

CASE NOTE

Judicial Marginalization of Communal Land Tenure in South Africa: A Critique of *CASAC v Ingonyama Trust*

Thomas Coggin 

School of Law, Faculty of Commerce Law and Management, University of the Witwatersrand, Johannesburg, South Africa
Email: thomas.coggin@wits.ac.za

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Abstract

The South African case, *Council for the Advancement of the South African Constitution and Others v Ingonyama Trust and Others* (CASAC) concerned a dispute between customary law communities and the Ingonyama Trust (the Trust). The Trust, which holds the land for the benefit and welfare of its communities sought to unilaterally convert customary land tenure to common law leaseholds. The communities successfully challenged this decision before the Kwazulu-Natal High Court and, in this case note, I appraise the court's reasoning. Although the order was progressive, there remained space within its reasoning to affirm customary law tenure on its own accord. Instead, the CASAC court restrained the development of customary law by employing other sources of South African law – including statutory law, the common law and the Constitution – to explain and give meaning to customary law land rights. Courts must exercise caution in engaging the plurality of land tenure in post-colonial contexts: although well-intentioned, the judicial reasoning in CASAC marginalized the application and development of customary land law.

Keywords: customary land tenure; customary law; indigenous land tenure; indigenous law; Ingonyama Trust; property law

It is possible to characterize South African land governance through a plurality of systems, formal and informal. The formal, common law system of land ownership dominates this environment, characterizing an owner's real right of ownership as conferring dominium over land and granting the owner several powers, such as alienation, encumbrance and use.¹ However, as a colonially imposed system, the common law of ownership sits uncomfortably with alternative land governance systems. These include informal and customary forms of land governance. Both informal and customary land rights are protected to a degree through various statutory laws, and customary land tenure is recognized as a component of customary law, which is held up in the South African Constitution (the Constitution) as an original source of law by itself. Neither informal land rights nor customary land rights are venerated in dominant, predominantly common law frameworks as a system of value.²

In the South African province of Kwazulu-Natal, indigenous-governed land is held in community of trust by the Ingonyama Trust (the Trust), a recognized traditional authority. The authority holds

1 On common law ownership and its entitlements, see in general G Muller et al *Silberberg and Schoeman's The Law of Property* (6th ed, 2019, LexisNexis Durban) at 104–105.

2 On the value of plural tenure systems, see K Patel "The value of secure tenure: Ethnographic accounts of how tenure security is understood and realised by residents of low-income settlements in Durban, South Africa" (2013) 24 *Urban Forum* 269 at 273.

the land for the benefit and wellbeing of the communities living within it, and customary law and practices govern land and resource governance within these areas.³ The Kwazulu-Natal High Court decision in *Council for the Advancement of the South African Constitution and Others v Ingonyama Trust and Others* (CASAC) concerned a dispute over customary land rights between residents living within trust-owned land and the Trust.⁴ In this case note, I appraise the court's reasoning and approach to reconciling the diverse land governance systems in the dispute, and I critique the decision for providing insufficient latitude to the legal plurality underlying the communities' land claim. This lack of latitude manifested in three ways. First, the court treated the residents' customary law right interchangeably with informal land rights protected in statutory law, diluting in the process both customary law land rights and informal land rights. Second, the court framed the residents' customary law right in terms of common law frameworks, further diluting the content of the customary law right by not developing customary law on its own accord. And third, the court missed an opportunity to frame the complexity and plurality of the residents' claims in terms of a constitutional right in "property".

The facts and decision in *CASAC v Ingonyama Trust*

CASAC concerned a dispute between the Trust and residents living on land held by the Trust. Recognized in terms of the Kwazulu Ingonyama Trust Act 3KZ of 1994 (the Act), this land encompasses over 2.8 million hectares, covering a population of 5.2 million people and consisting of over 250 traditional councils.⁵ Section 3 of the Act transferred all land and real rights from the state to the Trust. This land was vested previously in the Government of Kwazulu, a territory which formally become part of the Republic of South Africa upon the transition to democracy in 1994. This supposedly semi-autonomous regime of Kwazulu was a key component in propping up the apartheid state and its separate development policy.⁶

This trusteeship held by the Trust over the land does not equate to ownership; rather, section 2(2) of Act provided that the Trust *holds* the land for the "benefit, material welfare and social well-being of the members of the tribes and communities" living on the land.⁷ This is a key component to recall in studying contestation over customary land tenure; there is a default to assuming Trust *ownership* over the land.

Land within this Trust is however owned individually in terms of customary governance practices. These practices embody a "nested" system of land administration. Cousins identifies several features of customary land governance, including that land rights are "embedded in a range of social relationships and units", are "inclusive rather than exclusive in character" and are derived from "accepted membership of a social unit".⁸

3 It is also likely that indigenous law and practices govern land and resources *beyond* these areas, and in conjunction with common law precepts. The converse is also true: aspects of common law and statutory law find application within trust-held areas of land. On this complexity of land governance, see S Mbatha and K Mchunu "Tracking peri-urban changes in eThekweni municipality: Beyond the 'poor-rich' dichotomy" (2016) 9/3 *Urban Research & Practice* 275; S Mbatha and M Ngcoya "Peri-urban land transactions: The new geographies and cultures of peri-urban land in eThekweni municipality" (2019) 99/1 *Transformation: Critical Perspectives on Southern Africa* 1; M Pieterse and T Coggin "Property's shadow: Governing land and plurality in Durban, South Africa" (2023) 47/6 *International Journal of Urban and Regional Research* 1013.

4 *Council for the Advancement of the South African Constitution and Others v Ingonyama Trust and Others* [2021] ZAKZPHC 42; 2022 (1) SA 251 (KZP) (CASAC).

5 Available at <www.ingonyamatrust.org.za> (last accessed 10 October 2022).

6 On Bantustan nation-building as a key component of apartheid separate development, although with a specific focus on Bophuthatswana, see PS Jones "From 'nationhood' to regionalism to the North West Province: 'Bophuthatswananess' and the birth of the 'New' South Africa" (1999) 98 *African Affairs* 509.

7 Kwazulu-Natal Ingonyama Trust Act 3KZ of 1994, sec 2(2).

8 B Cousins "Characterising 'communal' tenure: Nested systems and flexible boundaries" in A Claassens and B Cousins (eds) *Land, Power and Custom: Controversies Generated by South Africa's Communal Land Rights Act* (2008, UCT Press)

This nested land administration system is influenced further through the continued everyday application of apartheid-era land tenure systems. Davis and Corder highlight four types of these apartheid-era tenure systems governing land in in apartheid-era “Bantu areas”⁹ – two on formally surveyed land and two on *unsurveyed* land. First, certain individuals or groups could hold freehold tenure on surveyed land, akin to a common law real right in land; however, the authors considered the extent of the title to not be “of great significance proportionately”.¹⁰ Second, the state recognized a limited form of tenure on surveyed land in the guise of quitrent title. Quitrent was an executive power, denoting a “restricted property right” issued only to “approved persons”.¹¹ The restrictions on land included that individuals could not transfer, mortgage or lease quitrent title without approval and could not transfer title unless noted in a specific register. Accordingly, quitrent title was neither a full right of ownership nor was it even commonplace “due to ignorance ... or unwillingness to participate in the system”.¹²

Unsurveyed land was characterized by two forms of tenure. First was communal tenure registered either in the name of the “minister of Development Aid or the state president in trust for a tribe”.¹³ Second was “trust tenure” – land registered in the name of the South African Development Trust¹⁴ and acquired by allotment on unsurveyed land through the state or inheritance or gift among individuals.¹⁵ It is this latter form of tenure which formed the basis of CASAC. Known as a permission to occupy (PTO), this allotment was conferred in writing in terms of Proclamation 188 of 1969.¹⁶

The PTO granted permission to a person to occupy a specified area of Trust land for a specified purpose. These purposes could include an arable or residential allotment, a church allotment, a trading allotment or a school allotment.¹⁷ Arable or residential allotments could not be hypothecated, transferred, leased or sub-let to a person who was not a “Bantu”, and any disposal to a “Bantu” could not take place without the approval of the Bantu affairs commissioner.¹⁸ This title was weakened further by the state’s power to grant a right of way over the allotment for mining or prospecting purposes.¹⁹ The minister of Bantu administration and development had the power to either suspend or terminate rights in arable or residential allotments if he deemed it “expedient in the interest of the State or the Trust or in the general public interest to do so”.²⁰ These powers were subject to compensation and the option of being offered “other land in an area set aside for residential purposes of elsewhere in a Bantu area”.²¹

The state retained the PTO certificate system through the transition to democracy by enacting the KwaZulu-Natal Land Affairs Act 11 of 1992 (KZLA Act). Chapter XI of the KZLA Act empowered the minister of land affairs to grant and record PTOs in the prescribed manner after consultation with traditional authorities. PTOs conferred the holder a right to use and improve the allotment,

109 at 129. See also R Kingwill “Lost in translation: Family title in Fingo village, Grahamstown, Eastern Cape” in H Mostert and T Bennett (eds) *Pluralism and Development: Studies in Access to Property in Africa* (2011, Juta) 210.

9 These areas extended beyond KwaZulu, and included the so-called independent states of the Transkei, Venda, Bophuthatswana and the Ciskei, and other “homelands” such as KwaNdebele, Lebowa and QwaQwa. The term “Bantu areas” is defined in sec 25(1) of the Bantu Administration Act 38 of 1927, read with sec 21(1) of the Bantu Trust and Land Act 18 of 1936.

10 D Davis and H Corder “Restructuring the rural economy: Legal issues” (1990) 5/2 *SA Public Law* 157 at 159.

11 Ibid.

12 Ibid.

13 Ibid.

14 Id at 160.

15 J Olivier, N Du Plessis and W Pienaar “Legislation affecting land: An overview” (1990) 5/2 *SA Public Law* 266 at 273.

16 Proclamation R188, 1969, promulgated in terms of the Bantu Administration Act 38 of 1927, read with the Bantu Trust and Land Act 18 of 1936.

17 Proclamation R188, sec 47(1)(a).

18 Id, sec 56(1)(a)(i) and (ii).

19 Id, sec 57(1)(b) and sec 57(2).

20 Id, sec 58(1).

21 Id, sec 58(5).

and the right endured for the life of the holder.²² The right could be ceded or disposed of by the PTO-holder to another party,²³ and section 26 of the KZLA Act enabled a holder to strengthen and formalize their rights by having the land surveyed and by acquiring a deed of grant in the plot.²⁴

Consequently, PTOs took on a new meaning through customary law and practice, one which denoted in practice a customary law right. This is apparent in litigants using a PTO to secure occupational rights to their land, as is visible in *CASAC* and *Twelve Apostles Church*.²⁵ The latter case is characterized by a dispute between two parties claiming access to the same space, one in terms of a lease agreement granted to the applicant by the Trust,²⁶ and the other in terms of a PTO inherited by the respondent from the previous holder of the right.²⁷ The respondent was successful in proving that the “PTOs or pre-existing rights of occupation”²⁸ could not be “infringed or over-ridden by the leases concluded”²⁹ with the applicant. This conclusion confirmed the respondent’s view that the PTO “satisfactorily proved that the property *belonged*”³⁰ to the respondent.

The legal status of the PTO certificate is thus contested: one party may view the PTO as signifying an already-existing customary law right to the property, while a traditional authority may believe its “ownership” over Trust land entitles it to convert the holding to a leasehold. This contestation is further amplified by the PTO’s origin as an apartheid-era legal instrument, intended to denote *less-than-ownership* rights. And yet, despite this origin, PTOs are now used by holders to signify *actual* ownership rights within customary law and practice. These contradictions illustrate the complexity of PTOs: communities and traditional leaders view their legal strength differently, and their meaning in customary law and practice contradicts their original statutory purpose.

These contradictions can be interpreted within legal pluralism, a theoretical framework concerned with the ways in which “multiple networks of relations ... cross bounded domains”.³¹ Legal pluralism highlights how individuals “strategically operate among plural normative and procedural regimes”, offering several “ports of entry” into a “world of multiple overlapping legal and quasi-legal systems”.³² This plurality, however, can be undercut by the dominance of the hierarchical, linear and singular³³ logic of formal law: the Trust’s “ownership” right and the certainty of the statutory provision underpinning the PTO. Both sets of “formal” law obscure the complexity of the social relations that exist in practice, in the process denying “any legitimacy or authority to any other co-existing spaces embodying forms of law or temporality that do not follow its template”.³⁴

This delegitimization is an issue in many post-colonial contexts: as McAuslan remarked:

“[customary] tenure then is *and always has been* one of the foundational elements of the land law of all states in Africa. It is not an add-on to the received law; the strict legal position is in

22 Kwazulu Natal Land Affairs Act 11 of 1992, sec 25(2).

23 *Id*, sec 25(4).

24 *Id*, sec 26.

25 *The Twelve Apostles Church in Christ and Another v The Twelve Apostles’ Church in Christ and Others* [2017] ZAKZDHC 41 (12 October 2017).

26 *Id*, para 22.

27 *Id*, para 29.

28 *Id*, para 93.

29 *Id*, para 93.

30 *Id*, para 44 (emphasis added).

31 A Griffiths “Thirty-six years on: Revisiting People’s Law and State Law: The Bellagio Papers” (2021) 53/3 *The Journal of Legal Pluralism and Unofficial Law* 330 at 337.

32 PS Berman “Understanding global legal pluralism: From local to global, from descriptive to normative” in PS Berman (ed) *The Oxford Handbook of Global Legal Pluralism* (2020, Oxford University Press) 20.

33 Griffiths “Thirty-six years on”, above at note 31.

34 *Ibid*. See also B Davy “After form: The credibility thesis meets property theory” (2018) 79 *Land Use Policy* 854.

fact the reverse. Received or imposed law – common law, civil law, Roman-Dutch law – is the add-on: it is therefore that law which should be adapted or adjusted to the indigenous law, not vice versa.”³⁵

The prevailing sentiment in legal culture is otherwise, and so rights held customarily by individuals and communities, as developed through everyday cultural practices, are tenuously held within the dominance of “formal” sources of law.

This precarity was evident in CASAC. In April 2007, the Ingonyama Trust Board (the Board) unilaterally decided that PTOs would no longer be issued, and that existing PTO rights would be converted to lease agreements between individual residents and the Board.³⁶ Occupants would have to pay rent to the Board.³⁷ The Board effected the change for three reasons: first, the PTO was a vestige of racially-based land tenure; second, its security of tenure was vulnerable and third, it was “uneconomic and unsustainable in that a PTO holder is only liable to pay R48 per annum forever, irrespective of the size and the use of the land”.³⁸ The conversion process was presented to residents as an upgrade to the PTO system of land tenure, and residents were dissuaded from registering PTO rights.³⁹

The applicants challenged this decision on two principal bases. First, the decision ignored the residents’ customary law right, disregarding in the process that in terms of Zulu customary law, persons living on the land are the “true and beneficial owners of Trust-held land”, and not the Trust itself.⁴⁰ And, second, the decision disregarded the statutory land rights of residents to land, held in terms of either the permission to occupy or “other informal rights to land protected under the Interim Protection of Informal Land Rights Act 31 of 1996 (‘IPILRA’).”⁴¹ IPILRA is an interim piece of legislation that is subject to annual renewal, and is geared towards protecting the beneficial occupation of land by a community, who hold an informal right to land through a customary law or practice of a tribal community.⁴²

The crux of the dispute in CASAC was therefore whether the PTO certificate conferred a right less than ownership and thus could be converted to a lease agreement, or whether the PTO certificate conferred a property right which would be stronger in law than a leasehold – protected through customary law and/or through statutory law.

Discussion

Customary law

The order was framed on two bases: Zulu customary law and statutory law. In terms of the former, the court drew on the evidence of an academic working in the field of customary law. The court noted that under customary law, the Trust neither has “exclusive rights to own, control and regulate Trust-held land, nor does it have an unfettered right to deal with such land”.⁴³ Instead, the land is owned by the community, and both “communal and individually owned land is defended by all members of the community concerned against attack or interference by outsiders”.⁴⁴

35 P McAuslan “Legal pluralism as a policy option: Is it desirable, is it doable?” (paper delivered at the UNDP International Land Coalition Workshop: “Land rights for African development: From knowledge to action”, Nairobi, 31 October–3 November 2006).

36 CASAC, above at note 4, para 46.

37 Ibid.

38 Id, para 48.

39 Id, para 49.

40 Id, para 14.

41 Ibid.

42 Interim Protection of Informal Land Rights Act 31 of 1996 (IPILRA), sec 1(1).

43 CASAC, above at note 4, para 95.

44 Id, para 136.

Each family head is “allotted a family home site, arable land and a right to graze his livestock on pasture lands”.⁴⁵ This land is allotted:

“to an individual without requiring anything in return in the nature of a purchase price or rental. The individual’s holding of a portion of the land allotted to him or her is sacrosanct in that it is inviolable and passes from generation to generation ... It becomes the property of the individual’s family ... [and the] owner ... acquires an exclusive right to its use.”⁴⁶

This exclusive right of use is connected to an individual’s membership of the relevant tribe or community, and an owner’s entitlement to land includes the power of transfer to any other person willing to be part of that community and to “owe allegiance to the inkosi of the area concerned”.⁴⁷ Accordingly, the court agreed with the expert’s view that the “payment of regular rental for land to traditional authorities is an unknown phenomenon under Zulu customary law”.⁴⁸

Framing the right within customary law is to be welcomed: section 39(3) of the Constitution recognizes legal plurality in South Africa. This section provides that the “Bill of Rights does not deny the existence of any other rights or freedom that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill [of Rights]”.⁴⁹ Moreover, section 211(3) of the Constitution mandates a court to apply customary law when that law is applicable.⁵⁰ Accordingly, it is possible for a court to validate a customary law right on its accord, this being as practiced and as experienced through everyday life. This position was confirmed by the Constitutional Court in *Alexkor*: the court noted that the “Constitution acknowledges the originality and distinctiveness of customary law as an independent source of norms within the legal system ... In the result, customary law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law”.⁵¹

Statutory law

Although the CASAC court goes a long way towards recognizing Zulu customary law as an independent source of law as practiced and experienced every day, it subsequently weakens the customary law right by treating it interchangeably with an informal right. This likely stems from the court’s difficulty situating the PTO right within customary law, perhaps due to the fact that the PTO right is a statutory apartheid vestige, which historically conferred less-than-ownership rights, but which now signifies customary land ownership. This lack of reconciliation between sources of law is most apparent when the court concludes that the lease agreement “severely and adversely affected PTO rights, *and* the customary law rights to land, *as well as* the informal rights to and interests of the residents in Trust-held land”.⁵² Which source of law is implicated?

The court enters this realm through the applicant’s use of section 2 of IPILRA, which affirms that a customary law right – defined in the act as an informal right to land – can only be deprived in terms of the applicable customary law. The applicant’s use of section 2 makes sense given the way in which it bolsters the protection of the customary law right. As noted by the Constitutional Court in *Maledu v Itereleng*,⁵³ “IPILRA ensures that [customary law] communities have a right to decide what should

45 Id, para 96.

46 Id, para 96.

47 Id, para 98.

48 Id, para 99.

49 Constitution of the Republic of South Africa, sec 39(3).

50 See also D Mailula “Customary (communal) land tenure in South Africa: Did *Tongoane* overlook or avoid the core issue?” (2011) 4 *Constitutional Court Review* 74 at 107–10; M Pieterse “It’s a ‘Black thing’: Upholding culture and customary law in a society founded on non-racialism” (2001) 17/3 *South African Journal on Human Rights* 364.

51 *Alexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC), para 51.

52 CASAC, above at note 4, para 157 (emphasis added).

53 *Maledu and Others v Itereleng Bakgatla Mineral Resources* [2018] ZACC 41 (25 October 2018).

happen to land in which they have an interest. It offers communities legal protection to assume control over and deal with their land according to customary law and usages practiced by them”.⁵⁴ The CASAC court provides that there was no consent apparent for the conversion project, which would need to be “genuine and informed”, based on “substantial knowledge concerning the nature and effect of the transaction” and “given freely, without duress or deception, and with sufficient legal competence to give it”.⁵⁵

While this outcome is correct, there is no clarity on the nature of the right subject to unlawful deprivation in the first place. The applicant’s use of IPILRA was not to replace their reliance on the customary law right, but this is nevertheless what the court achieves when considering whether the lease agreements adversely affected the residents’ PTO rights. The applicants pleaded IPILRA partly to assert that any deprivation of an informal right to land – including one grounded in customary law – could only be done in terms of the custom or usage of that community,⁵⁶ and partly to provide an alternative land right should the customary law right fail.⁵⁷

In reaching a conclusion of unlawful deprivation, without developing the underlying right, the court fails to extrapolate the content or nature of either a customary law land right, or an informal right to land protected or established through statutory law. Instead, the ostensibly interchangeable nature of both sources of law renders their content relatively empty, hollowing each out in the process.

The correct approach should have been to maintain the establishment of the customary law right on its own accord, one that is defined through everyday use and practice, and which may be signified in specific communities by legal instruments, such as the PTO certificate. The content of the customary law right is thus developed in terms of its inherent depth, and the right is not conflated with an informal right. The use of IPILRA should have been confined to protecting against the deprivation of the customary law right, and not to act interchangeably as a replacement of the customary law right.

This is important for four reasons. First, the use of IPILRA as protecting a customary law right may end up failing to develop customary law. Instead of developing the content of the customary law right itself, there is evident an unconscious default to treating customary law as inherently weak. To be sure, customary law is marginalized within a broader legal pluralism, but a court’s unwillingness to develop it on its own accord only exacerbates this marginalization. No one seems confident that customary law can and must serve its own independent role as a source of law. This lack of development stands in marked contrast to uses of the common law and constitutional law.

Second, it cannot be said that IPILRA replaces or regulates customary law land rights. As the Supreme Court of Appeal noted in *Gongqose*, section 211(3) of the Constitution mandates that “the injunction to apply customary law is not rendered subject to any legislation generally, but only to ‘legislation that specifically deals with customary law’”.⁵⁸ Writing on *Gongqose*, Bishop argues that customary law “rights continue to exist despite legislative regulation, unless the statute expressly or by necessary implication alters those rights”.⁵⁹ It cannot be said that IPILRA does either; instead, the role of IPILRA is to affirm and to provide *additional* legislative protection to customary laws and practices. Therefore, if an applicant successfully establishes a right or practice in terms of customary law, IPILRA should be used only to affirm that existing right. If an applicant is unsuccessful in establishing this customary law right or practice, however, then IPILRA should be used to protect the right or practice as an informal right.

⁵⁴ Id, para 95.

⁵⁵ CASAC, above at note 4, para 138.

⁵⁶ Id, para 14 and clause 1 of the draft order.

⁵⁷ Id, para 14 and clause 2 of the draft order.

⁵⁸ *Gongqose and Others v Minister of Agriculture, Forestry and Others, Gongqose and S* 2018 (5) SA 104 (SCA), para 23.

⁵⁹ M Bishop “Asserting customary fishing rights in South Africa” (2021) 47/2 *Journal of Southern African Studies* 291 at 292.

Third, continued reliance on IPILRA is dangerous given that it is a temporary piece of legislation, renewed annually by the minister for agriculture, rural development and land reform. Should it not be renewed, either through a lack of political will or through a change of political administration, communities would only have customary law to rely on as a subsidiary source of law; this could be a challenge if customary law remains undeveloped on its own accord within the plurality of South African jurisprudence.

Fourth, the use of IPILRA in customary law continues to isolate the application of IPILRA to customary law communities. In other words, IPILRA becomes *the* law for customary law communities. I have highlighted why this is problematic in the development of customary law, but it is also problematic in terms of the tenure protection accorded to those living informally on land *beyond* customary law. While IPILRA does not apply to residents occupying land informally on *non-trust* held land (for example, in an informal settlement on land owned by someone else in terms of the common law), I pose an open question as to whether an informal land right should be available to protect this tenure.

Collectively, therefore, the framing of the rights in CASAC as grounded interchangeably in statutory and customary law sources does not contribute meaningfully to South Africa's jurisprudence in protecting insecure land tenure. Maintaining the focus on one source of law would contribute to an understanding of the plurality of experiences of land governance; the judgment's lack of focus on one source of law serves to dilute already marginalized sources of law. This dilution is compounded even further, however: in the next two sections, I explore how Madondo J sought to give meaning to the PTO right by interpreting it within a common law and constitutional law framework.

Common law

The common law system of land governance derives from colonization. This system confers real rights over land; upon registration of a transfer of land, an owner is conferred dominium over the land, granting them several rights in relation to the land. The common law is the dominant system of land governance of South Africa, but it is not an especially ecumenical system of governance. As with the PTO system, it is enrobed within a broader system of racism, one that conferred individual propertyhood on South Africa's white population and which legacy remains today. The common law system retains considerable legitimacy relative to other forms of land governance, be it rights in land protected through customary law or statutory law.

The CASAC court described the PTO right as a "registrable and transferable real right"⁶⁰ on the basis that section 26 of the Land Affairs Act 11 of 1992 allows for the conversion of a PTO right to a deed of grant registrable in the South African Deeds Registries Office.⁶¹ South Africa does not recognize a closed list of real rights, and thus the legislature has the space to create new real rights through statute. However, it is not immediately clear from the legislation that the PTO right is a real right prior to registration. At best, the PTO constitutes a personal servitude over public land granted through statute to an individual, and which survives for the duration of that person's life. The right confers only limited entitlements of use, and it cannot be transferred.

But the resemblance to a personal servitude ends there, specifically because it is not clear whether trust-owned land is "public" land. As indicated above, trusteeship of the land was transferred to the Trust in 1994, but this land was vested in the Trust *on behalf of* the members of the tribes and communities already living on Trust-owned land. Thus, the land is *communally* owned; it is not *publicly* owned. Accordingly, it is impossible for a community to grant a servitude over their *own*

60 CASAC, above at note 4, para 86.

61 Sec 26(1) provides that "a person to whom permission to occupy land has been granted under section 25 (1) may, with the prior consent of the Minister after consultation with the tribal authority – in the case of an allotment outside an approved township, cause such allotment to be surveyed and shown on a diagram; [and] acquire deed of grant rights in respect of such land".

land and in favour of that very community. Thus, we can regard the community's ownership of that land as a customary right of ownership, with the PTO certificate existing merely as a singular expression of that ownership.

It does not make sense in terms of the common law itself to frame the PTO right, as an expression of customary law, within the prism of the common law.⁶² The approach appears to frame a square through the lens of a circle, and it is not possible to resolve this dispute within the common law. The court is likely well-intentioned in framing the customary law right as a real right; after all, the common law holds significant currency within South Africa's legal culture. But the net effect of throwing common law into the jumble of legal reasoning employed in the judgment does little in securing customary law title. Rather, the approach contributes to the perception that customary law on its own terms is weak and must be interpreted or framed within a different source of law for it to gain traction. Not only is this false in terms of the value accorded to customary law by the Constitution, but it is also not possible to consistently view the two sources as embodying transmutable legal concepts.

Constitutional law

Finally, the CASAC court considers the residents' right in terms of the property clause in the Constitution, concluding that the deprivation of the residents' rights was arbitrary and, thus, a violation of section 25(1) of the Constitution.

In considering this component of the court's decision, I focus on the court's treatment of whether the residents' rights were "property". In South African law, it is essential to deliberately establish and define a right as "property" to assess whether its deprivation is arbitrary.⁶³ South African courts have afforded a wide latitude to this definition, recognizing in the process that property entitlements can go beyond ownership rights and include, for example, personal rights held against someone else.⁶⁴

South African courts, however, often presume that an entitlement is property without exploring *why* the entitlement is property.⁶⁵ CASAC falls into this trap by assuming the residents' rights included a property claim. This is evident when the court states that the "situation has resulted in the loss of the residents' PTO rights and customary law rights to land, including their informal rights to and interests in the land in question".⁶⁶ Specifying the content of the right would strengthen the protection of these land rights under section 25. Instead, a reticence is evident in the CASAC court's depiction of the right; the right is framed as everything and, consequently, there is little meaningful engagement with the contours and complexities of the residents' rights.

The case provided the perfect opportunity, however, for a court to expose the open-ended nature of the property clause to the legal pluralism inherent in the South African landscape. In its ability to recognize claims to space that go beyond "traditional" legal entitlements, such as the common law real right, the property clause creates legal space for the recognition of the diverse array of relationships between people and resources. This interpretation recognizes that law "embodies a complex constellation of relations that create fluid and shifting domains for action,"⁶⁷ necessitating that the "legal representation of space", such as that present in CASAC, must "be seen as constituted by – and in turn constitutive of – complex, normatively charged, and often competing visions of social and

62 This argument rings true if one also considers that it is impossible in the common law to unilaterally change a real right of ownership to a leasehold.

63 T Roux "The 'arbitrary deprivation' vortex: Constitutional property law after *FNB*" in S Woolman and M Bishop (eds) *Constitutional Conversations* (2008, Pretoria University Press) 265.

64 See T Coggin "There is no right to property: Clarifying the purpose of the property clause" (2021) 11 *Constitutional Court Review* 1.

65 EJ Marais "Expanding the contours of the constitutional property concept" (2016) 3 *Journal of South African Law / Tydskrif vir die Suid-Afrikaanse Reg* 576.

66 CASAC, above at note 4, para 159.

67 A Griffiths *Transformations on the Ground: Space and the Power of Land in Botswana* (2019, Indiana University Press) at 164.

political life under law”.⁶⁸ The residents’ rights in CASAC are emblematic of this complexity, in which residents with historically insecure land tenure have, through everyday practice, used *apartheid*-era statutory law (which is subsequently protected by *democratic*-era statutory law), to assert a *customary* law right, that may be viewed by residents as denoting an entitlement to *communal* ownership, and framed (correctly or not) as akin to a *common* law real right.

The wide definition accorded to “property” in the Constitution allows for a constitutional recognition of this complexity and, while the outcome of Madondo J’s decision yields a positive result for this case, the net effect of not acknowledging this complexity serves in the longer term to stifle the layered legal representation of space in favour of more dominant representations.

Conclusion

This case note demonstrates that despite the progressive court order, the CASAC court accorded insufficient latitude to the legal plurality underlying the residents’ case. Although there exists initially a strong validation of customary law, this is subsequently weakened through the judgment’s conflation of the customary law right with informal land rights. This marginalizes customary law as a source of law, and pigeonholes the concept of informal land rights as applicable only to land held in terms of customary law. Consequently, it is questionable whether the judgment ultimately strengthens the status of customary rights in land. The dilution of customary land rights is compounded further by the use of common law principles to explain and provide further meaning to the customary right. And although the CASAC court is correct to frame the PTO right as “property” in terms of the Constitution, the case was a missed opportunity for the court to articulate in full why the PTO right is property for the purposes of section 25.

Competing interests. None

⁶⁸ Id at 165.