

BOOK REVIEW

MOSENEKE'S IMPACT ON LAND RESTITUTION

MY OWN LIBERATOR: A MEMOIR. By Dikgang Moseneke.
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I. INTRODUCTION

In May 2016, after over fourteen years on the bench, Deputy Chief Justice Dikgang Moseneke retired from his position on South Africa's highest court. Moseneke, who was an established public figure before joining the Constitutional Court, remains one of its most identifiable members. His retirement provoked an outpouring of support and gratitude from the public and from innumerable South African leaders. Indeed, President Jacob Zuma described him as "one of the country's finest jurists,"¹ and Chief Justice Mogoeng Mogoeng referred to him as a "legal giant."²

In October 2016, Moseneke released his memoir, *My Own Liberator*.³ It gives an intriguing account of Moseneke's life and of the modern history of South Africa. The memoir narrates his early life, political imprisonment, rise as a jurist, and involvement in the building of South Africa's new democracy. Throughout, Moseneke gives historical context to the personal milestones he describes, showing how the decades-long fight for liberty shaped his life.

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1. Media Statement, Jacob Zuma, President, President Jacob Zuma Thanks former Deputy Chief Justice Moseneke and Appoints Acting Deputy Chief Justice (May 23, 2016), <http://www.gov.za/speeches/president-zuma-thanks-former-deputy-chief-justice-moseneke-and-appoints-acting-deputy-chief>.

2. Gabi Falanga, *Legal Giant Moseneke Bids Farewell*, IOL (May 20, 2016), <http://www.iol.co.za/news/crime-courts/legal-giant-moseneke-bids-farewell-2024082>.

3. DIKANG MOSENEKE, *MY OWN LIBERATOR: A MEMOIR* (Alison Lowry, 2016).

My Own Liberator focuses on describing Moseneke's life before joining the bench, rather than expounding on his jurisprudential views. It also does not give any particularized insight into what he believes his legacy will be. This is not surprising, given the breadth of topics the Constitutional Court dealt with during his tenure. Similarly, this review does not attempt to do so. Instead, this review gives an overview of *My Own Liberator* while adding color to Moseneke's work at the Court, particularly as it related to land restitution. Part II provides a summary of *My Own Liberator*, and Part III discusses the background of land restitution in South Africa and Moseneke's impact on it. Part IV concludes by giving a brief assessment of Moseneke's memoir and how it relates to his land restitution jurisprudence.

II. SUMMARY

Family and Early Life

Born on December 20, 1947, Moseneke spent much of his childhood in Lady Selborne and Atteridgeville, two townships outside Pretoria (pp. 38-39). He completed his initial primary schooling in Bela-Bela (p. 46), a black township in modern-day Limpopo (previously Transvaal). In 1961, at the age of thirteen, Moseneke began attending Kilnerton Training Institution (p. 54), a boarding school in Pretoria. His time there was short-lived; Moseneke was expelled from Kilnerton for his involvement in protests during the spring of 1962 (pp. 59-60). Shortly thereafter, the apartheid government shut down the school and expropriated most of the land on which it was located (p. 59). The reason: Kilnerton was designated as an area for exclusive use by whites (p. 59). While many of his classmates were admitted to another boarding school nearby, Moseneke was blacklisted from attending (p. 59).

Political Imprisonment

After his ejection from boarding school, Moseneke briefly attended Hofmeyr High School in Atteridgeville (p. 60). There he was recruited to join the African Students Union of South Africa ("ASUSA") (p. 62). The ASUSA was connected to the Pan Africanist Congress ("PAC"), an Africanist offshoot of the African National Congress ("ANC").⁴ Meetings of the ASUSA were effectively an entry point for youth to join the PAC (p. 62). Because the apartheid government banned the movement, ASUSA

4. For a brief overview of the PAC's founding and ideology, see NELSON MANDELA, A LONG WALK TO FREEDOM 312-16 (Back Bay Books, 2008).

members were broken up into secret groups—or “cells”—of five to ten people (p. 63).

On the morning of March 21, 1963, police kicked in the door to Moseneke's home, arrested him for terrorism, blindfolded him (pp. 64-65), and took him to a police station in Erasmia, a suburb of Pretoria (p. 68). The police beat him until he was swollen and bloody (p. 67-68). He was detained there in solitary confinement for one month without the ability to consult with a lawyer (pp. 68, 73). In July 1963, Moseneke was convicted of sabotage along with thirteen others (p. 82). He was sentenced to ten years of imprisonment (p. 84).

Robben Island

After sentencing, Moseneke was sent to Robben Island (p. 92). Upon arriving on the Island, there were nearly 500 other political prisoners, who were kept separate from the smaller, common prison population (p. 93). Moseneke remained on Robben Island for ten years doing hard labor (p. 94-95). He worked at the island's quarry, where inmates mined blue slate to expand the prison (pp. 96-99). This experience was not pleasant; hard labor was combined with random assaults on prisoners, and there was race-based food rationing that left black prisoners malnourished (pp. 95, 105, 123). Additionally, black prisoners were issued no underwear and no socks, only pants, short-sleeved shirts and open-toed sandals (p. 123).

However, during that difficult time, Moseneke accomplished a great deal for himself and for the liberation community on the island. He worked as a news supplier by stealing newspapers from guards, reading them, and conveying their contents to the prisoners (p. 108). He also became acquainted with some of South Africa's current and future leaders, including, among others, Nelson Mandela (p. 266), Walter Sisulu (p. 111), and Jacob Zuma (p. 133). Indeed, upon Mandela's passing in 2013, Moseneke stated Mandela was like a father to him on the Island.⁵

Moseneke's most important accomplishment while on the island was his education. During his ten years, he passed his matriculation exam (p. 113) and earned two degrees from the University of South Africa: a bachelor's degree in the arts and a Baccalaureus Juris degree (pp. 138-39).

Legal Career

On July 1, 1973, at the age of twenty-five, Moseneke was released from prison (p. 148). He took a job as a law librarian and legal researcher

5. *Moseneke: Madiba was My Father on Robben Island*, S. AFR. GOV'T NEWS AGENCY, <https://www.sanews.gov.za/south-africa/moseneke-madiba-was-my-father-robben-island> (last visited Dec. 17, 2016).

(pp. 163-64) and was later taken on as a full articles clerk at Klagsbrun, Schewitz, and Partners, a law firm in Pretoria (p. 164).⁶ This was the first time that a black person became enrolled as an articles clerk at a white law firm in Pretoria (p. 206).

To finish his legal education, Moseneke completed an LLB from the University of South Africa in 1976 and finished his articles clerkship in 1977 (p. 165). However, upon applying to become an attorney, the law society opposed his application in light of the Status of Bophuthatswana Act (p. 165). The Act stripped Tswana-speakers (among others) of their South African citizenship and made them citizens of Bophuthatswana, a Bantustan (pp. 165-67).⁷ Therefore, the law society reasoned, Moseneke was no longer a citizen of South Africa and did not qualify to be an attorney (p. 165). He challenged that position at the Transvaal Provincial Division and won (p. 167). The court found that, while Moseneke was no longer a South African citizen, he still qualified to be admitted because he continued to be a resident of South Africa.⁸

Seeing no partnership offer at Klagsbrun, Schewitz, and Partners, Moseneke and two partners established one of the few black law firms in Pretoria in 1978 (pp. 175-78). After a tumultuous start, Maluleke, Seriti and Moseneke was a success. Moseneke represented many prominent black-owned businesses, including the Sundowns football club, which today is among the top teams in Africa (pp. 188-89).⁹ The firm also represented many anti-apartheid activists accused of crimes against the state (pp. 192-93).

1980s

After working as an attorney for five years, Moseneke decided to leave his attorney practice to become an advocate (pp. 222-23).¹⁰ After a contentious hearing before the all-white bar council, he became the first black member of the Pretoria Bar (pp. 224-25). Moseneke also joined the bar in Johannesburg, where he completed his pupillage (p. 226). Almost immediately, he gained ample business from his professional network and from other black attorneys in Johannesburg and Pretoria (p. 228).

6. In South Africa, a person seeking to become an attorney must first serve as a candidate attorney or "articles clerk" with a practicing attorney.

7. Bantustans were nominally autonomous territories created by the apartheid government for black South Africans.

8. See *Ex Parte Moseneke* 1979 (4) SA 885(I).

9. See *Sundowns Triumph to Become Second SA Team to Conquer Africa*, MAIL & GUARDIAN (Oct. 24, 2016), <http://mg.co.za/article/2016-10-24-sundowns-triumph-to-become-second-sa-team-to-conquer-africa>.

10. In South Africa, the legal practice is divided between attorneys and advocates. Advocates are court specialists, while attorneys provide a wider array of legal services.

Moseneke's work as an advocate was diverse. In political trials, he defended those accused of treason, terrorism, sabotage, and membership in banned political organizations (p. 236). These included criminal trials of anti-apartheid combatants that had returned to South Africa after military training abroad (pp. 238, 247-48). He also represented, with tremendous success, activists accused of public violence or sedition (p. 237).

But Moseneke's work with activists was not without a reaction. In 1984, his chambers were blown up overnight with an explosive device (p. 240). Later, he learned from the Truth and Reconciliation Commission¹¹ that the state police attempted to murder him on two different occasions (pp. 240-41).

My Own Liberator recounts some of Moseneke's most interesting cases as an advocate, including his defense of the poet Ingoapele Madingoane, the author of *Africa My Beginning*, who in 1984 was accused of possession of illegal literature for having copies of his own banned writings (p. 241). In another case, Moseneke defended Zola Mahobe, the then-owner of the Mamelodi Sundowns, for knowingly receiving millions of rands stolen from Standard Bank by Mahobe's mistress (pp. 243-44). Moseneke also defended Clement Zulu, a commander of the Azanian People's Liberation Army, the military wing of the PAC (p. 252-54).

Early 1990s

In early 1990, Moseneke and Keith Kunene, the president of the Black Lawyers Association, were invited to visit Nelson Mandela in prison (p. 266). It was the first time Moseneke had seen Mandela in seventeen years (p. 266). During the meeting, Mandela requested their support as the ANC sought to end apartheid through a negotiated settlement (p. 266). On February 2, 1990, President F.W. de Clerk, the then-current head of the apartheid state, announced that he was unbanning the ANC, the PAC and numerous other political organizations (p. 255). On February 11th, the government released Mandela from prison (p. 266-67).¹²

Towards the end of 1990, after the PAC was unbanned, Moseneke was elected as its second deputy president (p. 273). During that period, the PAC took an indecisive position on the negotiated settlement with the apartheid government, which frustrated Moseneke (p. 276). Despite

11. The Truth and Reconciliation Commission was an institution set up after the fall of apartheid to assist with creating national unity and the transition of governance. The commission recorded and, in some cases, granted amnesty for violations of human rights during apartheid. See generally TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA (Oct. 29, 1998), <http://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf>. See also HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: A CONTEXTUAL ANALYSIS 42-43 (Peter Leyland et al. 2010).

12. For an account of Nelson Mandela's release, see MANDELA, *supra* note 4, at 769-78.

several high-level meetings with the ANC, certain African heads of state and the government, the PAC remained scatterbrained (p. 277). As a result, Moseneke resigned in December 1992 and returned to his practice as an advocate (p. 282).

During the 1990s, Moseneke worked on a variety of significant cases. At the request of Nelson Mandela, Moseneke acted as legal counsel for Mandela's wife, Nomzamo Winifred Madikizela-Mandela (p. 267). Moseneke defended her in connection with the death of Moeketsi 'Stompie' Seipei (p. 294) and later represented her in connection with her unlawful dismissal as the Deputy Minister of Social Affairs (pp. 319-20). Moseneke was also part of the legal team that represented political inmates on Robben Island who sought their release after the unbanning of opposition political groups (pp. 295-97).

In 1993, Moseneke was appointed a senior counsel of the republic (p. 299).¹³ Shortly thereafter, Thabo Mbeki—who would later become South Africa's president after Mandela—requested Moseneke to serve on the technical committee that would draft the country's interim Constitution (pp. 299-301). The interim Constitution was critically important; it provided the legal framework for the transition to a democratic South Africa.¹⁴ After some hesitation, Moseneke agreed to be on the technical committee, which helped convert the political consensus of the multiple parties into constitutional text (p. 300).¹⁵ The South African parliament adopted the interim Constitution by the end of 1993 (p. 303).

In December 1993, after wrapping up his time on the technical committee, Moseneke received a call from Nelson Mandela (p. 304). Mandela had nominated Moseneke to become the deputy chairman of the Electoral Commission (p. 305). Moseneke accepted the nomination (p. 306) and worked with Judge Johann Christiaan Kriegler, the chairman of the commission, to set up the necessary infrastructure for South Africa's first non-racial democratic elections on April 27, 1994 (p. 310), the same

13. In South Africa, seasoned advocates can be appointed as senior counsel (also known as 'taking silk') in recognition of their experience and skill. Senior counsel status, which is part of South Africa's heritage as a British colony, is a recognition of the esteem in which the recipient is held by his or her peers. For an interesting background on the institution, see generally *General Council of the Bar and Another v Mansingh and Others* 2013 (3) SA 294 (SCA). See also Pierre De Vos, *The Colonial Roots of Conferring Silk on Advocates*, DAILY MAVERICK (Nov. 29, 2013), <https://www.dailymaverick.co.za/opinionista/2013-11-29-the-colonial-roots-of-conferring-silk-on-advocates/#.WFZbaVV96Uk>.

14. See KLUG, *supra* note 11, at 32-33.

15. See KLUG, *supra* note 11, at 29 ("[T]he negotiating parties entered into a series of bilateral negotiations, which came together again to form a multi-party negotiating forum. This body thrashed out the interim constitution that came into effect on 27 April 1994, as South Africans took part in their first-ever exercise of non-racial democracy. . . . [T]he . . . process provided for a Negotiating Council to discuss and decide upon reports from technical committees, which would clarify and present alternatives and issues for negotiation. . . . Dominated by academics and lawyers, the technical committees facilitated the emergence of clear alternatives.").

day the new interim Constitution became effective. The elections had some irregularities but were by and large a success (p. 315). The ANC took a majority of seats in parliament,¹⁶ and Nelson Mandela was inaugurated as President on May 10, 1994 (p. 315).

Post-Apartheid

After the elections, Moseneke returned to his practice as an advocate (p. 317). He also served a short stint in 1994 as an acting judge on the High Court in Pretoria (then known as the Supreme Court) (p. 318).¹⁷

Beginning in 1995, Moseneke took a six-year hiatus from the law (pp. 324-28). He joined Telkom, South Africa's state-owned telecommunications company, as chairman (p. 323-24). Moseneke also became involved with New Africa Investments Limited (NAIL), a holding company that owned stakes in a variety of companies in South Africa (pp. 328-32).

In July 2001, Moseneke resigned from his corporate positions to again serve as an acting judge on the High Court in Pretoria (p. 334).¹⁸ In September of the same year, he was appointed as a permanent judge (p. 335). During his tenure there, Moseneke and Sisi Khampepe—who currently serves on the Constitutional Court—were appointed as judicial envoys to report on the electoral framework in Zimbabwe for the then-president, Thabo Mbeki (p. 335). As envoys, they produced the controversial report, later known as the Khampepe Report, finding that the elections in Zimbabwe were not free and fair (p. 335). The report, which was withheld from the public by the government until 2014, made headlines upon its release.¹⁹

In November 2002, shortly after his permanent appointment to the High Court, Moseneke was elevated to the Constitutional Court (p. 336).²⁰

16. *1994 National and Provincial Elections*, INDEPENDENT ELECTION COMMISSION (1994) <http://www.elections.org.za/content/uploadedfiles/NPE%201994.pdf>.

17. Roughly analogous to federal district courts in the U.S., divisions of the High Court in South Africa are courts of general jurisdiction that sit above magistrate courts. High Court decisions can be appealed to the Supreme Court of Appeal and, in some cases, to the Constitutional Court. For a quick overview of the South African judicial system, see *Judicial System*, <https://www.gov.za/about-government/government-system/justice-system/judicial-system> (last visited Dec. 3, 2017).

18. See also *Press Release: Advocate Dikgang Moseneke Resigns From Nail, Metlife & Telkom*, (June 1, 2001), http://www.sharenet.co.za/free/sens/disp_news.phtml?tdate=20010601171628&seq=2653&scheme=default.

19. See, e.g., Chantelle Benjamin, *Khampepe: Zim's 2002 Elections Not Free and Fair*, MAIL & GUARDIAN (Nov. 14, 2014), <http://mg.co.za/article/2014-11-14-khampepe-zimbabwes-2002-elections-not-free-and-fair>.

20. The Constitutional Court is South Africa's highest court. Its jurisdiction includes all constitutional matters and all cases that raise "an arguable point of law of general public importance". See S. AFR. CONST., 1996 § 167. The Constitutional Court sits above the Supreme Court of Appeal,

In June 2005, Moseneke was appointed Deputy Chief Justice (p. 337). He held that position for over a decade, serving under three different Chief Justices, including current Chief Justice Mogoeng.²¹

III. MOSENEKE'S IMPACT ON LAND RESTITUTION

My Own Liberator does not give an in-depth look into Justice Moseneke's time on the Constitutional Court and the cases that were brought before it—he plans to write a second segment of his memoirs that will discuss that more fully (pp. xx-xxi). Nonetheless, during his time on the bench Moseneke contributed a great deal to South Africa's jurisprudence. He wrote important judgments on a variety of topics, including criminal law,²² civil procedure,²³ parliamentary procedure,²⁴ executive power,²⁵ intellectual property,²⁶ provincial power,²⁷ equality,²⁸ open justice and national security,²⁹ and corruption.³⁰

Perhaps the most enduring part of his legacy will be his work in land restitution. While the dawn of non-racial democracy and the adoption of the country's new Constitution restored political parity between white and non-white South Africans, the impact of apartheid in terms of land ownership remains.³¹ Moseneke's jurisprudence on land restitution,

South Africa's second highest appellate court. Divisions of the High Court and certain specialty courts sit below the Supreme Court of Appeal.

21. See *Moseneke Speaks on Being Overlooked for Chief Justice Position*, ENCA (May 21, 2016), <https://www.enca.com/south-africa/moseneke-speaks-on-being-overlooked-for-chiefs-justice-position>.

22. See, e.g., *Thebus and Another v S* 2003 (6) SA 505 (CC).

23. See, e.g., *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC).

24. See, e.g., *Mazibuko v Sisulu and Another* 2013 (6) SA 249 (CC).

25. See, e.g., *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC).

26. See, e.g., *Laugh It Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International and Another* 2006 (1) SA 144 (CC).

27. See, e.g., *Minister of Police and Others v Premier of the Western Cape and Others* 2014 (1) SA 1 (CC).

28. See, e.g., *South African Police Service v Solidarity obo Barnard* 2014 (6) SA 123 (CC); *Minister of Finance and Other v Van Heerden* 2004 (6) SA 121 (CC).

29. See, e.g., *Independent Newspapers (Pty) Ltd v Minister for Intelligence Services (Freedom of Expression Institute as Amicus Curiae) In re: Masetlha v President of the Republic of South Africa and Another* [2008] ZACC 6; 2008 (5) SA 31 (CC); 2008 (8) BCLR 771 (CC).

30. See, e.g., *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC).

31. For example, there are still many unresolved land claims under the Restitution of Land Rights Act (discussed below). According to the Minister of Rural Development and Land Reform, there were still 6,607 outstanding claims as of the end of March 2017. See Transcript of Proceedings of National Assembly at 55-56, (June 7, 2017) <https://www.parliament.gov.za/storage/app/media/Docs/hansard/87dabe76-3765-423c-8a68-9ff02b73078c.pdf>. See also HJ Kloppers & GJ Pienaar, *The Historical Context of Land Reform in South Africa and Early Policies*, 17(2) POTCHEFSTROOM ELECTRONIC LAW JOURNAL 677, 678 (2014), <http://www.scielo.org.za/pdf/pej/v17n2/04.pdf>.

notably his judgments in *Goedgelegen Tropical Fruits*,³² *Florence*,³³ and *Kwalindile Community*,³⁴ will undoubtedly have a lasting impact.

Background on Land Restitution

During apartheid, countless non-white South Africans were dispossessed of their rights in land.³⁵ This was accomplished through several pieces of legislation, including the Natives Land Act, the Native Trust and Land Act, the Urban Areas Act, and the Group Areas Act(s), among others.³⁶

By the early 1990s, title to most of the land in South Africa was held by the white minority.³⁷ During the negotiations for the interim Constitution, which laid out the broad framework for South Africa's final Constitution,³⁸ the major parties to the negotiations—including the apartheid government, represented by the National Party, and the ANC—struggled to address the land question. The ANC wanted to ensure that the property clause in the interim Constitution did not inhibit future land restitution measures, while the National Party sought to protect the property rights of white South Africans.³⁹ In the end, they agreed on the wording in sections 28 and 121-123 of the interim constitution.⁴⁰ In *My Own Liberator*, Moseneker, explains the final compromise:

The first part of the property clause . . . promised everyone the right to acquire and hold rights in property or dispose of it. Its thrust was clearly futuristic. Historical rights in property that had vested were protected by the assurance that 'no deprivation of any rights in property shall be permitted otherwise than in accordance with a law.' The property clause recognised that certain laws may regulate, limit or deprive the use or enjoyment of property. Also, the state may expropriate a right in property in accordance with a

32. *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC).

33. *Florence v Government of the Republic of South Africa* (6) SA 456 (CC).

34. *Kwalindile Community v King Sabata Dalinyebo Municipality and Others* 2013 (6) SA 193 (CC).

35. See Kloppers & Pienaar, *supra* note 31, at 686 (noting that, between 1960 and 1983, an estimated 3.5 million people were forcibly removed as a result of certain racial legislation).

36. See *id.* at 679-686; MOSENEKE, *supra* note 3, at 22-23; *List of Laws on Land Dispossession and Segregation*, <http://www.sahistory.org.za/topic/list-laws-land-dispossession-and-segregation> (last visited Dec. 23, 2016). See also Abolition of Racially Based Land Measures Act 108 of 1991 (listing prior race-based legislation that has since been repealed).

37. See Cheryl Walker & Alex Dubb, *The Distribution of Land in South Africa: An Overview*, <http://www.plaas.org.za/sites/default/files/publications-pdf/No1%20Fact%20check%20web.pdf>.

38. See S. AFR. (INTERIM) CONST., 1993 at § 71. See also KLUG, *supra* note 11, at 69-71.

39. Matthew Chaskalson & Carole Lewis, *Property*, in CONSTITUTIONAL LAW OF SOUTH AFRICA at 31-32 (1998).

40. Section 28 of the Interim Constitution laid out property rights, while Sections 121-123 dealt with the restitution of land previously dispossessed.

law, provided it is for a public purpose only. Expropriation must be against payment of compensation agreed to with the affected person or determined by a court.⁴¹

The language in the interim Constitution became the foundation for the final Constitution's slightly more progressive provisions on property rights and land restitution.⁴² Section 25 of the final Constitution, which was adopted in 1996, provides that "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."⁴³ All expropriations must be "for a public purpose or in the public interest"⁴⁴ and the owner must be paid just and equitable compensation.⁴⁵ Further, section 25(7) of the Constitution states that "a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled . . . either to restitution of that property or to equitable redress."⁴⁶

In order to effect South Africans' constitutional rights to land restitution, the South African Parliament adopted the Restitution of Land Rights Act (the "Restitution Act").⁴⁷ Under the Act, a person dispossessed of a right in land after June 19, 1913 as a result of past racially discriminatory laws or practices is entitled to restoration of such right in land or other equitable redress,⁴⁸ as long as just and equitable compensation was not received at the time of the dispossession.⁴⁹ Relief under the Restitution Act, whether through restoration of land or other equitable relief, is paid for by the state.⁵⁰

41. MOSENEKE, *supra* note 3, at 302.

42. *See* KLUG, *supra* note 11, at 53.

43. S. AFR. CONST., 1996 at § 25(1).

44. *Id.* at § 25(2)(a).

45. *Id.* at § 25(3).

46. *Id.* at § 25(7).

47. Restitution of Land Rights Act 22 of 1994 (S. Afr.).

48. *See id.* at §§ 1, 2(1).

49. *Id.* at § 2(2). Under the original legislation passed in 1994, the deadline for filing restitution claims was set at December 31, 1998. A later amendment to the Restitution Act reopened the claim period. However, in 2016 the Constitutional Court declared the amendment invalid because the public participation process conducted in connection with it was unreasonable. *See Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* 2016 (5) SA 635 (CC). Recently, certain members of the South African Parliament have made efforts to reopen the claim period. *See* Paul Herman, *Land Claims: Parliament Begins Process to Reopen Window to Lodge Claims*, NEWS24 (Oct. 5, 2017), <http://www.news24.com/SouthAfrica/News/land-claims-parliament-begins-process-to-reopen-window-to-lodge-claims-20171005>.

50. *See Florence*, 2014 (6) SA 456 (CC) at para. 137.

Moseneke's Impact on Land Restitution

During his tenure on the Constitutional Court, Moseneke wrote three judgments—*Goedgelegen Tropical Fruits*,⁵¹ *Florence*,⁵² and *Kwalindile Community*⁵³—that were instrumental in developing the meaning of certain provisions of the Restitution Act.

In *Goedgelegen Tropical Fruits*, the applicants had lived as labor tenants on a white-owned farm during apartheid. In return for two days of labor per week, the tenants were entitled to build homes for themselves and their families and to plant crops and graze their livestock on certain plots of land.⁵⁴ In 1969, the owners of the farm terminated the labor tenancy arrangement.⁵⁵ Many years later, after the passage of the Restitution Act, the applicants sought relief for the dispossession of labor tenancy rights in 1969. The Court dealt with, among other things, the question of whether past terminations of labor tenancies by private farmers entitle prior labor tenants to redress under the Restitution Act. Because the dispossession of rights was done by the landowner and not the apartheid government, the lower courts had held that the dispossession was not “as a result of past discriminatory laws or practices,” and the claimants were not entitled to relief.⁵⁶ Moseneke, writing for a unanimous court, disagreed. Interpreting the Restitution Act in light of its purpose and the spirit of the South African Bill of Rights, the Court held that “as a result of” in the Restitution Act meant “as a consequence of” and not “solely as a consequence of.”⁵⁷ Absent apartheid laws, policies and practices on the land rights of black people, the landowner would not have had the power to terminate the tenants’ land rights.⁵⁸ Thus, the Court reasoned, the private action taken in *Goedgelegen Tropical Fruits* entitled the tenants to relief under the Restitution Act.⁵⁹

In *Florence*, a family lived in a house in Cape Town. In 1957, the owner entered into a written agreement with members of the Florence family to sell them the property. Under the agreement, the purchase price was to be paid in monthly installments for approximately fourteen years. The installments were made, and the land was effectively paid off.⁶⁰ However, the property was located in an area classified as a “white group area” under

51. *Goedgelegen*, 2007 (6) SA 199 (CC).

52. *Florence*, 2014 (6) SA 456 (CC).

53. *Kwalindile Community*, 2013 (6) SA 193 (CC).

54. *Goedgelegen*, 2007 (6) SA 199 (CC) at para. 15.

55. *Id.* at para. 16.

56. *Id.* at paras. 26-27.

57. *Id.* at para. 69.

58. *Id.* at paras. 71, 76.

59. *Id.* at para 81.

60. *Florence*, 2014 (6) SA 456 (CC) at para. 12.

apartheid-era legislation, and Mr. Florence was not classified as white. As a result, in 1970 the parties agreed to cancel the original agreement. The owner refunded the Florence family a sum that, at the time of the dispossession, was less than one-twentieth the amount of compensation the family should have received.⁶¹ In 1995, a restitution claim was made on behalf of certain members of the Florence family, seeking equitable redress in the form of, among other things, financial compensation. The trial court upheld the claim and made an award, which was adjusted for the subsequent changes in the value of money since 1970. On appeal, one of the issues before the Constitutional Court was whether the consumer price index (the “CPI”) was an appropriate metric to calculate changes in the value of money instead of an investment-based metric, which was insisted upon by the family.⁶² In his majority judgment on the CPI issue, Moseneke analyzed the lower court’s decision, including the approach used to calculate the compensation due. He agreed with the trial court, rejecting the argument that financial compensation under the Restitution Act is only adequate where past loss is treated as an investment.⁶³ Moseneke also elaborated on the purpose of financial compensation under the Restitution Act:

[A] claim for compensation under the Restitution Act . . . has a reparatory and restitutionary character. It is neither punitive in the criminal justice sense nor compensatory in the civil sense. . . . Fair compensation is not necessarily equal to the monetary value of the dispossessed property and restitution has little or nothing to do with investing or commercial transactions. It has to do with addressing massive social and historical injustice.⁶⁴

Kwalindile Community analyzed how to properly apply section 34 of the Restitution Act. Under Section 34, the Land Claims Court—a specialized court created by the Restitution Act⁶⁵—may, prior to the final determination of a land claim under the Restitution Act, make an order that the land in question will not be restored to the claimant. This leaves other equitable relief (e.g. financial compensation) as the only remedy. However, such an order can only be made where it is in the public interest and when failing to do so will result in substantial prejudice to the public or to any substantial part thereof⁶⁶—such as when land has since been

61. *Id.* at paras. 8, 13. The Florence family was refunded 1,350 rands from the owner. However, the Land Claims Court found that the Florence family had been under-compensated for their dispossession by 30,513 rands.

62. *Id.* at para. 107.

63. *Id.* at para. 136.

64. *Id.* at para. 137.

65. Restitution of Land Rights Act 22 of 1994 (S. Afr.).at § 22

66. *Id.* at § 34(6).

developed and occupied by a large number of residents. In *Kwalindile Community*, the Land Claims Court made such an order, which meant that even if the claimants succeeded on the merits, they would only be entitled to equitable relief and not land restoration.⁶⁷ On appeal, Moseneke, writing for the majority, found that the Land Claims Court did not properly exercise its power under Section 34.⁶⁸ While the case was heavily fact-driven, Moseneke reinforced an important legal principle: “restoration of the land claimed must enjoy primacy when feasible”.⁶⁹

The impact of these three cases on the future of the Court's Restitution Act jurisprudence is significant. *Goedgelegen's* holding on causation under section 2(1) of the Restitution Act ensures that claimants can seek restitution for many types of dispossession. Had the Constitutional Court found that section 2(1) only applies to actions by state functionaries, former labor tenants who had their rights taken away by private actors would not have the right to claim restitution.⁷⁰ *Florence* maintains the Land Claim's Court's discretion in granting monetary awards while giving guidance on the purpose of relief under the Restitution Act.⁷¹ By rejecting an investment-based approach to changes in the value of money over time, Moseneke stayed true to the purpose of the Restitution Act⁷² while ensuring that state coffers are not unduly burdened by restitution claims. Lastly, *Kwalindile* reinforces the principle that primary relief for a successful claimant under the Restitution Act is land restoration, and signals the Court's willingness to intervene in lower-court decisions that eschew land restoration without sufficient reasons. This is significant because a variety of arguments for substituting land restoration with other equitable relief arise where development has occurred. By reinforcing the primacy of land restoration, *Kwalindile* put a thumb on the scales of the Land Claims Court, encouraging it to avoid alternative equitable relief when possible.

IV. CONCLUSION

My Own Liberator provides an engaging account of the life of one of South Africa's most prominent modern jurists. It describes Moseneke's journey from a fifteen-year-old political prisoner to a lawyer and activist, corporate executive, and one of the most respected legal minds in Africa. The memoir is an inspiring read for lawyers and laypeople alike.

67. *Kwalindile Community*, 2013 (6) SA 193 (CC) at paras. 26, 28.

68. *Id.* at paras. 51, 58, 64.

69. *Id.* at para. 43.

70. *Goedgelegen*, 2007 (6) SA 199 (CC) at para. 77.

71. *Florence*, 2014 (6) SA 456 (CC) at paras. 116-117.

72. *Id.* at para. 142.

In addition, by recounting some of the crucial events leading up to the fall of apartheid, *My Own Liberator* provides the reader with essential context for understanding South Africa's modern history. Moseneke's digressions and explanations make the narrative accessible to those outside the country.

During Moseneke's tenure on the Constitutional Court, he sat and wrote for a variety of cases that shaped South Africa's constitutional democracy. Among these are *Goedgelegen Tropical Fruits*, *Florence*, and *Kwalindile Community*—each of which helped develop one of South Africa's most significant pieces of post-apartheid legislation. Moseneke's memoir reinforces the importance of these cases and the Restitution Act by describing the impact that apartheid-era land laws had and continue to have on certain communities and individuals.⁷³ Additionally, *My Own Liberator* gives insight into Moseneke's views on the property clause and his general judicial philosophy. In this regard, even though the memoir does not detail Moseneke's time on the bench, it is a valuable read for understanding the purpose of the Restitution Act and his interpretations of it.

73. *See, e.g.*, MOSENEKE, *supra* note 3, at 22-23, 353.