

Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd: Johan Froneman, the Transformation of Property Law and the Virtue of Small Things



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Abstract

In this article in honour of Justice Johan Froneman, I consider an early judgment of his on the Constitutional Court, *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC). I read the case as an important property law judgment, showing already at an early stage in the Court's jurisprudence strong traces of a transformative vision of property law developed by Van der Walt, Ngcukaitobi and Wilson, among others that I describe as a democratised property law. I show how the three pillars of this approach (the move from objects to objectives; the opening up of the canon of recognised property interests; and the move from property to propriety) all feature in Froneman J's *Bengwenyama* judgment. On this basis I then conclude by making the point that real transformation of property law derives much more from the kinds of "small moves" made by Froneman J in *Bengwenyama* than from the grand-scale solutions such as "expropriation without compensation" or state custodianship of land that have dominated political imagination over the past several years.

Keywords

Property law; transformation; democratisation; "expropriation without compensation"; state custodianship of land; ownership

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1 Introduction

In November of 2010, in only his second judgment for the Constitutional Court¹ – *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*² – Justice Johan Froneman set aside a decision of a Deputy Director General of the Department of Mineral Resources to grant a prospecting right. Decided on lawfulness and procedural fairness grounds and as an early interpretation of the then still relatively new *Mineral and Petroleum Resources Development Act 28 of 2002* (the MPRDA), the judgment has been discussed mostly as an administrative law and mining law case. In this article I offer a rereading of it as instead, or at least also, an important property law case.

I do so for two reasons. First, in my view *Bengwenyama* provides early glimpses of a vision of a transforming property law developed by scholars such as Van der Walt,³ Ngcukaitobi⁴ and Wilson,⁵ that can best be described as one of a democratised or a democratising property law, aspects of which Justice Froneman explicitly aligned himself to in some of his later judicial and extra-curial work.

Second, I believe *Bengwenyama* illustrates a background point concerning transformation of property law and of our relations to property, and specifically land, that is crucial, but politically and ideologically unpalatable and for that reason often overlooked or purposely elided: That transformation – "true" transformation⁶ – of property law has less to do with grand gestures such as abolishing private ownership in favour of "state

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¹ Justice Froneman was appointed to the Constitutional Court in October 2009. His first judgment for the Court was in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile* 2010 5 BCLR 422 (CC), handed down in February 2010. He also penned a concurring judgment in February 2009, in *Albutt v Centre for the Study of Violence and Reconciliation* 2010 3 SA 293 (CC).

² *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 4 SA 113 (CC) (hereafter *Bengwenyama*).

³ In particular Van der Walt *Property and Constitution* but also Van der Walt 2001 SALJ, Van der Walt 2002 SAPL, Van der Walt *Property in the Margins*, and Van der Walt 2014 *J L Prop & Soc'y*.

⁴ Ngcukaitobi *Land Matters*.

⁵ Wilson *Transformation of Property*.

⁶ See e.g. Cornell *Transformations* 1, describing transformation as "change radical enough to so dramatically restructure any system – political, legal, or social – that the 'identity' of the system is itself altered".

custodianship" of land or enabling "expropriation without compensation" than with small movements, a constant chipping away at and erosion of property's accepted foundations or "codes".⁷

I start, in section 2 below, with a brief description, in outline, of the democratised vision of property law that I see in *Bengwenyama*. In section 3 below, I turn to the case itself and try to show how this vision of property law is present in the judgment. Finally, in section 4, through tracing *Bengwenyama*'s effect in later cases, I argue the virtue of small things rather than spectacle.⁸

2 Transforming/democratising property law

The values of the Constitution are not aimed solely at the past and present, but also the future.⁹

In a public lecture delivered at the University of Pretoria in 2014, Justice Froneman challenges us "to forge a coherent common vision under the Constitution about what purpose or value the holding of property may have for all our people".¹⁰ Of course, although he makes several suggestions on what the outlines of such a "coherent common vision" might be in the lecture, Justice Froneman, given the nature of his work as a judge does not himself develop this vision. But he does at several points in his jurisprudence align himself with what can loosely be described as visions of a democratised property law that have been developed by several property law scholars of the past two decades. The ideas of these theorists cohere around a common target: what Justice Froneman in his concurring judgment in *Daniels v Scribante* describes as the apartheid common law property system's "absolutisation of ownership and property and the hierarchy of rights it spawned"¹¹ – its concentration of absolute exclusive power over property in the holders of a short list of recognised property rights (most notably ownership). To describe the outlines of this kind of vision of property I take my cue from Justice Froneman¹² and focus on the work of the late André van der Walt, probably the most prominent proponent of this kind of analysis. Van der Walt points out that under apartheid, property law was understood simply as a system of rights – rights to "things". This system of rights showed two significant characteristics.¹³ First, property law

⁷ See in general Van der Walt 2001 *SALJ*.

⁸ See Van Marle 2007 *GLR*.

⁹ Froneman J, in *Daniels v Scribante* 2017 4 SA 341 (CC) (hereafter *Daniels*) para 137.

¹⁰ Froneman "Problem of Property" 2.

¹¹ *Daniels* para 136. See in general paras 133-137.

¹² *Daniels* para 133.

¹³ The apartheid paradigm for property law that Van der Walt describes has also been described as a "contravention paradigm", as opposed to the current, developing "human rights paradigm". See e.g. Pienaar *Land Reform* 668; Boggenpoel *Property*

recognised only a closed list of so-called "real" rights as worthy of its protection – a hierarchised list of rights, with ownership at the apex, followed by a small number of lesser "real" rights. Second, these "real" rights were understood and applied in a peculiarly formal fashion – a-contextually, with a simple, syllogistic relationship between rights and remedies, so that "real right"-holders could exercise an exclusivist remedy against everyone else simply and only because of the fact of having their rights.¹⁴ Van der Walt found this absolutist understanding of property law concerning because of what it enabled holders of real rights to do: to exercise absolute, exclusive control over the "things" to which their rights applied against everyone else, regardless of other individual interests not recognised as rights, context, broader public goals and concerns of fairness and justice. This establishment of zones of absolute, exclusive control in favour of real right-holders, Van der Walt identifies as the basic "code" of apartheid's common law of property.¹⁵

It should be clear how well-suited this property law, based on this notion of affording absolute power to exclude and keep apart to property rights holders was to the spatial and political programme and imaginary of apartheid. But it should be equally clear how uniquely unsuited it is probably to any society, but especially to ours. Property and specifically land, after all, is in our context inevitably subject to many overlapping, entangled interests and concerns, most not recognised as legal rights. The central problem that a new property law should be designed for is how to negotiate that overlap and entanglement, not how to exclude and keep apart.¹⁶ We are also engaged in an ambitious collective programme of reparation for severe past injustice and transformation towards a different, more just society, so that the public good and public, constitutional goals are inevitably overriding concerns in our relationships to property and land. To be able to take account of this context is a crucial requirement for any new re-imagined system of property law.¹⁷ In sum, as Justice Froneman writes in *Daniels v Scribante*, apartheid's "absolutisation of ownership" not only "confirmed and perpetuated the existing inequalities in personal, social, economic and political freedom",¹⁸ frustrating "the rectification of historical injustice". It also prevents the realisation in the context of property of the notion that "the values of the Constitution are not aimed solely at the past and present, but

Remedies 24. See also Liebenberg *Socio-Economic Rights* 311-316, referring to a "new eviction paradigm" in similar terms to Van der Walt's notion of a transforming property law.

¹⁴ Van der Walt *Property and Constitution* 113-116.

¹⁵ Van der Walt *Property and Constitution* 114.

¹⁶ Ngcukaitobi *Land Matters* 137, 150.

¹⁷ Wilson *Transformation of Property* 10-11.

¹⁸ *Daniels* para 136.

also the future"; of the transformation of our relationships to property and to one another concerning property.¹⁹

Consequently, the focus of Van der Walt's transformative property theory work is in light of this analysis on finding ways to disperse or disassemble this notion of absolute power over property, to my mind, to "democratise" property. In kind with others, he proposes to do this in several interlinked ways.

First, he advocates a shift of focus for property law and property rights from *objects* (property itself – "things") to *objectives* – constitutional goals and aims such as "providing restitution of apartheid land dispossessions, ensuring the long-term sustainability of development and the use of natural resources, promoting equitable access to land and housing, and improving security of land holding and housing interests".²⁰ Instead of the system of rights to things that property law was under apartheid, its goal should become to "legitimise and authorise state regulation that would promote constitutional goals or objectives with regard to the overall system of property holdings, proscribe action that would have certain unwanted systemic effects and bring existing law into line with the promotion of these constitutional goals".²¹

This shift from objects to objectives to my mind democratises property law, because it suggests, although not yet a complete de-privatisation of property law, then at least a "post-private" property law, much in the same sense as Karl Klare described the South African Constitution as post-liberal: "embrace[ing] a vision of *collective self-determination* parallel to (not in place of) ... [a] strong vision of individual self-determination".²² Such a property law does not relinquish the purpose of property law to protect individual rights and interests, but emphasises the public aspects and implications of property and the fact that individual interests should be given effect to in a manner that advances public goals. Individual rights such as ownership are contextualised within collective and public concerns. This vision of a "post-private" property law one finds also in more recent work. Ngcukaitobi, for example, proposes that "we should reconsider the exclusive and absolute nature of private title so that the exercise of rights over land is subject to a general public-interest override, provided that such an override is itself constrained by procedural fairness".²³

¹⁹ Daniels para 137.

²⁰ Van der Walt *Property and Constitution* 141.

²¹ Van der Walt *Property and Constitution* 142.

²² Klare 1998 *SAJHR* 153.

²³ Ngcukaitobi *Land Matters* 150-151.

Van der Walt secondly proposes a move from "property to propriety", in terms of which:

a constitutional notion of property exceeds the narrow private law focus on individual property rights and extends to interests in property that are not traditionally recognised or protected in private law, as well as attention for the limits and the effects of rights, considered in a contextual setting, rather than just the rights themselves considered abstractly.²⁴

This amounts to a recognition from among the many different interests that may apply to property in individual cases, all those that in addition to the existing closed list of recognised property rights deserve protection in light of constitutional/public goals. Here, one also hears Ngcukaitobi's concern with unravelling or "untangling" the "mystery of land tenure" to de-center what he calls private freehold and extend legal recognition to a range of other rights and interests.²⁵

This second aspect of Van der Walt's vision of property law is also democratising, because it opens the canon of recognised property interests beyond the closed list of "real" rights recognised at common law, also to those who, in the common law sense, have no legally cognisable interests – it allows outsiders or those "on the margins"²⁶ of property in. This vision of property both grants "recognition and protection to interests that would not have qualified for it according to private law doctrine" and extends the canon of recognised interests by—

requir[ing] the courts to reduce the potential impact of what may seem like trump rights in private law, in accordance with the propriety of giving some recognition and effect to what may seem like unrecognised and unprotected or systemically weak conflicting interests, or of restricting what may otherwise seem like an unlimited or overbearingly strong right.²⁷

The third move Van der Walt proposes involves a shift in the way property law is applied, and property law disputes resolved, away from syllogistic and towards transformative logic and reasoning. Where apartheid property law operated by determining the presence or absence of recognised property ("real") rights in a dispute and then, once those have been identified, mechanically applying the remedies associated with them to the exclusion of any other interests, a transforming property law will focus on mediating

²⁴ Van der Walt *Property and Constitution* 147.

²⁵ Ngcukaitobi *Land Matters* 150-153. See here also Thomas Coggin's argument for interpretation of the term "property" in s 25 of the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution) always in light of the transformative purposes of the property clause, both to validate against attack reform efforts that conflict with existing, traditional property rights and to enable recognition of previously unrecognised interests as worthy of constitutional property protection. Coggin 2021 *CCR* 34-37.

²⁶ Van der Walt *Property in the Margins* in general. See also Fox O'Mahony 2014 *CLP* 411-412.

²⁷ Van der Walt *Property and Constitution* 152.

between all the different interests that apply, in light of both the specific context of the dispute and the historical context of property in South Africa and in a manner that best accords with the systemic public goals of property law.²⁸

Also this third aspect of Van der Walt's vision amounts to a democratisation of property law, because it requires creating for all those holding interests in property, "participatory spaces" within the system of property law. A transformed property law would require participants in property disputes to account for the assertion of their interests within their specific context, the broader historical context, and the context of the overall systemic goals of the property law system. It would also require courts to decide such disputes by pursuing accommodation between competing or overlapping interests in a way that promotes constitutional goals.²⁹ In sum, in a particular expression of the notion of our Constitution's "caring" ethos,³⁰ it requires proper, contextualised *consideration* of and concern for everyone involved in property disputes, rather than the mechanical application of remedies flowing inevitably from abstract rights.³¹ Stuart Wilson has also recently developed this idea further, advocating a transformed property law with spaces within "which ordinary people ... [can] [] shape the terms on which they access land, tenure, and credit".³²

This then, is in broad outline the notion of property law that below I try to show operates in *Bengwenyama*: A system of property law that radically departs from the basic code of apartheid-era property law, namely that its purpose is to allocate absolute power over property in favour of someone or some, one thing, to the exclusion of all else. The goal of this new system of property law is to disperse and dissemble that absolute power; to democratise property law in the three related ways described above: by requiring contextualisation of private interests in land within history and within constitutionally mandated transformative goals; by opening up the canon of recognised property interests; and by resolving property disputes and developing land law through creating participatory spaces within which mutual accommodation rather than trumping and exclusion is sought.³³

²⁸ Van der Walt *Property and Constitution* 151.

²⁹ Van der Walt *Property and Constitution* 152.

³⁰ Cornell and Van Marle 2005 *AHRLJ* 213, 219; Van Marle 2019 *LDD* 204, 206, 215; Klare 1998 *SAJHR* 153; Van der Walt 2001 *SALJ* 303.

³¹ Brand and De Villiers "Street-based People" 102.

³² Wilson *Transformation of Property* 13-14, 11.

³³ An aspect of Van der Walt's understanding of a transforming property law that I do not consider here is the deprivileging of property rights in relation to other constitutional rights such as "life, dignity, free movement, free speech or demonstration rights" (Van der Walt 2014 *J L P & Soc'y* 91 *et seq*). See in general Van der Walt 2014 *J L P & Soc'y* 91 for his description of property in fact occupying a "relatively modest systemic status when compared to the non-property rights".

Of course, this focus on dispersing the absolute power that an unreconstructed notion of property law affords is not a proposal to do away with individual private ownership or, indeed more broadly, strong individual rights to land. There are many reasons related to land use and development and notions of personal freedom, autonomy, and equality why strong individual rights to land, capable of resisting interference from both other private individuals and communal or public power, are indispensable to the quest for justice in relation to property and our relationships to property.³⁴ It is instead thinking about how to relativise private ownership, how to contextualise it within and in relation to the panoply of other individual but also public, common, and cross-generational rights, interests and considerations that apply to property and operate in disputes about property.

3 A democratised property law in *Bengwenyama*

3.1 *Facts and background*

Bengwenyama concerned a review challenge to "the lawfulness of the grant to a company of a prospecting right on the land of another".³⁵ The first respondent, Genorah Resources (Pty) Ltd (Genorah), a black-owned company, was awarded prospecting rights in terms of the MPRDA over two farms, Eerstegeluk and Nooitverwacht, occupied by a community of people (the Community) represented in the litigation by the second and third to thirteenth respondents (the Bengwenyama-Ye-Maswazi Tribal Council and the Trustees of the Bengwenyama-Ye-Maswazi Trust). The Community had occupied Nooitverwacht uninterruptedly for over a century. Although they were dispossessed of Eerstegeluk in 1945 they had since "successfully lodged a land claim for its formal restoration"³⁶ and were for purposes of the MPRDA regarded as owners of both farms. Genorah lodged its application for prospecting rights on Nooitverwacht and Eerstegeluk (and several other properties) with the Department of Mineral Affairs on 6 February 2006. The rights were awarded to Genorah on 8 September 2006. The process in terms of which its application was dealt with and the rights eventually awarded was littered with irregularities and deficiencies in the conduct both of Genorah and the Department. Genorah failed to consult with the Community properly concerning Nooitverwacht and at all concerning Eerstegeluk before they submitted their application, as they were required to do in terms of section 16(4)(b) of the MPRDA. Subsequently, once they had submitted their application and it was under consideration, they again failed in their obligation to notify and consult with the Community. They also did not comply with the requirement in terms of the environmental

³⁴ See e.g. Froneman J in *Daniels* para 134.

³⁵ *Bengwenyama* para 1.

³⁶ *Bengwenyama* para 7.

management plan they had to submit as part of their application to consult with affected persons, concerning the Community. Genorah submitted their financial guarantee for environmental rehabilitation in terms of their environmental management plan, which should have formed part of their application, only a week after they had already been informed that their application had been approved. The environmental management plan itself, approval of which is a prerequisite for the success of an application for prospecting rights, was approved two months after the rights had already been granted to Genorah. In addition, despite the fact that the Community had itself successfully submitted an application for prospecting rights on the two farms by 24 July 2006 and the Department was in regular correspondence with it particularly during September and October 2006, the Community was not notified that prospecting rights had been awarded to Genorah, and only learnt this in early December 2006, when they were informed that their application had been refused because the rights had been awarded to another entity – three months after the fact.

Having learnt that Genorah had been awarded the prospecting rights, the Community lodged an appeal against this decision with the Department in February 2007. In March 2007 they also launched interdict proceedings against Genorah to prevent it executing the prospecting rights pending resolution of the appeal. When the Department finally responded to the appeal in June 2007, it was only to notify the Community that it could not deal with it as the matter had become *sub judice* with their launch of the interdict proceedings in March and that the Community should instead take the matter on review. This they did in the High Court, in August 2007. Their application failed there and on subsequent appeal before the Supreme Court of Appeal, on grounds that their review application had been brought out of time.

On appeal before the Constitutional Court, the Community was successful. Justice Froneman, writing for a unanimous court, upheld the appeal and set aside the decision to grant prospecting rights to Genorah on both Nooitverwacht and Eerstegeluk, on grounds that the decision was invalid for Genorah's failure to consult with the Community; for the Department's failure to notify the Community of its intention to decide Genorah's application for prospecting rights and provide them an opportunity to make representations in objection before the decision was taken; and for the Department's failure to properly consider and decide whether to approve Genorah's environmental management plan before granting it the prospecting rights.

Each of the three aspects of the democratised notion of property law described above is evident in Justice Froneman's judgment.

3.2 *From objects to objectives*

Right from the start of his judgment, Justice Froneman makes it clear that much more than simply the vindication of the individual rights of the parties to the dispute was at stake in the case. The judgment commences with the following:

This case turns on the lawfulness of the grant to a company of a prospecting right on the land of another. This deceptively simple statement of the ultimate legal issue at stake, though true, hides more than it reveals. First, it explains little of the invasive nature of a prospecting right on the ordinary use and enjoyment of the property by its owners. Second, it says nothing about the profoundly unequal impact our legal history of control of and access to the richness and diversity of this country's mineral resources has had on the allocation and distribution of wealth and economic power. Lastly, it does little to illuminate the effect of past racial discrimination on the ownership of land.³⁷

He then proceeds to point out that the Community is no ordinary landowner but a group of people who had been dispossessed of their rights in land under apartheid and had recently successfully claimed those rights back, in this way bringing into consideration the constitutional goal of redress of past wrongs related to land.³⁸ His introduction to the judgment concludes with mention of the centrality to the Constitution of equality, including "the full and equal enjoyment of all rights and freedoms" and a reminder that the MPRDA – the legislation in terms of which the dispute was to be decided – was legislation specifically intended to give effect to the constitutional value and goal of equality in the context of access to mineral resources.³⁹

Thus, the scene is set: the dispute around individual rights is to be decided in a manner that not only accords with but in fact advances the relevant constitutional goals. And this, Justice Froneman then proceeds to do.⁴⁰

After emphasising the constitutional goals that the MPRDA was enacted to give effect to and focussing on section 4 of the Act, which determines that "[w]hen interpreting a provision of the Act any reasonable interpretation which is consistent with the objects of the Act must be preferred to one that is inconsistent with the objects of the Act"⁴¹ he quite explicitly decides each and every issue presented in the case in a manner that advances relevant constitutional goals.

On Genorah and the other respondents' preliminary point, that there was no internal remedy of appeal at the Community's disposal, so that their attempted appeal to the Department served only to delay their launching review proceedings, rendering the review out of time, Justice Froneman

³⁷ *Bengwenyama* para 1.

³⁸ *Bengwenyama* para 2.

³⁹ *Bengwenyama* para 3.

⁴⁰ *Bengwenyama* paras 28-29.

⁴¹ *Bengwenyama* para 30.

holds that there was indeed an internal appeal available⁴² so that the review was not out of time.⁴³ He does so on a close reading of the MPRDA and the facts, but explicitly also because "the fundamental constitutional value requiring a democratic system of government to ensure accountability, responsiveness and openness, and the basic values and principles governing public administration ... are enhanced by [finding the existence of] an internal appeal process".⁴⁴

On the procedural fairness of the award of the prospecting rights to Genorah, Justice Froneman holds that the Community, as a group of people who were in the past dispossessed of their rights to one of their farms and who had since successfully claimed those rights back in terms of the constitutionally mandated restitution process, held in addition to their rights as owners of the farms, "a special category of right ... , ... namely to apply for a preferent right to prospect on their land" that entitled them to notice and an opportunity to make representations before the prospecting rights were awarded.⁴⁵ Again, this conclusion is reached on a close reading of the MPRDA, but the constitutional goals of enabling equitable access to land and other natural resources and ensuring security of tenure to those with insecure access to land are expressly cited as informing this interpretation of the Act and this manner of resolution of the dispute.⁴⁶

3.3 Opening up the canon of recognised property rights

The Community were owners of both Nooitverwacht and Eerstegeluk. Their ownership – the paradigmatic property right at common law – entitled them to the application of the MPRDA and the protection of the provisions concerning notice of an application for prospecting rights on their land and the opportunity to object to such an application.

Despite their in any event already holding ownership, Justice Froneman went further to hold that pursuant to section 104 of the MPRDA they in addition, as a "community" in terms of the Act, held a preferent right to apply for prospecting rights on their land before other applications could be considered and granted. This "special category of right" meant that they were entitled to be notified of Genorah's application and the Department's intention to decide that application ahead of time, so that they could decide whether to launch an application of their own as community, in terms of section 104.

⁴² *Bengwenyama* para 55.

⁴³ *Bengwenyama* para 60.

⁴⁴ *Bengwenyama* para 52.

⁴⁵ *Bengwenyama* para 73.

⁴⁶ *Bengwenyama* para 72.

Strictly speaking it was not necessary for Justice Froneman to decide this issue – as owner of the land the Community was in any event entitled to notice of Genorah's application and an opportunity to resist it through representations to the Department. His doing so nonetheless, indicates to my mind an acute awareness on his part of the fact that a developing "new" property law centrally requires "giving some recognition and effect to what may seem like unrecognised and unprotected or systemically weak conflicting interests" in order to "reduce the potential impact of what may seem like trump ['real'] rights in private law"⁴⁷ (in this case the potential impact upon the Community's interests, including their ownership right, of the mineral rights that Genorah had applied for).

3.4 Property to propriety

The final and probably most significant manner in which I see Justice Froneman operationalising a democratised vision of property law in *Bengwenyama* relates to the way in which property disputes should be resolved – no longer simply through the assertion of rights so that the remedies associated with them may syllogistically follow, but through a process of contextualised mediation of the different interests that apply to the property in issue to reach the proprietary resolution indicated by that context of the dispute.

Justice Froneman's embrace of this notion shows first in his emphasis on the requirements of consultation with interested parties incumbent on both an applicant for prospecting rights and the Department; and in particular the nature and quality of the consultation required. While comprehensively pointing out all the specific "participatory spaces" that an applicant and the Department are required to create in the process of an application within which other interested parties may express and protect their concerns (including imposing on the Department a duty to notify and consult that does not self-evidently arise from the Act), Justice Froneman's focus is clearly on the kind and depth of consultation required. For him, all the requirements concerning consultation in the Act refer to substantive processes of engagement where the parties involved must show a good faith intention and effort to reach an accommodation between the different interests that are asserted; the antithesis of the empty, tick-box approach that Genorah employed in the one instance where it attempted consultation. The quality and depth of the "participatory spaces" that Justice Froneman here envisages come close to Wilson's notion related above, of spaces where "ordinary people ... [can] [] shape the terms on which they access property".⁴⁸

⁴⁷ Van der Walt *Property and Constitution* 152.

⁴⁸ Wilson *Transformation of Property* 13-14, 11.

But perhaps more poignantly and powerfully, Justice Froneman's appreciation of this notion shows second in his clear understanding of the fact that property disputes no longer pit rights against one another but concern instead how the participants in the dispute relate to one another and can negotiate their dispute.⁴⁹ During his description of the facts of the case Justice Froneman relates how Genorah's one and only attempt at engagement with the Community consisted of their representatives visiting the Community's traditional leader, Kgoshi Nkosi and after a brief meeting, leaving a prescribed consultation form with two blocks ("Yes"/"No") to indicate whether or not there are any objections to the planned application for prospecting rights, and five lines underneath in which to set out the objections should there be any. Although this form was never filled out or signed by the Community, it did elicit a response from Kgoshi Nkosi, in the form of a letter, as follows:

Subject: Your Notice and Consultation application for a prospecting right on Nooitverwagt 324 KT to Bengwenyama.

Response: Your letter that notifies us or rather consults us about your interest in our land had been received. As your letter requires us to enable you to comply with relevant provisions of the Act, as well as completion/filling of the form attached, we would like to advise that Bengwenyama-ya-Maswati would do that, once we know each other. For now, we don't know each other well. The form that you request us to complete, seems to be more binding, as it does not fall within the definition of our standard letter that we give to Companies that applies for similar rights.

Bengwenyama-ya-Maswati has an interest in the Property you applied for. We submitted an application for prospecting on three farms including Nooitverwacht 324 KT.

The good luck wished to ourselves and other companies in an attempt of getting similar rights are also wished to your Company.

The contrast between Genorah's approach and the Community's response could not be clearer. Kgoshi Nkosi emphasises throughout that the fact that Genorah plans to submit an application for rights on his community's land does not in the first place pit them against one another in competition, but instead creates a relationship between them that is likely to endure for some time and will have to be negotiated somehow. He offers to complete the form left with them but only once they have gotten to know one another, emphasising that at that point they do not. He refers to other applications by other entities and to the Community's own. He concludes by wishing Genorah the same luck with their application that he wishes other applicants and himself and his community. Genorah makes one visit, leaves a tick-box

⁴⁹ See in general concerning this, in addition to Van der Walt *Property and Constitution*, also Van der Walt 2014 *J L P & Soc'y*.

form to be filled out and then makes no further contact, not even in response to the Kgoshi's letter.

Equally clear is Justice Froneman's appreciation of the Community's approach and his disapproval of Genorah's. After relating the Kgoshi's letter he writes only, but tellingly: "To this old-worldly and courteous response Genorah did not reply".⁵⁰ Further on in the judgment, he again mentions that "despite the letter addressed to it by the Kgoshi, dated 13 March 2006, Genorah made no further attempt to engage or consult with the Community".⁵¹ Although he deals with neither the Kgoshi's letter nor Genorah's failure to respond in any more depth than this, one cannot escape the impression that to him this particular exchange was telling and his appreciation of the Kgoshi's engaging, collaborative approach and disapproval of Genorah's silence coloured his entire consideration of the adequacy and good faith or otherwise of Genorah's and the Department's conduct throughout the process.

4 In conclusion: In defence of small things/against spectacle

The fact that Justice Froneman, in 2009, while Van der Walt and others were still in the process of formulating coherent visions of a democratised property law simply "did" the central features of such a vision in his judgment is in itself remarkable. But apart from that, why is it important to take account of the property law implications of the *Bengwenyama* judgment today?

Since the Economic Freedom Fighters introduced their motion to amend section 25 of the Constitution to allow for "expropriation without compensation" in February 2017,⁵² our debates about property and specifically land – political, policy and law reform – have been dominated by sweeping, grand-scale analyses and proposals for dramatic, once-and-for-all solutions. The history of land is often described exclusively as one of dispossession/loss/theft, creating a pressing current need for restoration, above and before all else. The most prominent proposals for solutions – the ANC proposal for amendment of section 25 to allow for expropriation without compensation and the EFF proposal for "state custodianship of all land" – both focus on enabling the state to take land without having to pay for it, so that it can be "given back", and are as a consequence of the same scale and scope.

The framing of the debate in this manner has long past been described as reductive: in Cheryl Walker's terms, this "grand narrative of loss and

⁵⁰ *Bengwenyama* para 10.

⁵¹ *Bengwenyama* para 13.

⁵² Mokoena 2018 <https://www.parliament.gov.za/news/national-assembly-debates-motion-land-expropriation>.

restoration" although on its own terms undoubtedly true, is "too simple", and "does not tell the full story, or enough of the story, to sustain a satisfactory resolution of the plotline it sets up".⁵³ This is so, because it loses sight of several intractable problems in landholding that have nothing to do with an actual loss and claim for restoration, such as how to secure tenure for the existing landholding of those many who have access to land but do not enjoy the protection of the law; and how to generate access to land for those who have never had it and so could never – at least not in any particular sense – lose it. This is so also, because it fails to account for what happened in the more than 40 years that have passed since actual dispossessions until restoration became possible in the early 1990s.⁵⁴ This is so finally, because it fails to account for the loss and restoration as part of a broader story of social change – to relate the project of reversal and redress to "other programmes of social development" and to "mesh its own priorities with other constitutional commitments to justice, socio-economic development and equality"⁵⁵ – in Justice Froneman's terms, because it fails to respond to the fact that "the values of the Constitution are not aimed solely at the past and present, but also the future".⁵⁶

Also the grand-scale solutions offered to the land question on the basis of this framing of the problem have been criticised as overly simplistic, as our failure to effect justice concerning land in South Africa has been shown to have little to do with the unavailability of land or the state's inability to acquire land and far more with dramatic under-resourcing; administrative incapacity and, depressingly often, maladministration and corruption; and a lack of appropriately directed policy and political will.⁵⁷ I have further argued elsewhere that these solutions run the risk of working out to be positively anti-transformative, because both fail to break with and so mirror and indeed confirm the basic code of apartheid land and property law, namely that somewhere, someone or something must always hold absolute power over land and property that can be exercised to the exclusion of all else. This is true of the ANC proposal for "expropriation without compensation" because it contemplates as the main solution to the problem of the seizure of land simply taking land and giving it back to individual people or communities in the same untransformed form of ownership as operated under apartheid. This is less obvious although no less true about the EFF's proposal for "state custodianship of land"⁵⁸ as, by affording the state exclusive control over certain or all land, it replicates the control the state could exercise

⁵³ Walker *Land-Marked* 16.

⁵⁴ Walker *Land-Marked* 16.

⁵⁵ Walker *Land-Marked* 17.

⁵⁶ *Daniels* para 137.

⁵⁷ Ngcukaitobi *Land Matters* 206, 212-13.

⁵⁸ EFF 2021 https://pmg.org.za/files/210702State_Custodianship_of_Land-Updated.docx.

concerning land against black people under apartheid and replicates (as did apartheid statutory land law) the absolute control that ownership under apartheid common laws afforded private owners.⁵⁹

In contrast to these large-scale analyses and solutions, the small moves that Justice Froneman makes in *Bengwenyama* – not abolishing or even challenging the notion of privately held mineral rights, but simply tweaking legislation through interpretation, to bring to the fore the existence of rights to property not previously recognised and deepening and making more robust the existing requirements of consultation and engagement when decisions are taken that would affect those and other rights to land – seem almost inconsequential. Nonetheless, within eight years after it was decided, *Bengwenyama* proved to be extraordinarily impactful in the context of land rights disputes in mining.

The basic principle that Justice Froneman established in *Bengwenyama* that all requirements imposed on applicants for mineral rights or mineral rights holders to consult with the holders of surface rights to the land concerned should be interpreted substantively, to require "negotiation and ... agreement" and "engagement in good faith to attempt to reach accommodation ... in respect of the impact on the [surface right-holder's] right to use his land",⁶⁰ has led to the creation of particularly robust participatory spaces in the process of acquisition and implementation of mineral rights such as prospecting rights – often to the strong advantage of otherwise marginalised and disempowered communities. In *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited (Maledu)*,⁶¹ the

⁵⁹ Brand "Setting our Transformation Sights too Low" 21-22. I refer here not in any general way to the power of the state to interfere with property rights or ownership. Such power is of course indispensable for transformation of property and land law and indeed transformation more generally. Instead, I am concerned with, in the EFF's case, the notion that the *absolute* control that ownership affords should be taken from private owners and then in absolute terms transferred to the state through so-called "state custodianship of land". Not only does this uncomfortably mirror the absolute power concerning land that the Apartheid state held over black South Africans. In those two instances in which in current South Africa such absolute state control has been attributed to the state (mineral rights in terms of the *Mineral and Petroleum Resources Development Act 28 of 2002* (the MPRDA) and emerging farmer leases in terms of the State Land Lease and Disposal Policy (SLLDP) of 2013 (DRDLR 2013 <https://www.griquas.com/landact.pdf>; see also the more recent Beneficiary Selection and Land Allocation Policy, 2020 DRDLR 2020 https://www.gov.za/sites/default/files/gcis_document/202001/42939gon2.pdf)) the impact of the absolute control afforded the state has not been transformative and it has instead been used for patronage and the exercise of political control. See Claassens and Matlala "Platinum, Poverty and Princes" in general and Hall and Kepe 2017 *Review of African Political Economy* 8. The issue, that is, is not control but *absolute* control.

⁶⁰ *Bengwenyama* para 65.

⁶¹ *Maledu v Itereleng Bakgatla Mineral Resources (Pty) Limited* 2019 2 SA 1 (CC) (hereafter *Maledu*).

Constitutional Court held that the grant of a mineral right does not automatically extinguish informal rights to the land to which it applies, held in terms of the *Interim Protection of Informal Land Rights Act 31 of 1996* (IPILRA). Instead, these informal rights could only be deprived (and a mineral right executed) with the consent of their holders. For communally held land this consent could only be obtained at a meeting of which all actual right holders had prior notice and in which they had a reasonable opportunity to participate.⁶² The Constitutional Court also held that the grant of a mining right does not, in and of itself, entitle its holder to evict surface right holders to the land in question such as owners or holders of rights in terms of IPILRA. Before it could obtain an eviction order it would have to show that it had made exactly the good faith and reasonable attempt to achieve the accommodation of the surface right holders' interests that was established in *Bengwenyama*, which had failed.

Some of the implications of *Maledu* were in turn shown in *Baleni v Minister of Mineral Resources*, where the North Gauteng High Court held that a mining right could not be granted to an applicant mine on land occupied in terms of IPILRA rights by the *Umgungundlovu* community unless the community themselves had given their free and informed consent to be deprived of the informal rights to the land in question.⁶³ Furthermore, in *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy*, the Eastern Cape High Court set aside the grant of exploration rights to the Shell Oil Company in terms of which they sought to conduct a seismic survey of the ocean floor off parts of the Eastern Cape, on the basis that Shell had not properly, in terms of the "thick" conception of consultation established in *Bengwenyama*, consulted with communities who held subsistence fishing rights in the area, with the spiritual rights associated with those.⁶⁴

Maledu, *Baleni* and *Sustaining the Wild Coast NPC* illustrate clearly the final point of this article. True transformation, in the sense envisaged, for example, by Drucilla Cornell – "change radical enough to so dramatically restructure any system – political, legal, or social – that the 'identity' of the system is itself altered"⁶⁵ – of property law is not achieved through wholesale replacement of the current system with another, such as the ostensible doing away with private ownership through introduction of "state custodianship of all land", or removal of certain central pillars of the system. As briefly mentioned above, such grand gestures run the risk of mirroring that which it replaces and so operating in an anti-transformative fashion.

⁶² *Maledu* paras 107-108. For a discussion of *Maledu*, see Meyer 2020 *PELJ*.

⁶³ *Baleni v Minister of Mineral Resources* 2019 2 SA 453 (GP). For a discussion of *Baleni*, see Meyer 2020 *PELJ*.

⁶⁴ *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* 2022 6 SA 589 (ECMk).

⁶⁵ Cornell *Transformations* 1.

Indeed, we stand forewarned of this by Van der Walt,⁶⁶ who, relying on Ndebele,⁶⁷ decries the oppositional nature of what he calls "toy-toyi" land jurisprudence:

In the confrontational stand-off of challenge and demand the reform process derives its power and its dynamics from its position of confronting and facing the other, waiting for something to be given or done by the other. The inherent recognition of the confronted other as the source of injustice is also understandable in this aesthetic, but the aesthetic and rhetorical implication is that the confronted other is still recognized as the source of power, even at a time when political power has already been wrested away from the other.

Instead, true transformation requires painstaking engagement with the particulars of the system, the codes that sustain it – working from within, with small steps, to change the system from within to alter its very identity.⁶⁸ This is the legacy that Justice Froneman left us with *Bengwenyama*.

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⁶⁶ Van der Walt 2001 *SALJ* 292-293.

⁶⁷ Ndebele 2000 *Social Dynamics* 47: "[I am] bothered by the phenomenon of a black majority in power, seeming to reduce itself to the status of complainants as if they had a limited capacity to do anything more significant about the situation at hand, than drawing attention to it. It is not that the complaints have no foundation, on the contrary the foundations are deeply embedded in our history. But I cannot shake off the feeling that the galvanizing of concern around racism reflects a vulnerability, which could dangerously resuscitate a familiar psychology of inferiority, precisely at that moment that the black majority ought to provide confident leadership through the government they have elected.

I worry that the complaining may confusingly look like a psychological submission to 'whiteness' in the sense of handing over to 'whiteness' the power to provide relief. 'Please, stop this thing!' seems to be the appeal. 'Respect us.' I submit that we moved away from this position decisively on April 27, 1994. We cannot go back to it. It should not be so easy to give up a psychological advantage."

⁶⁸ Van Marle 2003 *SAJHR* in general but specifically at 241, 243 and 250-251 for an argument linking transformative interpretation with an appreciation of particularity, rather than generality or spectacle.

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List of Abbreviations

CCR	Constitutional Court Review
CLP	Current Legal Problems
DRDLR	Department of Rural Development and Land Reform
EFF	Economic Freedom Fighters
GLR	Griffith Law Review
IPILRA	Interim Protection of Informal Land Rights Act 31 of 1996
J L P & Soc'y	Journal of Law, Property and Society
LDD	Law, Democracy and Development
MPRDA	Mineral and Petroleum Resources Development Act 28 of 2002
PELJ	Potchefstroom Electronic Law Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	Southern African Public Law