

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION PRETORIA

CASE NO: 46869/2020

In the matter between:

THE ASSOCIATION & COALITION FOR THE
RESTORATION OF THE BOER REPUBLIC (ACRBR)
APPLICANT

and

THE PRESIDENT OF THE REPUBLIC OF
SOUTH AFRICA

MINISTER OF HOME AFFAIRS

MINISTER OF AGRICULTURE, LAND REFORM
AND RURAL DEVELOPMENT

MINISTER OF CORPORATE GOVERNANCE
AND TRADITIONAL AFFAIRS

MINISTER OF INTERNATIONAL RELATIONS
AND COOPERATION

THE SPEAKER OF THE NATIONAL ASSEMBLY

SIXTH RESPONDENT

FIFTH RESPONDENT

FOURTH RESPONDENT

THIRD RESPONDENT

SECOND RESPONDENT

FIRST RESPONDENT

SIXTH RESPONDENT

FIFTH RESPONDENT

FOURTH RESPONDENT

THIRD RESPONDENT

SECOND RESPONDENT

FIRST RESPONDENT

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ANSWERING AFFIDAVIT

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**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: 46869/2020

In the matter between:

THE ASSOCIATION AND COALITION FOR THE RESTORATION OF THE BOER REPUBLICS (ACRBR)
Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA
First Respondent

MINISTER OF HOME AFFAIRS
Second Respondent

MINISTER OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT
Third Respondent

MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS
Fourth Respondent

MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION
Fifth Respondent

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ATTORNEY FOR SECOND RESPONDENT
STATE ATTORNEY, PRETORIA
 SALU Building, Ground Floor

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AND TO: MINISTER OF AGRICULTURE, LAND REFORM
AND RURAL DEVELOPMENT
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AND TO: MINISTER OF CORPORATE GOVERNANCE AND
TRADITIONAL AFFAIRS
THE FOURTH RESPONDENT

C/O STATE ATTORNEY, PRETORIA
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PRETORIA

AND TO:

**MINISTER OF INTERNATIONAL RELATIONS AND
COOPERATION**
THE FIFTH RESPONDENT
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316 Thabo Sehume Street,
PRETORIA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Case No: 46869/2020

In the matter between:

THE ASSOCIATION AND COALITION FOR THE
RESTORATION OF THE BOER REPUBLICS (ACRBR)
Applicant

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA
First Respondent

MINISTER OF HOME AFFAIRS
Second Respondent

MINISTER OF AGRICULTURE, LAND REFORM
AND RURAL DEVELOPMENT
Third Respondent

MINISTER OF COOPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS
Fourth Respondent

MINISTER OF INTERNATIONAL RELATIONS AND
COOPERATION
Fifth Respondent

SECOND RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned,



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reliance of such advice.

To the extent that I make submissions in this matter and make submissions on advice of my legal representatives in this matter and make submissions on

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knowledge, I verily believe them to be true and correct.

To the extent that I rely on the facts which are not within my personal personal knowledge and are to the best of my belief, both true and correct. Save where otherwise indicated, the facts to which I depose are based on my

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Sehume Street, Pretoria.

I am an adult male and Director-General ("DG") of the Department of Home Affairs ("DHA"). I am duly authorized to depose to this answering affidavit and oppose the applicant's application on behalf of the second respondent. C/o the State Attorney (Pretoria) at SALU Building, Ground Floor, 316 Thabo

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THE DEPONENT

do hereby make oath and state that:

LIVHUWANI TOMMY MAKHODE

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4. I am aware that the applicant's application was also brought against the President of the Republic of South Africa ("the President"), the Ministers of Agriculture, Land Reform and Rural Development, Cooperative Governance and Traditional Affairs; and International Relations and Cooperation ("Ministers").

5. As I shall fully demonstrate below, the applicant's application is opposed based on a careful consideration of legal advice I received from my legal representatives, and advice based on the historical context of land rights in South Africa; the constitutional and international principles which inscribe protection of sovereignty and territorial integrity of the Republic of South Africa ("Republic"); the constitutional and statutory limitation(s) of the constitutional rights of the applicant's members and the legality of the intended government's policy of expropriation of land without compensation.

6. Accordingly, I respectfully submit that submissions of a legal nature are necessary and may assist in the efficient disposal of this matter.

ORGANISATION OF THIS AFFIDAVIT

7. In this answering affidavit, I wish to deal with matters schematically as follows:

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- 7.1 First, I deal with preliminary point of non-joinder of the parties who may be prejudicially affected by the carrying into effect of an order of this court;
- 7.2 Second, in an introductory part of this answering affidavit, I set out an overview and briefly explain the contentions raised in the applicant's application and the context in which they arise;
- 7.3 Third, I give a brief description of the parties;
- 7.4 Fourth, I discuss and place the history of land rights and ownership in South Africa in a proper context with reference to the establishment of the defunct Boer Republics and the nature and extent of land dispossession and gross human rights violations in those Republics;
- 7.5 Fifth, I explain the constitutional and legislative imperatives and principles which engrave protection of national existence, political independence and sovereignty of the Republic;
- 7.6 Sixth, I explain the constitutional and statutory limitation(s) of the constitutional rights of the applicant's members;

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7.7 Seventh, I discuss the nature and the legality of the proposed government policy of expropriation of land without compensation ("nil compensation").

7.8 Eighth, I shall address the international and regional instruments which inscribe protection of sovereignty, territorial integrity, the borders and political independence of the Republic;

7.9 Ninth, I discuss the grounds for opposition mounted against the applicant's application;

7.10 Tenth, I shall, to the extent that it is necessary to do so, deal with each of the applicant's allegations in the required detail; and

7.11 Eleventh, I set out the relief sought by the second respondent and humbly ask this court to dismiss the applicant's application with costs.

8. I shall deal with each of these issues in turn.

PRELIMINARY POINT: NON-JOINDER

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13. In broad terms, however, the applicant's application implicates the values and founding principles of the Constitution. Should this court grant the relief sought,

12. I am further advised that non-joinder is a matter that no court, even at the latest stage in proceedings, can overlook. This is so because the court cannot allow orders to stand against persons or parties who may be interested, but who have had no opportunity to present their case. This court, however, can *mero motu* raise the issue of joinder at any stage of the proceedings.

11. I am advised that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned.

10. Rule 10 of the Uniform Rules of Court deals with joinder of the parties and causes of action.

9. This answering affidavit begins with the preliminary point of a plea of non-joinder. The applicant's application fails to join the Ministers of Health, Justice and Correctional Services, Public Works and Infrastructure ("Ministers") and the Premiers of the provinces ("Premiers") who may be affected by the relief sought. The justification of the joinder rests on the contention that Ministers and the identified Premiers have a direct and substantial interest in the matter.

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16. The applicant further raises a plethora of allegations and issues relating to Covid-19 pandemic and the role of South Africa in the affairs of World Health Organization ("WHO"). The Department of Health is a custodian of South Africa's national health system. It remains the responsibility of the Minister of Health to deliver much-needed services to combat and reduce the spread of Covid-19 and save the lives of the South Africans.
15. The applicant' application further seeks to change the constitutional architecture and undermine the territorial sovereignty of the Republic. The Minister of Justice is the guardian of the Constitution². The Minister has the constitutional mandate to promote the values and human rights enshrined in the Constitution and uphold and protect the Constitution and the rule of law.³
14. I have been advised that considering the above, it should then follow that the non-joinder of the Premiers is fatal when viewed with the relief the applicant seeks.
- the constitutional structure of the boundaries of the provinces would fundamentally change. These changes would affect the provinces of Gauteng, North West, Limpopo and Mpumalanga. These provinces were established on the land areas that historically formed parts of the former Boer Republics.

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19. I have read the notice of motion and the founding affidavit deposed to by PHILLIPUS ROEDOLF SWANEPOEL ("SWANEPOEL") together with its annexures filed on behalf of the applicant. In support of its contentions, the

INTRODUCTION AND OVERVIEW

18.2 If the Ministers and the Premiers are not joined their legal interest in this matter may be prejudicially affected by the order of this court.

18.1 Ministers and the Premiers of the aforesaid provinces are the necessary parties and have the legal interest in the matter; and they should be joined in the current proceedings; and

18. In the premises, I respectfully submit that:

17. The Minister of Public Works and Infrastructure is assigned the role of a custodian and manager of all government immovable properties and buildings. Therefore, the applicant's claim would have a bearing on the infrastructure and land which will be affected by the relief sought.

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applicant asserts that its members possess the divine entitlement and the ownership right, title and sovereignty in the land of the former Boer Republics.

20. The applicant contends that:

20.1 its members are entitled to the restitution of the ownership right, title and sovereignty in the land of the former Boer Republics, to wit, the Republic of Transvaal or Zuid-Afrikaansche Republiek ("ZAR") and Orange Free State ("OFS");

20.2 the ownership right, title and sovereignty to be restored in the land of the defunct Boer Republics is primarily founded and based on history, religion, beliefs and culture;

20.3 the land (former Boer Republics) is the location in the wilderness provided to them by God and constituted a vertical relationship between its members and God;

20.4 its members' peaceful and undisturbed possession of the land in the former Boer Republics is confirmed and supported by the historical events of the Great Trek, the Battle of Blood river, covenants

of the Battle of Blood River and Paardekraal, Boer Independence Wars, Peace Treaty of Vereeniging and the Protestant refugees from Europe;

20.5 prophecies and verses in the Bible confirm and

support its claim for the restitution of the ownership rights, title and sovereignty in the land of the former Boer Republic; and

20.6 the ongoing threat by the respondents to

expropriate land in South Africa deprives its members of their peaceful and undisturbed possession.

21. Central to the applicant's relief sought in the notice of motion lies a claim of the Republics and its borders as in 1902. Fundamentally, the applicant claims the restoration of the sovereignty (supreme power or authority) of the former Boer Republics.

22. I shall demonstrate below that the applicant's claim is grounded on "religious mythology" and "segregated history" not by the amount of truth they contain, but by the fact that they are believed by the applicant to be true. I therefore

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maintain that the applicant's claim is a desire to "turn the clock back" thereby moving South Africa back to "Boer colonialism" of the former Boer Republics.

23. The applicant's application (unprecedentedly so) captures the heartland of ugly past into the current non-racial democratic dispensation and seeks to alter the "constitutional landscape" of the Republic. The application also goes at the fundamental root of the principles of international law which inscribe protection of the borders and sovereignty of the Republic against any interference whatsoever.

24. Implicit in the applicant's founding affidavit, however, is a selective acknowledgment of the Constitution⁵. The applicant relies on the Bill of Rights for the protection of its members' rights to freedom of religion, beliefs, culture, expression, equality, privacy, assembly, movement and citizenship. Contrary to this reliance, the applicant seeks a relief that militates against the Constitution.

25. I am advised and submit that the Constitution was never meant to be a selectively recognised weapon, conveniently produced and used by the applicant only when it could help to advance its illegitimate sectarian interests

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through legal stratagems. The Constitution was designed to facilitate justice and equity for all⁶.

THE PARTIES

26. The applicant is THE ASSOCIATION AND COALITION FOR THE RESTORATION OF THE BOER REPUBLICS (ACRBR)

26.1 The applicant is a voluntary association of groups, individuals and organisations in South Africa whose members and their identities are unknown to the second respondent.

27. The first respondent is the PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA ("THE PRESIDENT")

27.1 The first respondent is the head of State and head of the national executive under section 83 (a) of the Constitution. The second respondent's primary responsibility is to uphold, defend and respect the Constitution as the supreme law of the Republic as well as to promote the

⁶ City of Tshwane Metropolitan Municipality v Afriforum and Another, (157/15) [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) para 18.

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29.1 The third respondent is responsible for the development of policy with regard to agriculture and agrarian reform. The Minister is also

AND RURAL DEVELOPMENT ("THE MINISTER")

29. The third respondent is the **MINISTER OF AGRICULTURE, LAND REFORM**

28.1 The second respondent is the member of the national executive responsible for a multitude of services to the citizens of South Africa, as well as foreigners who wish to visit, work or stay in South Africa. He also determines and grants citizenship. C/o the State Attorney (Pretoria) at SALU Building, Ground Floor, 316 Thabo Sehume Street, Pretoria.

MINISTER")

28. The second respondent is the **MINISTER OF HOME AFFAIRS ("THE**

unity of the nation and that which will advance it. The first respondent declared a national state of disaster in terms of the Disaster Management Act 57 2002 to enable government to prevent and reduce the outbreak of Covid-19. C/o the State Attorney (Pretoria) at SALU Building, Ground Floor, 316 Thabo Sehume Street, Pretoria.

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responsible to accelerate land reform, catalyse rural development and improve agricultural production to stimulate economic development. The third respondent focuses on providing redress and equitable access to land.

30. The fourth respondent is the **MINISTER OF COOPERATIVE GOVERNANCE**

AND TRADITIONAL AFFAIRS ("THE MINISTER")

30.1 The fourth respondent is responsible to develop and

monitor the implementation of the national policy and legislation. The third respondent had in terms of section 3 of the Disaster Management Act 57 of 2002 and after consulting with the responsible Cabinet members, made and gazetted regulations in response to the outbreak of COVID-19 virus. C/o the State Attorney (Pretoria) at SALU Building, Ground Floor, 316 Thabo Sehume Street, Pretoria.

31. The fifth respondent is the **MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION ("THE MINISTER")**

31.1 The fifth respondent is responsible for South Africa's relationships with foreign countries and international

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organizations and runs South Africa's diplomatic

missions. C/o the State Attorney (Pretoria) at SALU

Building, Ground Floor, 316 Thabo Sehume Street,

Pretoria.

32. I am aware that the applicant has launched the joint application in this court. The purpose of the application is to request this court to join the **SPEAKER OF NATIONAL ASSEMBLY ("SPEAKER")** in these proceedings. I am further aware that the joint application is not opposed by the government co-respondents.

HISTORICAL CONTEXT OF LAND RIGHTS

Dispossession, Great Trek and the Republics

33. The history of the ownership rights and titles in the land of South Africa points that several settlements of the African groups (African indigenous people) in South Africa took place long before the colonial penetration in 1652. The pre-colonial South Africans utilized collective systems of land rights, which prioritized communal land uses and community interests. The indigenous law

⁷ The words "African indigenous people" is used interchangeably in this answering affidavit to refer to the Khoisan, black groupings such as the Tswana, Pedi, Sotho, Venda, Shangaan and Nguni people, Zulu, Xhosa, Swazi and Ndebele). The words are also used in this affidavit to refer to "natives" and "blacks".

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ownership is the way in which black communities have held land in South Africa since time immemorial⁸. I annex hereto a copy of article titled: "South Africa's Land Restitution Challenge: Mining Alternatives from Evolving Mineral Taxation Policies", marked "PAM1".

34. The arrival of Dutch colonists in 1652 marked the formation of a new land ownership system. The Dutch settlers were later joined by the Huguenot refugees who were expelled from France by the revocation of the Edict of Nantes in 1685 and sought a home in Holland where they were driven, very much against their will, to the Cape of Good Hope⁹. On their arrival there they were incorporated into the Dutch population.

35. But most importantly, both the Dutch and Huguenot settlers found the indigenous African groups at the Cape of Good Hope. The interior region of what would become the Cape colony had long been inhabited by the San and Khoikhoi. Some Xhosa and Zulu had also settled on the eastern coastline by the 17th century.¹⁰

8 Alexkor Ltd and Another v Richtersveld Community and Others, (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003) para 96.
9 The Huguenots were French Protestants, who were members of the Reformed Church established by John Calvin about 1550.
10 Annexure "PAM1" at page 224 of the Article. It is also important to note that the Cape of Good Hope was discovered by Bartholomew Diaz in 1486, during his command of one of the many expeditions sent out by the Kings of Portugal with a view of discovering an ocean route to India.

36. The first process of land dispossession commenced when the first Dutch

settlers arrived at the Cape of Good Hope in 1652¹¹. The Dutch settlers first drove the Khoikhoi and the San communities out of their former grazing lands and later continued to dispossess the Xhosa and Zulu in the eastern areas of the Cape colony.¹² Thereafter, conquest and colonial settlement of the Dutch and later the British became the standard methods of property dispossession. The Africans held their land according to indigenous law, where no system of registration was required¹³.

37. During the Dutch colonial era, the system of registered ownership was recognised, respected and protected. Whites held their land under this system.¹⁴ As a result, the system of registered ownership was used as an effective tool of land dispossession. This trend of land deprivation was taken further by the British colonialists when they endorsed their authority at the Cape in 1795 and 1806 respectively. The African indigenous people were progressively and aggressively forced out of their land by white settlers and their colonial authorities through the process of conquest accompanied by land dispossession.

¹¹ It is also important to note that the Cape of Good Hope was discovered by Bartholomew Diaz in 1486, during his command of one of the many expeditions sent out by the kings of Portugal with a view of discovering an ocean route to India.

¹² Daniels v Scribante and Another, [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) para 14.

¹³ Alekhor Ltd and Another v Richtersveld Community and Others, (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003) para 94.

¹⁴ Alekhor Ltd and Another v Richtersveld Community and Others, (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003) para 95.

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15 The Afrikaans word "voortrekkers" literally in English means "those who go ahead". The word basically refers to any of the Boers or Afrikaners (Dutch settlers or their descendants) or as they came to be called in the 20th century, the Afrikaners who left the British Cape Colony in South Africa after 1834 and migrated, first into the Zululand and later into the interior highveld north of the Orange and Vaal Rivers. The Boers were Dutch settlers of South Africa, and those that headed inland to settle were called "Trekkeers" or pioneers (or "voortrekkers").

16 Between 1835-1838, Voortrekkers left the Cape Colony in large groups organised by various Trekker leaders. In 1835, groups under the leadership of Hans van Rensburg, Louis Tregardt and Andries Hendrik Potgieter left the colony followed by Gert Maritz (1836), Piet Retief and Piet Uys (1837), and Andries Pretorius (1838). After crossing the Orange River the various groups spread in different directions to settle in the region of their preference. Annexure "PAM3"; "Desegregating History in South Africa: The Case of the Covenant and the Battle of Blood/Ncome River."

17 Annexure "PAM2": Manifesto of the Immigrants" by Pieter Mauritz Retief, published in English in the Graham's Town Journal on 2 February 1937.

39.2 British's abolition of slavery and policy of relaxing control over labour. The British policy placed servant and master on an equal footing. This greatly

39.1 the introduction of the British policy of equality between black and white settlers;

39. The main causes of the Great Trek were¹⁷:

38. Another colonial event which accelerated the process of land dispossession was the period of the Great Trek which happened in 1836 when the Voortrekkers or Boers¹⁵ packed wagons with women and servants and set off on their quest to drive the natives (indigenous African people) living further north and inland into submission thereby displacing them as they went along¹⁶. I annex hereto a copy of article titled: "Manifesto of the Immigrants" by Pieter Mauritz Retief", marked "PAM2".

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affected the Boers or white farmers who used the black people of the Cape as their cheap source of labour; and

39.3 The Dutch also felt that their identity was being threatened due to a series of laws which were proclaimed between 1823 and 1828 which substituted the official use of Dutch with English.

40. The Voortrekkers further claimed christian motives for their departure from the Cape Colony.

41. During the Boer migration, some of the Voortrekkers reached Zululand, an area which was largely owned by the Zulus. This resulted into clashes between the Zulus and the Voortrekkers over land and ultimately the Battle of Blood River (known as Battle of Ncome River) on 16 December 1838. The proximate cause of the Battle of Blood River was a clash over land rights of the Zulus and the massacre of Voortrekkers by the Zulu King Dingane¹⁸. I annex hereto a copy of article titled: "Desegregating History in South Africa: The Case of the Covenant and the Battle of Blood/Ncome River" marked "PAM3".

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42. In 1839, after the Battle of Blood River, the Boers established the Republic of Natalia on the territory occupied and owned by the Zulu chiefdoms under the mighty Zulu Kingdom. The establishment of the Boer Republic culminated into an aggressive process of land dispossession. This Republic was conquered and annexed by Britain in 1843. Thereafter, the British intensified the process of the land dispossession in Zululand.¹⁹

43. In 1852, a steady stream of white people crossed the Vaal (Lekwa) river and the Orange river and began to infiltrate into the black territories in search of land and wealth. They settled in the territories of the Sotho-Tswana, Pedi, Venda, Shangaan and Swati and acquired land in those areas without regard to the land rights of those black communities. Britain granted the Voortrekkers independence at the Sand River Convention (Atrikaans: Sandrivierkonvensie) in 1852, after which they established the Republic of Transvaal. The British without warning the black people recognized the independence of Transvaal.

44. In 1854, the British went further and recognized the independence of the Republic of Orange Free State ("OFS").²⁰ The two Conventions excluded the black people who were in majority within the Republics. Consequently, generally the black people found themselves at the mercy of the unscrupulous

¹⁹ Annexure "PAM3": "Desegregating History in South Africa: The Case of the Covenant and the Battle of Blood/Ncome River."
²⁰ The Republic was centered at Winsburg and came to be called the Orange River colony Sovereignty and later Orange Free State.

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Boers of the two former Boer Republics. Quite evidently, the Great Trek laid the foundation for massive land dispossession in the former Boer Republics.

45. The legislative authority of the Transvaal and Orange Free State was vested in the Volksraad ("Parliament"). The **Gronwet** (Constitution of the Transvaal Republic) was adopted at Rustenburg in 1858. The Constitution and Volksraad of the Transvaal Republic excluded blacks from political power.

46. The **Gronwet** provided *inter alia*²¹:

"The people will not permit any equalisation of coloured persons with white inhabitants neither in Church nor in State"; (Underlining supplied)

47. It is axiomatic that the **Gronwet** was applied to entrench racial discrimination in the Transvaal Republic. This is what the Great Trek sought to achieve as the trekkers rejected equality between black and white. I annex hereto a copy of article titled: "Royal Batokeng Nation: Submissions by the Royal Batokeng Nation in respect of the Communal Land Rights Bill, 2003", marked "PAM4".

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48. Black people in the Boer Republics were not allowed to vote and to be represented in the Volksraad. With the establishment of the Boer Republics came the slavery and forced labour model. This was the original model of colonialism brought by the Dutch in 1652, and subsequently exported from the Cape to the Boer Republics.²²

49. The Transvaal Republic adopted the resolutions that declare that land grants for black people were only for occupation and not ownership. This meant that blacks were recognized by the Transvaal authorities as occupiers and not the owners of land.²³

50. The process of land dispossession was further stimulated by the concession of the Transvaal government that white settlers who had settled in the Transvaal before 1852 would qualify for two farms per household free of charge. White farmers' infringed on land owned by Africans. Various burghers (Boers) and speculators registered farms on which Africans lived, or near to where they lived without their knowledge and the Africans would have to be driven away.²⁴ Later, the Africans were forced to buy their own land from the very same Boers who dispossessed them. Black communities purchased land through the missionaries who held land in trust on their behalf. I annex hereto a copy of

22 Annexure PAM4: Royal Bafokeng Nation: Submissions by the Royal Bafokeng Nation in respect of the Communal Land Rights Bill, 2003".
23 Annexure PAM4: Royal Bafokeng Nation: Submissions by the Royal Bafokeng Nation in respect of the Communal Land Rights Bill, 2003".
24 Annexure "PAMS": "S.J.P. Kruger and Landownership in the Transvaal, 19th September, 1853".

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Article titled: "S.J.P. Kruger and Landownership in the Transvaal, 19th September, 1853", marked "PAM5".

51. To give effect to the process of dispossession, on 28 November 1853, the Transvaal Volksraad adopted the Resolution. I annex hereto a copy of the Resolution titled: "Volksraad Resolution, 19th September, 1853", marked "PAM6".

52. The Resolution read, *inter alia*, as follows²⁵:

"With regards to land granted to kaffirs [blacks] for occupation, the Commandants-General and Commandants are ordered, where it is necessary to grant [them land for occupation] ... The Raad has resolved that such a farm be occupied by them and their descendants conditionally as long as they behave in accordance with the law and obediently. In case of disobedience such tenure may be declared lapsed". (Underlining supplied)

53. It is recorded that in 1855, the system of land deprivation was reinforced further by another Volksraad Resolution. Resolution of 1855 read as follows²⁶:

25 Annexure "PAM6": Volksraad Resolution, 19th September, 1853.
26 Annexure PAM1: Royal Bafokeng Nation: Submissions by the Royal Bafokeng Nation in respect of the Communal Land Rights Bill, 2003".

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“... No one who is not a recognised burgher [Boer] shall have any right to possess immovable property in freehold ... All coloured [black] persons are excluded here-from and the burgher's right may never be granted to them ...” (Underlining supplied)

54. In the main, however, the process of land dispossession was not merely bureaucratic political arrangement, but it had specific religious overtones. The Boers maintained that the “Bible made Ham a servant of servants, and servants these children of Ham must always remain”. According to the Boers, the Africans were the children of Ham destined to a position of inferiority for all eternity. I annex hereto a copy of article titled: “Traditional Leaders of the Bakgatla ba Kgafela and their Succession Story”, marked “PAM7”.

55. Madlanga J wrote:²⁷

“Dispossession of land was central to colonialism and apartheid. It first took place through the barrel of the gun and “trickery”. This commenced as soon as white settlement began, with the Khoi and San people being the

²⁷ Daniels v Scribante and Another, [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) para 14.

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first victims. This was followed by "an array of laws" dating from the early days of colonisation". (Underlining supplied)

56. In the words of Madise²⁸:

"many black South Africans articulate that when the missionaries came, we had the land and they had the Bible. They said: 'let us pray,' and when we opened our eyes after the prayer, they had the land and we had the Bible" (Underlining supplied)

57. The land dispossession of the black groups in Transvaal and Orange Free State was further taken ahead when the church collaborated and connived with the colonial State and endorsed the racial disparity in the alienation of land. The Boers exploited the christian faith as much as possible to justify property dispossession. I annex hereto extracts of Doctor of Theology-Thesis titled: "Church and State Relations: The Story of Bophuthatswana and its Independence from 1977 to 1994", marked "PAM8".

58. The Boers authorities further introduced a system of formal land registration of land in Transvaal and Orange Free State. The grants of the farms were performed informally by the landdrost who issued certificates of registration for

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land. I have already stated that some of the white farmers registered land of the black communities without their knowledge and consent. As a result, black people lost much of their land to white settlers.

59. In 1877, the British annexed Transvaal Republic. The annexation Proclamation guaranteed "equal justice to the persons and property of both white and coloured", but "without the granting of equal civil rights", such as the right of voting, or their being entitled to "other civil privileges incompatible with their uncivilized condition."²⁹

60. The black groups of Transvaal rejoiced in the belief that the British would at last secure their borders and halt the influx of the Boer invaders. Then again, they were betrayed because Britain failed to protect their settlements against the Boer invasion and encroachment which perpetuated the already existing pattern of massive land dispossession³⁰.

61. In 1881, Transvaal regained its independence after the Battle of Majuba which was followed by the signing of the Pretoria Convention and (and later) London Convention. The land dispossession of the black settlements was taken with much rigour when the Boers regained the independence of Transvaal³¹.

29 Annexure PAMA: Royal Bafokeng Nation: Submissions by the Royal Bafokeng Nation in respect of the Communal Land Rights Bill, 2003".
30 Widenboer L "The Judicial Officers of the Transvaal High Court, 1877-1881" Fundamina Volume 25 Number 2 | 2019 at 257.
31 Military History Journal Vol 5 No 2 - December 1980 The Battle of Majuba, 27 February 1881.

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32 Due to participation of blacks in the war, either on the side of Britain or the Boer Republics, it is
 33 befitting to refer to the Anglo-Boer War as the "South African War" and Annexure "PAM2" at page
 33 of the Article.
 34 Some of the historians argue that the Anglo-Boer War should be called the "South African War" because black people participated in the war either on the side of Britain or the Boers.
 Declaration of the Uittander Council, 01 July 1899.

64.2 The Boer opposition to British rule in the Transvaal and Orange Free State; and

64.1 the conflicting political ideologies of imperialism and republicanism and the discovery of gold on the Witwatersrand;

64. These factors were *inter alia*³⁴:

63. In 1899, however, the Anglo-Boer War³² broke out between the British and the Boer Republics. Several interrelated factors led to the Anglo-Boer War.³³ I annex hereto a copy of the "Declaration of the Uittander Council, 01 July 1899", marked "PAM9".

62. Reaffirming the above submissions, it is evident that the white settlers in the Republics used various methods and tactics to dispossess the black communities, namely: law: bible and religion; trickery and barrel of the gun (conquest); and the system of land registration.

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For the United Kingdom, His Excellency Lord Milner, High Commissioner and Field Marshal Horatio Herbert Kitchener, who signed the treaty as "Kitchener of Khartoum. For the Government of the South African Republic, Messrs Schalk W. Burger, F.W. Reitz, Louis Botha, J. H. de la Rey, L.J. Meyer, and J.C. Krogh. For the Government of the Orange Free State, Messrs C.R. de Wet, J.B.M. Hertzog, C.H. Olivier and W.C. Bebnor.

66.1 The legal effects of the Peace Treaty were: the two Boer Republics were lawfully and formally extinguished; and

65. On 31 May 1902, the Peace Treaty of Vereeniging ("the Peace Treaty") was signed by the representatives of the Boer Republics and the government of Britain³⁵. The Peace Treaty provided for the end of hostilities and ended the existence and independence of Transvaal and the Orange Free State. The two former Boer Republics became the British colonies of the British Empire. The Boer Republics agreed to come under the sovereignty of the British Crown. I annex hereto a copy of "Peace Treaty of Vereeniging", marked "PAM10".

64.3 the Uitlanders (white foreigners mainly the British) were not allowed to vote in the former Boer Republics. Therefore, the Uitlanders' franchise led to the Anglo-Boer War.

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36 Tongwane and Others v National Minister for Agriculture and Land Affairs and Others, (CCT100/09)
 [2010] ZACC 10; 2010 (6) SA 214 (CC) ; 2010 (8) BCLR 741 (CC) para 10.

37 Tongwane and Others v National Minister for Agriculture and Land Affairs and Others, (CCT100/09)
 [2010] ZACC 10; 2010 (6) SA 214 (CC) ; 2010 (8) BCLR 741 (CC) para 10.

"Natives will be allowed to acquire land, but the grant or transfer of such land will in every case be made to and registered in the name of the Native Location Commission hereinafter mentioned, in trust for such natives." (Underlining supplied)

68. Article 13 of the Pretoria Convention, 1881 provided that:³⁷
67. That being said, until 1905, the practice in the former Transvaal was that ownership of land could not be registered in the name of a "native" (black). This was justified on the basis of two instruments, namely, the Volksraad Resolution of 14 August 1884 and Article 13 of the Pretoria Convention, 1881.³⁶

66.3 The Boer leaders surrendered the "independence" of the Boer Republics i.e waived their right to political independence of the Boer Republics.

66.2 the Boer leaders who were in majority when the Peace Treaty was negotiated; agreed and accepted the dissolution of the Boer Republics; and

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69. I am advised that in 1905 and following the decision in *Tsewu v Registrar of*

*Deeds*³⁸ which held that neither of those instruments had the force of law and that title could be registered in the names of "natives". As I shall demonstrate below, this fundamentally changed in June 1913 when the Natives' Land Act, 1913 was promulgated.

Mythology of the Covenants of the Battle of Blood River and Paardekraal

70. Ehlers records that in February 1838, Piet Retief and his expedition of 70 whites and 30 blacks were killed by the Zulus. In further attacks by the Zulus, 300 Voortrekker men, women and children were killed at Italen. Against this background, Andries Pretorius arrived in Natal in November 1838 and organised punitive expedition against Dingane.³⁹

71. Before the military encounter, Pretorius initiated the idea of a covenant with God. Van Der Merwe notes that this idea was underlined by a remark of Sarel Cilliers, an elder in the Dutch Reformed Church. Cilliers declared after the battle of Italen, which the Voortrekkers lost, that the loss was due to their indifferent attitude towards God.⁴⁰ The covenant took the form of a prayer by Cilliers and the Voortrekkers asked God to grant them a victory over the Zulus. In return,

38 *Tsewu v Registrar of Deeds, 1905 TS 130.*
39 Annexure "PAM3"; "Desegregating History in South Africa: The Case of the Covenant and the Battle of Blood/Ncome River"
40 Van der Merwe J "From 'Blood River' to 'Belhar': a bridge too far?" *Studia Hist. Ecc. vol.40 n.1* Pretoria May. 2014 at 138-140.

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they would build a church in memory of His name. The military encounter took place on 16 December 1838 where the Zulu army was defeated.⁴¹

72. Van Der Merwe explains that during the 20th century, the Vow and the Battle of Blood River were used by Afrikaner political, religious and community leaders to explain the political, social and economic circumstances of Afrikaners and in the process fed the fire of Afrikaner nationalism. He writes that this is confirmed by 1938 centenary celebrations of the Great Trek during which the Battle of Blood River and the Vow were a central reference point in what Grundlingh and Sapire described as "an important populist phase" in the development of Afrikaner nationalism⁴²

73. Ehlers further writes that the mythology that developed around the covenant and the Battle of Blood River consisted of the following:

73.1 The Blood River victory was interpreted as proof

that God had commissioned the Afrikaner people to
keep South Africa white or that God desires white
supremacy in South Africa. Blood River saved the
Great Trek; and Blood River was a symbol of the

41 Annure "PAM3"; "Desegregating History in South Africa: The Case of the Covenant and the Battle of Blood/Ncome River"
42 Van der Merwe J "From "Blood River" to "Belhar": a bridge too far?" Studia Hist. Ecc. vol.40 n.1
Pretoria May. 2014 at 142.

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74.2 Nobody can make a binding Vow on behalf of somebody else without the latter even being aware of it. The Vow was simply the idea of Pretorius ("Pretorius idea") supported by Calliers and others who were present when it was initiated. Therefore, the idea of covenant of the Battle of Blood River was man-made and had nothing to do with God.

74.1 the Vow was binding only on those who participated in making it (i.e. Pretorius and his group);

74. Ehlers explains that:

73.2 The victory at the Battle of Blood River was a miracle in the sense that divine intervention gave the Voortrekkers the victory. God's intervention at Blood River to save the Voortrekkers proved that He was on the side of the Afrikaner people and would not abandon the Afrikaner nation.

victory of Christianity over heathendom and barbarism; and

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75. Ehlers further writes:

75.1 God cannot be claimed to be on the side of the

Afrikaners because of the Voortrekker victory at

Blood River. God is not exclusive but universal. The

God of Blood River is also the God of Italeni and

Perdeberg. The God of the Afrikaners is also the

God of the English, the Germans, Zulu (Pedi, Swati,

the Tswana etc).

76. In view of the above, I submit that the applicant's reliance on the covenant of

the Battle of Blood River to claim the ownership right, title and sovereignty of

the former Boer Republics is not only unsubstantiated, but it is fraught with

unimaginable collections of myths.

77. Furthermore, on 8 December 1880, ten thousand Boers assembled at the

Paardekraal Farm (Krugersdorp). The meeting was arranged by Paul Kruger.

At the gathering, the Boers decided to take action against the British to regain

the independence of the Transvaal Republic.

78. It is recorded that during the meeting, the Boers took stones and made a heap

at this spot to ensure that they will always, at this space, remember the pact

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that they made to recover the Republic from the English. This led to the battle of Majuba on the 27th of February 1881 ("First Anglo Boer War") where the Boers succeeded in recovering the Transvaal Republic⁴³.

79. Clearly, the idea of the event of Paardekraal was initiated by Kruger ("Kruger idea"). I therefore submit that the interpretation that the Voortrekkers' victory at Blood River and the Battle of Majuba (Blood River and Paardekraal covenants) is an indication that God granted the applicant's ancestors land in the former Boer Republics is just a fiction. It is also "a tale told about the past to legitimize white supremacy in South Africa".

Union settlement, Apartheid and the new constitutional negotiations

80. In 1910, the Union of South Africa was formed as a unitary state when the British colonies of Cape and Natal, and the former Boers' Republics of Transvaal and Orange Free State were amalgamated by the South African Act of 1909⁴⁴ (the 1910 Constitution). The so-called unity achieved under the Union of South Africa in 1910 (and later through the Republic of South Africa Constitution Act of 1961) was one based on racism, as it united the white English and Afrikaans speaking parts of the population whilst excluding the

"Paardekraal Monument, Market Street, Krugersdorp" Paardekraal Monument, Market Street, Krugersdorp | South African History Online (sahistory.org.za) Accessing Date: 12 November 2021.
South African Act of Edward VII C of 1909. Since 1910, there have been four Constitutions in South Africa, namely: the 1910 Constitution, the 1961 Constitution, the 1983 Constitution ("Tricameral Constitution"), the 1993 Constitution ("Interim Constitution") and the 1996 Constitution.

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indigenous African population.⁴⁵ Basically, the 1910 Constitution reflected the aspects of the Constitutions (*Grontwet*) of the former Boer Republics which prohibited equality between black and white.

81. Like the former Boer Republics' authorities, the Union government did not protect the land ownership of the black communities. Instead, the Union Parliament enacted a plethora of laws to legitimize the pre-1910 land dispossession or land grabbing that occurred in the former Boer Republics and the British colonies.⁴⁶ In the main, the Union government promulgated the Natives' Land Act⁴⁷ ("Land Act") which was widely regarded as one of the "keystones in the house of apartheid."

82. The Natives' Land Act was the first national law to entrench, formalise and legalise the land which was already taken from black people during colonialism and in the former Boer Republics and perpetuated further land dispossession and the forced removals. In other words, the Natives' Land Act endorsed and approved the already acquired "land loot" and property dispossession that occurred in the former Boer Republics and in the British colonies of Natal and Cape colony.

45 Nelson Mandela Foundation Trust and Another v Atriforum NPC and Others, (EQ02/2018) [2019] ZAEQC 2; [2019] 4 All SA 237 (EqC); 2019 (10) BCLR 1245 (EqC); 2019 (6) SA 327 (GJ) para 1-2. For example, Native Land Act 27 of 1913, Native Administration Act 38 of 1927 and Native Trust and Land Act 36 of 1936.

46 Act 27 of 1913. This Act was subsequently renamed Bantu Land Act and Black Land Act respectively. It was aimed at regulating the acquisition of land by black people. The Act formed an important part of the system of apartheid and was of importance for both legal and historical reasons.

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83. Solomon Plaatje, a significant writer and politician angrily denounced the Natives' Land Act in his famous book titled: "Native Life in South Africa". The first sentence of this book is perhaps one of the hardest hitting political statements in South African land history⁴⁸:

"Awakening on Friday morning, June 20, 1913, the South African Native found himself, not actually a slave, but a pariah in the land of his birth." (Underlining supplied)

84. The prejudicial effects of the Natives' Land Act can best be captured as follows⁴⁹:

"The Native Land Act... apportioned 8% of the land area of South Africa as reserves for the Africans and excluded them from the rest of the country, which was made available to the white minority population. Land available for use by Africans was increased by 5% [in terms of the Native Development and Trust Land Act 18 of 1936] bringing the total to 13% of the total area of South Africa, although much of the land remained in the ownership of the state through the South African Development Trust supposedly held in

48 Daniels v Scribante and Another, [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC)
 49 14 and Plaatje ST Native Life in South Africa (Picador Africa, Johannesburg 2007) 1.
Daniels v Scribante and Another, (CCT50/15) [2017] ZACC 13; 2017 (4) SA 341 (CC); 2017 (8) BCLR 949 (CC) para 35.

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trust for the African people. Thus 80% of the population was

confined to 13% of the land while less than 20% owned over 80%

of the land. This apportionment of land remained until the end of

apartheid and remains virtually unchanged. (Underlining

supplied)

85. Inscribed in the Natives' Land Act was the history of land dispossession and

the creation of the so-called "white South Africa" and the black reserves (later

Bantustans and nominal "independent" homelands).⁵⁰ The system of the

Bantustans reinforced ethnic polarization. The Act was the first step in the

process of creating the structural force behind the forced removals of black

communities from their land. The resultant landlessness and forced removals

brought pain, indignity, and extreme poverty to black people.⁵¹

86. In 1948, black people were further placed under a vicious system of the

apartheid regime by the Afrikaner leaders.⁵² The apartheid government

intensified the programme of land dispossession and further legalised and

50 The Natives' Land Act was followed by the Native Trust Land Act 18 of 1936. The Native Trust and Land Act established the South African Native Trust which owned 13% of the land that was reserved for use by Africans. However, access to this land by Africans was governed by Proclamation 293 of 1962 which was issued in terms of the Native Administration Act 38 of 1927. The Proclamation afforded Africans rights in land which could not be equated to ownership. See *Graham Robert Herbert N.O. and Others v Sengqu Municipality and Others*, [2019] ZACC 31 para 7. *Agri South Africa v Minister for Minerals and Energy*, (CCT 51/12) [2013] ZACC 9; 2013 (4) SA 1 (CC); 2013 (7) BCLR 727 (CC) para 1. The CC reminded us that white South Africans wield real economic power while the overwhelming majority of black South Africans were still identified with unemployment and abject poverty.

51 *Lungisile Ntsbeza et al v. Daimler AG et al, and Khujumani et al. v. Barclays National Bank et al*, United States District Court Southern District of New York, United States, Case number: 02 MDL 1499 (SAS).

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confirmed land acquired through dispossession in the Boer Republics. This was achieved through various laws. The abiding imperative of apartheid was to keep blacks under the conditions of perpetual servitude and submission so as to keep white supremacy intact.

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87. Chaskalson J wrote:⁵³

"... The policy of apartheid, in law and in fact, systematically

discriminated against black people in all aspects of social life.

Black people were prevented from becoming owners of property

or even residing in areas classified as 'white', which constituted

nearly 90% of the landmass of South Africa ..." (Underlining

supplied)

88. In 1961, the Union of South Africa became the Republic and adopted the Republic of South Africa Act⁵⁴ ("the 1961 Constitution"). The 1961 Constitution also took away the political, social and economic rights of black people and entrenched the policy of separate development or apartheid of which was frowned upon by the United Nations ("UN") as it would appear below.

⁵³ *Brink v Kitshoff NO, (CCT15/95) [1996] ZACC 9; 1996 (4) SA 197; 1996 (6) BCLR 752 (15 May 1996)*

⁵⁴ para 4. *Duncanmec (Pty) Limited v Gaylard NO, and Others, [2018] ZACC 29 para 3. Japha J reminded us that: Racism and discrimination were the hallmarks of the policy of apartheid that was implemented in the previous order. That policy rested on the false notion and belief that the white race was superior and that the other races were inferior. Consequently, black people were denied their dignity and other fundamental rights. The institutionalisation of racism brought intolerable suffering, hurt and humiliation to them.*

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Essentially, the 1961 Constitution reflected the fundamental racial prejudices entailed in the **Gronwet** and the racial policies of the Boer Republics.

89. The apartheid policies and laws envisaged the total separation of black and white races, socially, territorially, economically and politically.⁵⁵ On 30 November 1973, the UN General Assembly adopted "The Convention on the Suppression and Punishment of the Crime of Apartheid" ("**Apartheid Convention**"). This Convention declares that apartheid is a crime against humanity.⁵⁶

90. Of particular importance is that apartheid had its roots from the record of racial practices and human rights violations which occurred in the former Boer Republics. In essence, racism and discrimination were the hallmarks of the policy of apartheid that was implemented in the previous political order of the former Boer Republics.⁵⁷ Therefore, apartheid should be understood in the context of history of the racist laws of the former Boer Republics.

55 Those laws included but not limited to: **Population Registration Act 30 of 1950, Group Areas Act 41 of 1950, Prevention of Illegal Act 52 of 1951 ("PIA"), Native Laws Amendment Act 54 of 1952, Reservation of Separate Amenities Act 49 of 1953, Native Resettlement Act 19 of 1954 and Immorality Acts (Immorality Act 5 of 1927 and Immorality Act 23 of 1957). See also the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid. See also the International Convention on the Elimination of All Forms of Racial Discrimination.**

57 That policy rested on the false notion and belief that the white race was superior and that the other races were inferior. Consequently, black people were denied their dignity and other fundamental rights.

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91. In 1983, however, the apartheid government passed the Constitution ("the

Tricameral Constitution)⁵⁸ which created the tricameral parliament. This meant that there was a separate Parliament for the White, Coloured and Indian groups. Blacks were excluded from the tricameral parliament. Apartheid South Africa was described as one of most unequal societies in the world with a "wicked system of law".⁵⁹ I annex hereto a copy of the "United Nations Centre Against Apartheid Memorandum, United Nations (New York) November 1983.", marked "PAM11".

92. In the early 1990s, however, the apartheid was finally acknowledged by the apartheid government as a failure. The apartheid government admitted that apartheid was evil. The former President FW De Klerk apologized to the South African public for the pain and indignity that apartheid has brought to people of colour in South Africa⁶⁰.

93. As the result, the apartheid government began to negotiate a different future with black leaders who had been imprisoned, silenced, or driven into exile in consequence of their resistance to apartheid system. The formal political negotiations started with the Convention for a Democratic South Africa ("CODESA"). This convention resulted in a negotiated new Constitution of the Republic ("Interim Constitution").⁶¹ This Constitution was committed to a

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Republic of South Africa Constitution Act 110 of 1983.

Smith A "Equality constitutional adjudication in South Africa" (2014) 14 AHRJL 6 at 609-610.

TimesLIVE VIDEO "Video of FW apology released after his death" Sowetan, 12 November 2021 page 2.

Constitution of the Republic of South Africa Act 200 of 1993.

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transition towards a more just, defensible and democratic political order based

on the protection of fundamental human rights.⁶²

94. In sum, I am advised and submit that:

94.1 the land dispossession and racial discrimination started in

1652 at the Cape of Good Hope and went on to rear its ugly face in the Boer Republics and it was also intensified in the British colonies of Natal and Cape colony. What was dispossessed, however, was not only the land but the livestock and crops were also seized from the black communities;

94.2 the independence of Boer Republics of Transvaal and

Orange Free State was legally and formally terminated in 1902 by the Peace Treaty of Vereeniging and the two Republics became under the British administration as the British colonies. The Boer themselves agreed to come under the sovereignty of Britain.⁶³ In essence, the applicant's application seeks to claim the territories which politically and legally are no longer in existence.

62 Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others, (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 para 2.
63 Majority of the signatories to the Treaty were the representatives of the Boer Republics and they outnumbered the representatives of the British government.

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THE CONSTITUTIONAL AND LEGISLATIVE IMPERATIVES
IS A CLAIM OF SOVEREIGNTY FROM A SOVEREIGN STATE JUSTIFIED?

94.6 the Natives' Land Act legalised, legitimized and confirmed land acquired under colonialism by the British and the land properties acquired in the Boer Republics through conquest, trickery and various legal instruments. In other words, the Natives' Land Act approved the pre-1913 land grabbing.

94.5 history of land ownership in South Africa refutes the applicant's version that God granted its members' ancestors the land in the former Boer Republics. This belief is a mere religious mythology; and

94.4 the Boers in tandem with the missionaries used religion and bible, among others, as the effective tool to dispossess the black people of the former Transvaal and Orange Free State Republics;

94.3 the 1910, 1961, 1983, 1993 and 1996 Constitutions confirmed the dissolution of the Boer Republics and altered the borders of the former Boer Republics;

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South Africa and the reconstruction of society.

The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of

colour, race, class, belief or sex.

development opportunities for all South Africans, irrespective of

human rights, democracy and peaceful co-existence and

suffering and injustice, and a future founded on the recognition of

deeply divided society characterised by strife, conflict, untold

This Constitution provides a historic bridge between the past of a

"National Unity and Reconciliation"

96. The epilogue to the Interim Constitution reads as follows:

rac⁶⁴.

committed to achieving equality between men and women and people of all

a common South African citizenship and a democratic system of government

the Interim Constitution provided for the "establishment of one sovereign state,

Bill of Rights and 34 entrenched constitutional principles. The first principle of

The Interim Constitution was the supreme law of the country and contained a

Interim Constitution

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The adoption of this Constitution lays the secure foundation for

the people of South Africa to transcend the divisions and strife of

the past, which generated gross violations of human rights, the

transgression of humanitarian principles in violent conflicts and a

legacy of hatred, fear, guilt and revenge.

These can now be addressed on the basis that there is a need for

understanding but not for vengeance, a need for reparation but

not for retaliation, a need for ubuntu but not for victimization ..."

(Underlining supplied)

97. Pursuant to the provisions of the epilogue, Parliament enacted the Promotion

of National Unity and Reconciliation Act⁶⁵ ("Truth and Reconciliation Act").

The Act establishes a Truth and Reconciliation Commission. The objectives of

that Commission are set out in section 3. Its main objective is to "promote

national unity and reconciliation in a spirit of understanding which transcends

the conflicts and divisions of the past."⁶⁶

98. The Interim Constitution retained from the past only what was defensible and

represented a decisive break from, and a ringing rejection of, that part of the

past which was disgracefully racist, authoritarian, insular, and repressive.⁶⁷

Promotion National Unity and Reconciliation Act 34 of 1995.

Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and

Others, (CCT17/96) [1996] ZACC 16; 1996 (8) BCLR 1015; 1996 (4) SA 672 para 3.

S v Makwanyane and Another, (CCT3/94) [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391; [1996 2

CHRLD 164; 1995 (2) SACR 1, para 262.

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99. Historically, the former Boer Republics and later apartheid created a society

characterized by property dispossession, oppression, racial segregation, disenfranchisement, political and economic exclusion and injustice.⁶⁸ What the

Interim Constitution expressly aspired to do was to provide a transition from

these grossly unacceptable features of the past (Boer republics).⁶⁹ Therefore,

the Interim Constitution negated the applicant's claim for the restoration of the

former Boer Republics.

1996 Constitution

100. The 1996 Constitution serves as the foundation for a democratic South Africa,

a united and sovereign country free of oppression, social injustice and racial

discrimination of the past (including the injustices and racial discriminatory

practices of the former Boer Republics.⁷⁰

101. I must mention that the Preamble to the Constitution announces to the nation

and the world that the Republic is a sovereign State and South Africa belongs

to all those who live in it. This is so regardless of religion, colour, belief, creed

and culture. It reflects on the injustices of the past (which include the painful

Annexure "PAM9": United Nations Centre Against Apartheid Memorandum, United Nations (New York) November 1983.

Nelson Mandela Foundation Trust and Another v Afriforum NPC and Others, (EQ02/2018) [2019]

ZAECQ 2; [2019] 4 All SA 237 (EqC); 2019 (10) BCLR 1245 (EqC); 2019 (6) SA 327 (GJ) para 1-2.

Constitution of the Republic of South Africa, 1996.

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period of land dispossession and gross human rights violations which occurred in the Boer Republics).

102. Put it in a proper context, I have been advised that the Constitution shows a clear intention to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human right. Furthermore, the Preamble mirrors a "need to create a new order"⁷¹. Essentially, the Constitution establishes a fundamentally different territorial, political, social and apartheid with a new constitutional project of national unity and territorial sovereignty.⁷²

103. Section 1 of the Constitution provides:

"The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) Non-racialism and non-sexism.
- (c) Supremacy of the constitution and the rule of law.

71 City of Tshwane Metropolitan Municipality v Afriforum and Another, (157/15) [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) para 5.
72 Nelson Mandela Foundation Trust and Another v Afriforum NPC and Others, (EQ02/2018) [2019] ZACC 2; [2019] 4 All SA 237 (EqC); 2019 (10) BCLR 1245 (EqC); 2019 (6) SA 327 (6I) para 1-2.

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(d) Universal adult suffrage, a national common voters roll,

regular elections and a multi-party system of democratic

government, to ensure accountability, responsiveness and

openness". (Underlining supplied)

104. Section 1 acknowledges and recognizes "indivisible and sovereign South Africa"; Section 2 of the Constitution, however, takes it further and emphatically provides that the Constitution is supreme law in the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

105. Section 3 of the Constitution declares that there is a common South African citizenship, and that all citizens have equal rights and responsibilities. This is a response to the colonial Boer Republics and apartheid-era policies which revoked the South African citizenship of black people, making them instead foreigners in their country. The advent of the constitutional dispensation established South African citizenship as a constitutional precept based on equality⁷³.

106. I should further point out that section 103 of the Constitution establishes and recognises the nine (9) provinces and their boundaries. Under the new constitutional dispensation, the land area of the defunct Boer Republics is made

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up of the provinces of Limpopo, Mpumalanga, Gauteng, Free State and some

parts of the North West.

107. Evidently, the relief sought for the restoration of the ownership of the former Boer Republics will (if granted) radically alter the constitutional design of the borders and territorial sovereignty of the Republic. In addition, if the relief is granted, the South Africans who live in the areas of the former Boer Republics will forfeit their right to common citizenship of South Africa overnight.

108. In the premises, I am advised and submit that the Constitution envisages and emphasizes:

108.1 the oneness, indivisibility and sovereignty of the Republic and the creation of a democratic climate as is possible in the ushering in of a democratic State for a new legal order.

109. I therefore respectfully submit that the applicant's claim of sovereignty from the sovereign Republic is constitutionally and legally unjustified. The sovereignty of South Africa is a necessary and inalienable "political and legal property" of Republic and it is constitutionally protected.

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IS THE LIMITATION ON THE APPLICANT'S CONSTITUTIONAL RIGHTS

JUSTIFIABLE?

110. Section 7 (3) provides that the rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill. The Constitution itself imposes the limitations on the rights in the Bill of Rights. ("constitutional limitation")

111. It is evident from above that the applicant's claim is grounded on history, religion, beliefs, opinion and culture. The applicant and its members believe that their ancestors were given the land in the former Boer Republics by God.

112. Thus, the applicant's contentions implicate the following constitutional rights:

112.1 Section 15 of the Constitution-the right to freedom of religion, belief and opinion. Everyone (including members of the applicant) has the right to freedom of conscience, religion, thought, belief and opinion. However, no person is allowed to force his or her religious beliefs on others. Section 15 (3) (b) imposes limitation on the right to freedom of religion if the right is inconsistent with the Constitution.

112.2 Sections 30 of the Constitution provides that everyone has the right to use the language and to participate in the

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cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights. This means that section 30 itself imposes limitation on the right to participate in the cultural life. This is so if participation in cultural life is inconsistent with Constitution.

112.3

Sections 31 of the Constitution entitles persons belonging to a cultural, religious or linguistic community-(a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.⁷⁴ Section 31 (2) of the Constitution subjects the religious and cultural rights to the same requirement of consistency with the Bill of Rights⁷⁵.

113. I am advised that neither culture nor religion enjoy elevated constitutional protection. Therefore, the cultural and religious beliefs and practices of the applicant may be limited if they are inconsistent with the Constitution.

Section 36 limitation analysis

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Section 31 (1) of the Constitution.
Section 31 (2) of the Constitution provides that the rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

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114. Section 36(1) of the Constitution provides for the limitation of rights in the Bill of Rights ("statutory or common law limitation). Every right in the Bill of Rights including the applicant's rights to freedom of religion, belief and culture may be:

114.1 limited by law of general application but only insofar as this is reasonable and justifiable in an open and democratic society based on dignity, freedom and equality; and

114.2 limited for certain democratically justifiable purposes while prohibiting practices that are harmful to democracy by reason of their nature, purpose and extent.

115. I am advised that the limitation analysis requires the relevant considerations which include the nature of the right and the scope of its limitation, the purpose, importance and the effect of the limitation, and the availability of less restrictive means to achieve that purpose. None of these factors is individually decisive. Nor are they exhaustive of the relevant factors to be considered.⁷⁶

⁷⁶ With regard to the limitation of freedom of religion, see *Prince v President of the Law Society of the Cape of Good Hope*, (CCT36/00) [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231 (25 January 2002) para 45.

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116. I am further advised that the applicant's rights to freedom of religion, belief and

culture are not absolute.⁷⁷ It is therefore in the public interest and/or the public of the Republic that reasonable limitation of the applicant's rights to freedom of religion, belief and culture be applied. These rights like any other rights are inherently limited by the rights and freedoms of others.⁷⁸

117. Therefore, the applicant's rights must be limited to balance the potentially conflicting rights of the majority of the South Africans who will be affected by the applicant's claim. The rights of the South Africans that are threatened by the applicant's religious beliefs are the rights to citizenship, residence, property, equality and human dignity.

118. The applicant's rights to freedom of religion, beliefs and culture upon which their claim is based unfairly discriminates against the South Africans:

118.1 who are not the descendants of the Dutch settlers

and do not hold the membership of its association;

and

⁷⁷ Prince v President of the Law Society of the Cape of Good Hope, (CCT36/00) [2002] ZACC 1; 2002 (2) SA 794; 2002 (3) BCLR 231 (25 January 2002) para 146.
⁷⁸ With regard to the limitation of freedom of religion, see Christian Education South Africa v Minister of Education, (CCT4/00) [2000] ZACC 11; 2000 (4) SA 757; 2000 (10) BCLR 1051 para 41.

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121.1 the religious and cultural rights of the applicant are not absolute and essentially must be limited. Moreover, the applicant religious believers seek to diminish the sovereignty

121. In view of the above, I submit that:

120. PEPUDA is an appropriate law of general application which limits the applicant's rights to freedom of religion, belief and culture because it weighs heavily in on the majority of the South Africans in any proportionally review under section 36 of the Constitution. The fact that PEPUDA gives effect to equality between people of all races in South Africa is a strong indication that it is "reasonable and justifiable in an open and democratic society" to limit the applicant's rights.

119. I am advised that the law of general application which imposes limitation on the applicant's rights is the Promotion of Equality and Prevention of Unfair Discrimination Act ("PEPUDA").⁷⁹ This Act is a comprehensive South African anti-discrimination law. It prohibits unfair discrimination by the government and by private organisations, individuals and voluntary associations such as the applicant.

118.2 on the grounds of race, religion and culture.

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every citizen and every legal person including members of the applicant in South Africa are obliged to respect, protect, promote, and fulfill their rights to freedom of religion and culture towards other citizens, just as the State must respect, protect, promote and fulfill the rights in the Bill of

121.4

the applicant's religion and culture have no certain advantages before the Constitution. Neither can any religion in the Republic claim any theocratic control or advantages from the State, the people of the Republic and the courts; and

121.3

the limitation of the religious and cultural rights of the applicant is justifiable and reasonable in a democratic society for the realization of common good and social justice. In other words, the rights must be limited in the interest of the whole nation;

121.2

of the Republic which is vested and exercised by the people of South Africa. Certainly, the religious practices which seek to undermine the rule of law and constitutional sovereignty of the Republic are harmful to democracy;

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legacy of grossly unequal distribution of land in this country". These

constitutional provisions further include express commitments to "land reform" and to "equitable access" to land and natural resources. They also create express rights to secure tenure and to restitution for dispossession after 1913.

125. I am advised that sections 25 (1) (2) (b) and (3) are problematic in a sense that they protect the property acquired during colonial and apartheid days including the property acquired throughout the process of property dispossession which took place in the former Boer Republics. The Amendment to section 25 seeks to change this position and provide certainty by amending section 25 (2).

126. Froneman J aptly explained⁸¹:

"... mention was made of the contested nature of our country's conversation about the protection of property and the potential danger this holds for the success of our constitutional project. We need to be open about why this is so. The explanation lies in our history and in the pre-constitutional conception of property, which entailed exclusive individual entitlement. Put simply, that is largely a history of dispossession of what indigenous people held and its transfer to the colonisers in the form of land and other property, protected by an economic system that ensured the continued deprivation of those benefits on racial and class

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lines. That history of division probably also explains the concerns
both the previously-advantaged and disadvantaged still
have. The former fears that they will lose what they have; the
latter that they will not receive what is justly theirs ..." (Underlining
supplied)

127. The Expropriation Bill and the Amendment of section 25 of the Constitution should be understood in the context of the history of land dispossession in this country. The main problem lies with the history of property dispossession in this country. That is why the Bill seeks to expropriate land for public purpose or in the public interest without compensation.

128. I am advised and submit that Parliament has taken a step in the right direction in its endeavour to amend section 25 of the Constitution to allow expropriation of land without compensation. This will address the historical injustices of land dispossession perpetuated by both British and Boer colonialism including apartheid. In any event, section 25 (8) of the Constitution authorizes the State to take legislative measures to achieve land reform. Section 25(8) makes it clear that the other parts of section 25 (such as sections 25(1), (2) and (3)) should not "impede land reform".

129. I must emphasize that the expropriation law will provide for expropriation without compensation in limited categories where: (a) the State will expropriate abandoned land; (b) land held by Organs of State, land not being used for its

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132.1 It is constitutionally permissible to expropriate land without compensation in order to advance land reform. Section 25 (8) permits deviation from the compensation-based nature of the Constitution. But only in limited circumstances, and subject to procedural and judicial safeguards;

132. In the premises, I submit:

131. I cannot find any reason why the applicant would want to ground its request for the return of the Boer Republic on the basis of the intended expropriation of land without compensation whereas there are other avenues to challenge it.

130. Most importantly, the issue of compensation would be the business of the courts (and not the State) in a sense that the courts will be required to determine whether an order granting a nil compensation is just and equitable.

investment or subsidy in the acquisition of that land.
 health, safety or physical risk; (e) and land which market value is less than the core purpose; (c) land held for speculative purpose; (d) land which poses

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132.2 The Amendment to section 25 of the Constitution

and the Expropriation Bill should be viewed in a broader context of land reform and redress of the injustices of land dispossession which occurred in the former British colonies and; the Boer Republics; and apartheid.

INTERNATIONAL AND REGIONAL INSTRUMENTS

133. As I indicated above, the applicant (among others) claims the restoration of

sovereignty of the former Boer Republics and their borders as in 1902. The applicant further claims that the Boer Republics were internationally acclaimed Republics. The applicant also complains about the participation of South Africa in the new world order. I am advised that the notion of "state sovereignty" and "state borders" are the basic concepts of the Constitution and international

law.⁸²

134. South Africa's entered the global community after the abolition of its notorious apartheid laws. Therefore, South Africa is a member of the international community. South Africa's foreign policy is echoed in the Preamble to the

⁸² Gevorgyan K "Concept of State Sovereignty: Modern Attitudes" http://eph.am/files/karen_Gevorgyan.pdf, Accessing Date: 16 November 2021.

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Constitution which enjoins the Republic to take its rightful place as a sovereign

State in the family of nations.

135. Section 231(4) provides for the domestication of international law through national legislation. It reads that "any international agreement becomes law in the Republic when it is enacted into law by national legislation". Section 232 states that "customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

136. The territorial sovereignty and political independence of the Republic are guaranteed in the international and regional instruments to wit, the Charter of the United Nations (also known as the UN Charter), the Constitutive Act of African Union ("Constitutive Act") and the OAU Charter. These instruments also recognize the national existence and the borders of the Republic.

137. Article 2 (1) of the UN Charter provides that the Organization is based on the principle of the sovereign equality of all its Members.

138. The objectives of the AU under Article 3 of the Constitutive Act are (among others) to:⁸³

83 Article 3 (b), (c) and (g) Constitutive Act of the African Union.

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138.1 defend the sovereignty, territorial integrity and independence of its Member States;

138.2 encourage international cooperation, taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights; and

138.3 promote democratic principles and institutions, popular participation and good governance.

139. Article 4 provides *inter alia* that⁸⁴:

139.1 sovereign equality and interdependence among Member States of the Union;

139.2 respect of borders existing on achievement of independence;

139.3 respect for democratic principles, human rights, the rule of law and good governance; and

84 Article 4 (a), (b), (m) and (p) of the Constitutive Act of the African Union.

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See generally, section 39(1) of the Constitution. It stipulates: "When interpreting the Bill of Rights, a court, tribunal or forum—(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and c) may consider foreign law".

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142. But what is prominently important here is the right of all the South Africans to sovereignty. If this right is not protected by this court, freedom and the rights of the South Africans which are entrenched in the Constitution, the OAU Charter and the Universal Declaration of Human Rights (UDHR) will be trampled upon

141. I am further advised that this court has the peremptory obligation to consider international law (i.e the OAU Charter, the Constitutive Act of the AU, the UN Charter and other relevant international instruments) under section 39(1)(b) when it interprets the applicant's rights to freedom of religion, belief and culture in relation to other rights of the South Africans.⁸⁵

140. I am advised that the "structural properties" that characterize the legal nature of sovereignty of the Republic are territorial sovereignty (supremacy of the Republic on its territory) and political independence. The essence of territorial supremacy of the Republic is that "the State exercises the highest, supreme authority over all persons and their associates, located in the national territory" including the applicant and its members.

139.4 condemnation and rejection of unconstitutional changes of governments.

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