

Property Law

Exam Prep Question

Section B: Question 5 of the Property Law Take Home Exam 2012.

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clearly identifies the question to be answered in his own words.

**Issue:** Whether or not the State can lawfully evict the occupiers of the land in question and if so, what defences are available to the latter?

Relevant Legal Principles and Application to the facts

Section 211(3) of the Constitution obliges the court to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. Such legislation and for the purposes of this question, is the Interim Protection of Informal Land Rights Act (herein IPILRA).

It is submitted that s211 (3) and IPILRA entrenches the recognition of customary law land rights and furthermore, that any property that is subject to customary law, shall be resolved in light of such customary law interests and the above statutory provisions.

It is common cause that the members of this community were the holders of an informal land right in terms of s1(iii) of IPILRA. Their right to this informal right is based on a trust which is recognised as such by s1(3)(a)(ii) of the Act.

As it has been established that such informal land right existed, the question becomes whether or not the holders of such a right can be lawfully evicted.

An eviction purports to remove an unlawful occupier of land; it is the very foundation (in normal circumstances) of an application for eviction. However, it is submitted that the members of this community were lawfully occupying this land; this is based on two things:

1. The recognition of their informal land right in terms of IPILRA and the Constitution
2. The chief lacked the authority to enter into an agreement with Bricks R Us on behalf of the community members.

The first issue has already been dealt with above; I now turn to the second issue, namely, the authority of the chief and the validity of his actions.

Customary land law has traditionally been based on the individual use of property, subject to communal use. Chief have traditionally been given power to allocate the land to members of the community, however, the chief has never been the owner of such communal property, he plays more of an administrative role in the allocation of property. Furthermore, a consultation process has always been a norm, where the entire community is engaged in an important discussion about how the land will be distributed.

IDENTIFIED THE APPLICABLE AUTHORITY  
CLEARLY STRUCTURED APPLICATION TO THE FACTS



Section 2(4) IPILRA expressly provides that

- a. the disposal of any informal land right shall only be effective upon the decision of the majority holders of such right at a meeting convened for such purpose; and
- b. there shall be sufficient notice given for such a meeting; and
- c. the holders of such right shall have a reasonable opportunity to participate

On the fact, it is common cause that the chief acted independently of the holders of such informal right, and as such, it is submitted that the disposal of such rights is null and void.

Secondly, no such meeting was convened and the requisite notice was not provided, therefore the disposal of such right is unlawful and the agreement is null and void.

Third, the holders of such right were not given a reasonable opportunity to participate in the disposal of their rights, and therefore, it is submitted that the disposal of the land rights is unlawful and the agreement null and void.

Furthermore, s2(1) provides that "no person may be deprived of any informal land right without his or her consent". In application to the facts, it is clear that the chief acted without consulting the holders of the informal land right in question but more importantly, their consent was not obtained, and as such, they disposal of their rights is null and void.

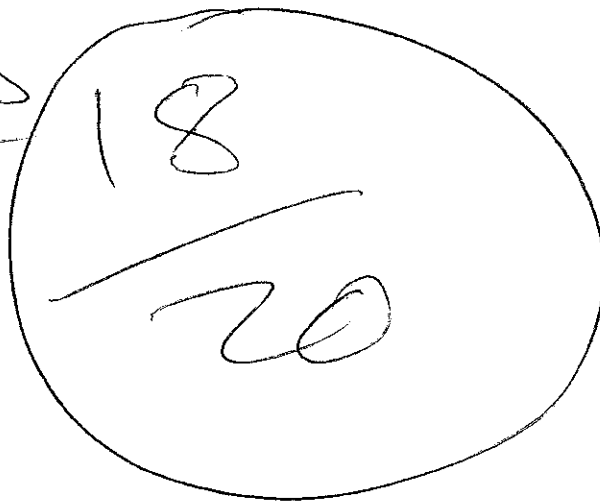
In other words, the defence of the holders of the informal right would be:

- 1. They are lawfully occupying the land
- 2. The chief lacked the authority to act on their behalf.

**Conclusion**

The State can only evict the parties in question if they can prove that such occupation of the land is unlawful and as argued above, their occupation is lawful and the disposal of their right is unlawful.

Virtually perfect



COMES TO A CRISP, CLEAR OPINION

TO OBTAIN FULL MARKS, A BRIEF DISCUSSION OF NOW CUSTOMARY LAW IS ASCERTAINED, WITH REFERENCE TO THE ALEXCOR CASE, WOULD HAVE BEEN REQUIRED

EACH FACTUAL ISSUE ISOLATED AND ADDRESSED IN A CLEAR LOGICAL ORDER

clearly identifies the correct defences

DISTINCT PARTS OF THE STATUTORY FRAME WORK IDENTIFIED AND APPLIED

IDENTIFIES THE RELEVANT PART OF IPILRA