FEATURE

Contested Co-Existence: Addressing Women's Housing Insecurity with the Legal Recognition of Family Homes

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Introduction

'The values indelibly imprinted in our Constitution require that we seriously and consciously consider the lives that women have been compelled to lead by law and legally-backed social practices' (Nzimande v Nzimande [2012] ZAGPJHC 223, para 63)

South Africa has a pluralistic legal system where customary law and common law co-exist, but not necessarily harmoniously. This is evident from the trend of cases in which applicants seek legal recognition of their 'family homes': a hybrid form of freehold tenure infused with African values. However, in urban areas, title deeds are used to confer exclusivity, and are prioritised over the dynamic, kin-based arrangements these families intend for their homes – often to the detriment of the women who, due to law and legally-backed social practices, are compelled to be the homemaker but never the homeowner.

Analysing this situation through the lens of 'family homes', we argue that women's constitutional rights to equality (section 9), land (section 25), and housing (section 26) are fundamentally limited by courts' adherence to the common law property paradigm.

First, we examine the historical background of black land-holding in South Africa and the disproportionate dispossession experienced by black women. Thereafter, we reflect critically on the jurisprudence on family homes, as well as the recognition of 'family property' in polygynous marriages, and show that the law's transformative potential is hindered by common law-mindedness that pigeonholes customary property rights into common law property concepts to the detriment of women.

We conclude that large-scale, bottom-up law reform that centres women is necessary. In the interim, we propose two measures to provide immediate relief to women at risk of losing their family homes.

Dispossession and adaption: The story of family homes

Apartheid-era legislation prevented black people – especially black women – from acquiring title to urban land. The Black (Urban Areas) Consolidation Act 25 of 1945, for example, prevented black people from owning property in urban areas and townships. Instead, by way of the Regulations Governing the Control and

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Supervision of an Urban Black Residential Areas (GN R1036 of 14 June 1968) issued under the 1945 Act, black people could apply for permit-based rights to designated areas of urban land.

These permits, conferring personal rights vesting exclusively in the named permit-holder, were non-transferable by agreement or succession. Moreover, officials were conferred far-reaching, often unchecked, discretion to cancel permits, rendering occupants of those sites without any legal protection (Olivier 1988: 33).
Consequently, the death of a permit-holder was widely unreported for fear of losing the permit and, hence, the home. Instead, internal family arrangements would decide how household duties would be allocated, typically in terms of African custom. Thus, a single home acquired significance as it remained in the family for generations.

In 1986, the Black Communities Development Act 4 of 1984 was amended to process ownership rights for black persons in urban areas. The Conversion of Certain Rights to Leasehold Act 81 of 1988 was passed to formalise this process through provincial administration. The Conversion Act, as amended in 1993, allowed for certain permit-holders to acquire full ownership rights.

Often, families were told that only one person could be registered on the title deed (Bolt 2022). Following customary prescripts, this tended to be the eldest male, who bears responsibility as the family head. The houses were understood by their inhabitants to be 'family homes', supervised by a custodian and dealt with to the benefit of all who live in it. Unaware of what registration on the deed meant (ownership), women were left with only customary rights to the property, which were invisible under the common law property paradigm.

While the term 'family home' is ubiquitous, it lacks a singular formal definition (Bolt & Masha 2019: 155). Its distinguishing feature is its focus on family and inclusion, as opposed to the exclusive individual ownership which is at the centre of the common law of property.

Empirical research by the Socio-Economic Rights Institute of South Africa has observed that the family home is a 'hybrid' system of tenure, one which is based on freehold title infused with African, familial notions of property (SERI 2024: 5). This hybrid nature is exemplified by recurring features associated with family homes, features that highlight its combination of both fixed and dynamic characteristics. While family homes maintain strong adherence to values of family, reciprocity, and kinship, the application of these values adapts to the different realities of the family members.

A family home is intrinsically connected to the abstract idea of a 'family', and is the physical manifestation of the family. 'Family' is understood multi-generationally as encompassing past, present, and future generations. The preference is for including extended family as right-holders and duty-bearers in the property, rather than confining this only to the individual or nuclear family, as is the case under common law (SERI 2024: 16).

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The home therefore keeps the family together, physically and spiritually. In the physical sense, it serves as a tangible space to which family members facing hardship can return to as a matter of right by virtue of being a 'patrilineal descendants of an original householder' (Bolt 2022: 222). In the spiritual sense, family homes are a place of refuge providing security for family members – a home they can return to in times of need and social, physical or economic hardship (Bolt & Masha 2019: 156–157). Need is an important factor in determining occupation, use, and administration of the family home. Hence, despite seldom having formal legal title over it, women and children are often the primary occupants of family homes (Mbatha 2002: 269).

In contrast to an owner at common law, a family home is headed by a custodian, typically the eldest male family member, who manages the family home in the

best interests of all occupants (Kingwill 2017: 245). What has been noted is a gradual shift away from situations where the title-holder exercises custodianship to ones where capable and responsible persons (increasingly women) are appointed as custodians (Kingwill 2017: 258). This reflects how community rules applicable to family homes are flexibly adaptive in furthering the best interests of the family. However, the shift towards appointing women as caretaker-type custodians at customary law rarely affords them enforceable property rights, as women custodians are seldom registered on the title deed.

Lastly, owing to the communal nature of a family home, there are limitations on the custodian's ability to alienate the home (SERI 2024: 25). Importantly, a family home cannot be unilaterally alienated. A family home may only be sold, for instance, when there is broad agreement among the family members (SERI 2024: 26).

Brick by brick: Judicial recognition of family homes

In this section, we reflect on the jurisprudential recognition of family homes from two angles. First, we do so from the perspective of cases that have dealt explicitly with the sale of family homes without the consent or knowledge of other family members. Secondly, and somewhat more promisingly, we consider the order in *Ramuhovhi,* which recognised 'family property' for the first time. Both avenues are, however, seemingly dead-ends in that they fail to bring customary notions of property into the mainstream property paradigm, thereby failing to accurately reflect the experiences of customary-law-abiding women.

The 'I' in family

Since 2014, a notable trend has emerged wherein properties formerly governed by the permit system have been converted into ownership rights. Although such properties are intended to be family homes, they often get sold unbeknownst to their inhabitants, or without the agreement of the non-owner inhabitants.

In Khwashaba and Maimela, the applicants sought to cancel the name registered on the title deed to properties holding their family homes. The customary character of the property was emphasised by the applicants in Khwashaba, who urged that their brother, whose name was on the title deed, 'was only the de jure holder of leasehold on behalf of his mother and her family' (para 9). The registration in the name of the brother came about because he had 'replaced his father as the head of the family' (para 9).

In both cases, the court held that because 'the upgrading from residential permit holder rights to ownership took place automatically, the basis of the transfer … occurred without a lawful basis' (Maimela, para 10). The courts ordered that the contested ownership be resolved through a participatory rights-enquiry, adjudicated by the provincial Director-General and governed by section 2 of the Conversion Act.

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Although such an approach serves to protect the family home, in many cases it might not be permitted. For example, in Maimela, the court directed a section 2 enquiry even though the site in question did not fall within the definition of sites for which such inquiries were permitted (Marule, para 16). More fundamentally, such an approach may be inappropriate. The applicants' claim in Khwashaba did not relate to ownership. They sought recognition of their family home as a family home, which has no owner. The mandated enquiry into ownership ignores this.

To enhance the protection of family homes, family rights agreements (FRAs) have become a tool. In Ntshalintshali, an FRA was concluded vesting

responsibility of a family home in the eldest son as 'custodian for the benefit of the entire family' (para 2). The Housing Department, however, failed to register the FRA against the title deed. Such registration 'would have [placed] a restriction on the rights of the persons appearing on the deed to further deal with the property' (para 6). The custodian's ex-wife, whom he had married in community of property, sought to sell the property.

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The court found that the ex-wife – herself a signatory of the FRA – knowingly 'took advantage of the error' by the Housing Department. Given both her inability to plead ignorance and the lack of a section 2 enquiry in the determination of ownership, the registration on the title deed in the name of the eldest son and his ex-wife was declared null and void, with the court ordering that a section 2 enquiry be undertaken.

In *Hlongwane,* the Housing Department again failed to register the FRA against the deed. There, three sisters agreed to register their brother on the title deed on the basis that he would assume a 'supervisory or safe-keeping role for and on behalf of the whole family', with their preference being for the property be a family home (para 21). Taking advantage of the error, the brother sold and transferred the property to a bona fide third party. This time, the court held that the FRA 'was nothing but a personal arrangement between the siblings' and not an 'arrangement above the real right of ownership in the immovable property, registered through the transfer process' (para 53).

The court noted, furthermore, that 'the advice of the department [to conclude an FRA] was misconceived' because 'the Act makes no provision for the concept of a "Family House"' (para 54). Therein lies the problem. The default common law property regime – which views property rights as boundaries of exclusion – scowls at the dynamic and inclusive nature of customary property encumbered only by mutual obligations. Customary law is hence erased in the process.

This disjuncture is perpetuated by so-called statutory 'remedies'. For example, mandating a section 2 enquiry to determine ownership of affected sites ignores the fact that 'ownership' is seldom what families truly seek, or is sought as a compromise to protect the family home. What is sought is the recognition of the family home as a family home.

Likewise, the conclusion of FRAs is another attempt by customary law adherents to express their lived realities through the suffocating constraints of the common law property paradigm, notwithstanding the fluctuating judicial treatment of such agreements.

Plurality through polygyny?

An alternative route to the recognition of family homes emerged from the Constitutional Court's order in Ramuhovhi. In Ramuhovhi, the constitutionality of section 7(1) of the Recognition of Customary Marriages Act 120 of 1998 (RMCA) was challenged insofar as it enshrined differentiated matrimonial property regimes between customary spouses married before the RCMA came into effect (to whom customary law applied) and those married after (which were, by default, in community of property). Under the applicable Venda customary law, wives were not entitled to ownership or control of property (paras 1, 9).

The Court found that section 7(1) 'perpetuate[s] inequality between husbands and wives' in pre-RCMA polygamous marriages (para 35). The section unfairly discriminated on the basis of gender, race, and marital status, according wives in pre-RCMA polygynous marriages comparatively weaker property rights than those in post-RCMA polygynous marriages (paras 37-45).

Importantly, the Court ordered (para 71) an interim regime to govern the property rights in pre-RCMA polygynous marriages so as to ensure 'joint and equal ownership' as well as 'joint and equal management and control' of marital property between husbands and wives.

Marital property rights were divided between those in (a) family property, held between the husband and all the wives, to be exercised 'jointly and in the best interests of the whole family'; and (b) house property, held between the husband and the wife of the house concerned, to be exercised 'jointly and in the best interests of the family unit constituted by the house'. The ruling makes the concept of family property enforceable in customary law.

While facially a progressive step towards securing women's property rights, the judgment does raise difficulties. For starters, as explained above, 'ownership' is an alien concept in family homes. Moreover, the phrase 'joint and equal management and control' was unaccompanied by any explanation of its meaning or application.

Crucially, however, unequal power dynamics exacerbate the patriarchal mores that underpin marriages. The Court hinted at this when it dealt with section 7(4), which allows wives in pre-RCMA marriages to apply to a court jointly to change the property regime applicable to their marriage. This, the Court noted, was 'cold comfort' for wives in polygynous marriages, as the option was dependent on consent of their husband (paras 41-42).

The patriarchal realities of marriages could turn this new court-introduced interim regime into pie-in-the-sky. Wives are often dependent on their husbands for access – economic and social – and have constrained autonomy or control when it comes to important family decisions. In this context, 'joint and equal management and control' may end up as an empty promise that yields little practical progress for wives. The power imbalance makes it easy for the husband's wishes to find their way into 'joint' management and control.

The Ramohovhi regime does little to address this power disparity, with no safeguards provided to prevent the wives' wishes and needs from being ignored. Even if in theory a wife could enforce her right if she did not get a say in dealing with marital property, in reality the existence of coercive economic and social factors would prevent her from approaching courts to ensure compliance by her husband. As such, the practical usefulness of this regime remains unclear.

En-gendering change: Reform and recommendations

Realistically speaking, major law reform is necessary for giving customary law equal status to common law under the Constitution. But this cannot be resolved by a top-down approach: relying solely on codification and formal legal structures to deal with customs that have developed over centuries is often counterproductive. It also fossilises customary law, creating a precedential hierarchy in which codified law ends up at the top (SERI 2024: 64).

Law reform must be informed by the community it will impact. Therefore, any further changes in the law with the aim of bringing family property or homes into the South African constitutional framework must centre the voices of the customary communities. The body tasked with remedying the issues highlighted above must conduct consultations with the communities that live in family homes. These consultations must specifically include women, and ensure that women of all marital categories – wives, widows, sisters, daughters, mothers, maternal figures, and women leaders within the communities – are consulted. Additionally, there must be cross-community representation in these consultations, so that nuances in the application of customary law as it relates to family homes in different regions can be accounted for.

Nonetheless, intervention in the short term is crucial. The starting-point for any intervention must be

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to accept that people may choose to comply with customary practices irrespective of their legality.
In Hlongwane, for example, notwithstanding that the rule of male primogeniture was declared unconstitutional in Bhe, the sisters explained that they wanted their brother's name on the title deed only because 'in our culture, a male child is usually given a responsibility to look after the family' (para 21; Ntshalintshali, para 4). The challenge is to find ways to honour customary norms to the greatest extent within the existing legal framework.

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To this end, we make two suggestions. First, section 2 enquiries should be employed purposively. Section 2 vests wide discretionary powers in the Director-General to make decisions about the implementation of the conversion provisions. In doing so, the Director-General may give effect to 'any agreement or transaction in relation to the rights of a holder' (section 2(3)(a)). The term 'any agreement' is wide enough to include agreements between family members amounting to written or oral FRAs. This gives a purposive interpretation to section 2, as it recognises rights in ownership and the limitations of that ownership, including those acknowledged under customary law.

Secondly, courts should develop the common law in accordance with section 39(2) of the Constitution to inject custom into the mainstream. In Shomang, for example, Du Plessis J suggested fragmenting land rights 'by developing a more comprehensive range of rights, such as a property right in a family home, that can sometimes trump ownership' to be applied flexibly and contextually (para 73).

Another option, one which does not depend on the recognition of new rights, is applying the common law requirements for transfer of ownership in ways that enliven customary values.

For example, the requirement that there be a 'real agreement' – an intention of the transferor to transfer, and an intention of the transferee to receive, ownership of the property – can be held to be defective where the transferor is aware that his name appears on the title deed only as a matter of necessity but appreciates that the home is a family home. In those circumstances, the transferor does not truly believe that he has ownership, and cannot intend to transfer ownership.

Conclusion

While family homes lack formal legal definition, they are central to the social organisation of African families in customary settings, where they both preserve and anchor family relationships (Bolt & Masha 2019: 155–156). Judicial recognition of family homes is patchy and inconsistent, revealing the juxtaposing values that underpin customary versus common law property systems. Likewise, the court's culturally sensitive remedy in Ramuhovhi still superimposed common law concepts of 'ownership' and 'joint and equal management and control' unknown to customary law over family property. Moreover, the gendered power imbalance underlying marriages could impede any practical improvement that the judgment intended to bring about in the lives of the wives in pre-RMCA polygynous marriages.

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Temporary relief can come from section 2 rights-enquiries, and from courts applying the common law in ways that give effect to customary norms. Taking the pluralistic reality of customary adherents seriously not only provides protection for women who choose to adhere to gendered customs, but elevates the status

of customary law from applying in a silo to influencing the everyday lives of the majority of South Africans.

But rather than introducing formal, top-down legal solutions, what is necessary is law reform which is bottom-up – that is to say, informed by the community and the needs of women therein. The experiences of women to whom the customary property regime applies may shed light on the manner in which these regimes have reinforced intersecting structures of oppression or, instead, how at times they may have provided them with informal structures of support. This might help accurately highlight the gaps that have to be filled in order to bring the regime into consonance with constitutional framework, and thereby give meaningful protection and impetus to women's rights to equality, property, and housing.

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