahube became aware that her brother had gained full ownership when he instituted eviction proceedings against her in 2009. She had received no notification, and had no opportunity to make her representations, despite the fact that she was a lawful occupier and had been maintaining the property as well as paying rates and taxes. Ms. Rahube contended that she was never granted the opportunity to assert her interest in the

ownership of the property, an opportunity that was not extended to women.

The Certificate of Occupation was issued to the brother of Ms. Rahube, who was the ‘head of the household’, and listed the people occupying the house. Ms. Rahube and the other women residing in the house were precluded from being issued the Certificate of Occupation due to their gender. The language used was racist and sexist, in that it was underpinned by patriarchy. On 13 September 1998, the Department of Local Government and Housing of the Republic of Bophuthatswana issued Deed of Grants to the person issued with the Certificate of Occupation, in this case her brother, thus making him the ‘lawful’ owner.

Section 2(1) of ULTRA deals with the circumstances in which occupation of a township house can be converted into ownership. This act vests automatic ownership without the opportunity for any person who may have a right to the property to make representations. In this case, Ms. Rahube brought the matter to court, stating that this ‘automatic’ vesting of ownership perpetuates discriminatory law because it excludes woman from ownership. This Proclamation sought to address past racially discriminatory practices, but it did not consider the history of occupation. Indeed, it perpetuated gender inequality, and failed to protect, notify, or consult with occupants of the property.

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On the face of it, section 2(1) of ULTRA seems to protect and promote tenure. It falls short of achieving this, however, because it entrenches the sexist and racist laws of apartheid. It violates the right to equality, the right to property, the right to dignity, and the right to fair administrative action. The purpose of ULTRA is to provide for conversion into full ownership.

When customary law was entrenched into the common law system, the administrators who were in charge of interpreting the law failed to understand certain social realities which recognised the position of women in society. This left them with few legal protections and very few rights. Colonialism thus exacerbated the patriarchy already embedded in African customs. It is important to note that the Black Administration Act provided in section 11(3)(b) that a 'native' woman living with her husband shall be deemed to be a minor and her husband shall be deemed to be her guardian. This law was repealed only in 2005, by the Amendment of Certain Laws Act. Black women were so disenfranchised that they were excluded from even seemingly gender-neutral spaces.

The High Court found that the provisions of the act were unconstitutional...

Even though Ms. Rahube had lived on the property uninterrupted for 32 years without the presence of a man, she was not afforded the opportunity to be allowed full ownership of the land because the Deed of Grant was issued in terms of the provisions of the Proclamation R293 under the Black Administration Act. Only men could be heads of family.

Land tenure rights were supposedly realised in terms of section 25(1), (5) and (6) of the Constitution; however, the Proclamation violates the equality clause contained in section 9 of the Constitution, as it does not encompass the rights of all those affected on an equal basis. At the very least, there should have been an opportunity for the affected people (listed on the Certificate of Occupation) to be provided notice or to be heard with regard to the ownership of the property. The deprivation was arbitrary.

Ms. Rahube, represented by Lawyers for Human Rights (LHR), challenged the constitutionality of section 2(1) of ULTRA for the reasons explained above. The High Court found that the provisions of the act were unconstitutional because they allowed for automatic conver-

sion of tenure rights into ownership without any procedures for considering competing claims to ownership. It held that this violated sections 9, 25 and 35 of the Constitution. In terms of section 167(5) of the Constitution, when legislation is declared unconstitutional, the Constitutional Court must confirm the invalidity. Subsequently, LHR thus brought the matter before the Constitutional Court.

The Constitutional Court began its judgment by citing – in Setswana, Ms. Rahube's home language – article 1 of the Universal Declaration of Human Rights and the right to dignity. The judgment set out how vulnerable black women are, given that they suffer a three-fold discrimination based on race, socio-economic realities, and gender. The judgment held that the law must do more to eradicate discrimination and inequality rather than just regulate formalistically.

The Court found that Ms. Rahube had indeed been arbitrarily deprived of the right to property, and that section 2(1) of ULTRA was unconstitutional as it allowed for such deprivation. Section 2(1) of ULTRA was ruled unconstitutional and invalid to the extent that it deprives those occupants of a property that are not holders of the Certificate of Occupation or Deed of Grant of an opportunity to claim ownership. The exclusion is based on a gender discrimination.

This case not only helped Ms. Rahube but also women in similar circumstances. Currently, Parliament has drafted amendments as per the Constitutional Court order. How the changes will be implemented is another matter. The realisation of equality and housing for black women still has a long way to go.

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Conclusion

Notwithstanding the progress that the post-apartheid state has made in providing equitable housing for black people, many of South Africa's laws and policies still have a noticeable blind spot when it comes to gendered experiences. This was elucidated in the case of *Rahube* and continues to be a problem affecting the urban landscape. If the injustices of the past are to be addressed, it is therefore necessary to put women at the forefront of decision-making on urban policy.

Take, for instance, the issue of informal settlements, which provide residence for about 3.1 million South Africans, and mostly so in cities. In addition to contending with the gendered dimension of living in informal settlements that subject them to an added layer of crime, violence, and hypermeability, women struggle to access property and tenure in the context of a market-based society where life opportunities are shaped by asset ownership. Expanding property ownership to the historically deprived would allow them to access revenue streams or capital gains, and provide the basis for economic activities. These could take such forms as informal trading, using houses as spaza shops, or providing a range of accommodation offerings that are especially beneficial to women in urban areas.

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