

Land matters: 2008 (2)

General

Apparently, the State possesses approximately four million properties that are unknown to the Departments that must deal with these specific pieces of land or buildings. Local governments, especially, are not aware of all their properties and therefore fail to utilise them to generate income for the municipality. (See in this regard De Lange 'Staat besit derduisende stukke eiendom waarvan hy nie weet' *Beeld Sake24* (2008-05-20) 1.)

In a presentation at a Conference on the challenges of land and agrarian reform in South Africa, held in Pretoria on 2008-08-26, the Director-General of the Department of Land Affairs indicated that these challenges are experienced by both first economy and second economy farmers with regard to the supply side, demand side and the business environment. The Director-General indicated that the current challenges facing land reform are being addressed various initiatives, including strategic partnerships; increased capacity through the new structures; improved performance management and continued engagement with National Treasury. He emphasised the need for a successful partnership consisting of the following key elements: recognition, commitment, support, positive attitude, respect, acceptance and trust. An invitation was issued to various stakeholders to join government by becoming strategic partners, and these stakeholders include organised agriculture; emerging farmers and food growers; farm workers; farm dwellers and organised labour; government (especially the Department of Agriculture, the Department of Land Affairs, the Department of Trade and Industry, the South African Revenue Services, the Department of Provincial and Local Government, the South African Police Service, provincial departments of agriculture and municipalities); women and youth groups in agriculture, financial institutions (eg the Land Bank, ABSA, Sanlam and the DBSA); research institutions (eg the ARC, the OBP, universities, the HSRC and the CSIR), and marketing and trade organisations (eg the NAMC and the WTO).

As regards the alignment of the activities of the Department of Land Affairs and the Department of Agriculture with respect to the implementation of the three land reform programmes, the Minister of Agriculture and Land Affairs recently announced the implementation of an interdepartmental programme that focuses, amongst others, on the alignment of activities of the Department of Agriculture and Land Affairs. The Land and Agrarian Reform Project (LARP) provides a new framework for delivery and collaboration on land reform and agricultural support. The main objective of this programme is to accelerate the rate, as well as the sustainability, of land reform by aligning the individual and joint actions of all stakeholders concerned. The five aims (or key priority areas) of the LARP are:

- (a) the redistribution of 5 million hectares of white-owned agricultural land to 10 000 new black agricultural producers, consisting of farm dwellers and new producers from, and in, rural, peri-urban and urban areas;
- (b) to increase the participation of black entrepreneurs in the agri-business industry by 10%;
- (c) to provide universal access to the above-mentioned target groups;
- (d) to ensure an increase in agricultural production of 10-15% for the target groups; and
- (e) to increase participation in agricultural trade by 10-15%.

The following key principles will ensure that government is in a position to take a more proactive and integrated approach to fast-tracking land and agrarian reform, namely, through the use of focus areas to concentrate service delivery in order to better exploit synergies between land redistribution, agricultural production and agri-business development; an aligned comprehensive support package to cater for the inherently multi-sector requirements to make sustainable agricultural production and agri-business development a success; application of co-operative government by establishing joint planning, budget planning approval and implementation procedures between various government departments and programmes; full utilisation of partnerships in order to exploit the relative strengths and capacities of key NGO stakeholders; and subsidiarity - the decentralisation of decision-making and implementation to the lowest practical level depending on the specific activity. Mention is also made of the implementation of a monitoring and evaluation (M&E) system. This will be augmented by the implementation of an impact assessment system.

The coordination of the LARP will be done by the establishment of a LARP office in the office of the Minister, and the appointment of a national LARP Project Manager who will be responsible for the overall coordination of planning and implementation. The Project Manager will report to the Intergovernmental Technical Committee for Agriculture and Land (ITCAL). In addition, a National Intergovernmental Forum for Agriculture and Land (NIFAL) was also established (25 February 2008).

In this note, the most important legislation and court decisions with regard to restitution of land rights, land redistribution in particular, as well as unlawful occupation, housing, land use planning, expropriation, sectional titles, minerals, and the repeal of the Black Administration Act are discussed for the period reviewed.*

Land restitution

According to the *Towards a Fifteen Year Review* (http://www.info.gov.za/otherdocs/2008/toward_15year_review.pdf), a significant number of assets have been transferred by government to land reform beneficiaries (28-29):

Through the land restitution programme, assets worth R12,5 billion were transferred to 1,4 million beneficiaries between 1994 and 2007. Recognising that land is an important asset for livelihood development, beneficiaries of land restitution who wish to engage in farming activity can access financial support of between R20 000 and R100 000 depending on their contribution - the total amount of grants provided was R15,2 billion. Although most land restitution cases have been settled, the remaining 5 000 cases are mainly rural and are moving slowly due to their complexity ... The Government set a target of transferring 30% of white-owned agricultural land through restitution, redistribution and tenure reform by 2014, which amounts to 24,9 million hectares. The total transferred by 2008 amounted to 4,8 million hectares, indicating that the land reform programme would have to be stepped up considerably to meet the 2014 target.

The *Towards a Fifteen Year Review* contains a clear indication that government realises that insufficient post-settlement support has, in many instances, resulted in the absence of sustainable use of land, with a resulting negative impact on South Africa's overall agricultural output (29): 'A serious shortcoming in the land programme is the

*In this note, the most important literature, legislation and court decisions are discussed for the period 2008-02-22 to 2008-09-15.

weakness of after-settlement support and the consequent failure of many transfers to result in sustainable use of the land, impacting on the country's overall agricultural productive capacity'.

In the Annual Report 2007/08 of the Commission on Restitution of Land Rights the Acting Chief Land Claims Commissioner indicated that various challenges were being experienced in the finalisation of the outstanding 4949 rural claims. These are, amongst others: 145 claims which were still in the Land Claims Court (LCC) due to disputes on the issue of validity; prohibitive land costs; the issue of community disputes, including boundary disputes involving traditional leaders; the reluctance to release state land by other government departments and institutions; the diverse typology of claims (claims on agricultural land, claims on forestry land, claims on protected areas, and claims on land which is used for mining purposes) (10). Arrangements have been reached with a number a key role players, for example, a Memorandum of Agreement (MoA) with the Department of Environmental Affairs and Tourism as regards the finalisation of claims on conservation land (affecting approximately 122 claims); MoA with Mondi and Sappi (regarding claims on forestry land - approximately 739 claims) and the establishment of a working relationship with Anglo American and the envisaged signing of a Memorandum of Agreement (affecting approximately 170 claims).

The outstanding claims are as follows: KwaZulu-Natal: 1740; Mpumalanga: 851; Limpopo: 674; Western Cape: 599; Eastern Cape: 555; Northern Cape: 218; North West: 215; Free State: 97 and Gauteng: 0. The Acting Chief Land Claims Commissioner indicated on 23 July 2008 that an additional five years were needed to settle the outstanding land claims as the rural claims were complex in nature (Louw-Carstens 'Agri SA twyfel of nóg vyf jaar genoeg is vir grondeise' *Beeld* (2008-07-25) 10). Of the land claims that are outstanding, 207 pertain to mining land, which according to Hill would take more than five years to finalise (Hill 'Over 200-mining-related land claims still outstanding' *Mining Weekly* (2008-04-23) www.miningweekly.com). In the Western Cape the settlement of land claims are delayed by allegations of corruption, conflict in communities and families as well as disputes between the City Council and the District Six Beneficiary Trust (*Legalbrief Today* (2008-03-31) www.legalbrief.co.za). R280 million has been allocated to develop District Six for former residents who chose to return to District Six. Those that accepted financial compensation would not be considered for relocation (*Legalbrief Today* (2008-03-04)).

Land was transferred to the Riemvasmaak community, who were removed 35 years ago after the area they were occupying was declared to be a 'Black Spot'. The 122 000 ha of land were used for military purposes (Bruce *Words and Deeds* (2008-03-25)). When the Inanda Dam was built, 317 families were removed. They received R5,6m compensation, which was paid to the Tribal Authority. The beneficiaries never received their share of the compensation. The traditional leader alleged that the money was to the benefit for the Qadi community as a whole and was not allocated to individual beneficiaries (*Legalbrief Today* (2008-03-31)). The GaMawela Community received their land in 1998 subject to certain conditions. One of the conditions was that the permission of the Minister of Land Affairs must be sought whenever the land was used as collateral for a bank loan. The community needed money to finance their farming operations, but could not access loans due to delays caused by the Minister when granting this permission. They stated that they were going to approach the court to either obtain the Minister's permission or comparable redress (*Legalbrief Today* (2008-04-14)).

The Klipfontein community would receive compensation for being removed from their land in 1979. However, 3200 people from Colchester, Coega and Kinkelbos would not receive any compensation as they did not lodge their claims before 1998-12-31. These communities wanted to share in the benefits received by the Klipfontein community. The Legal Resources Centre (LRC) visited all the communities before 1998 to inform them about the process to institute claims. It is uncertain whether the community thought the claim would be instituted by the LRC on their behalf or whether they thought the Klipfontein claim was also instituted on their behalf (*Legalbrief Today* (2008-03-07)). The Minister of Land Affairs indicated earlier that, in relation to the more than 1000 land claims in the Eastern Cape that had not been lodged before the cut-off date, no additional claims would be allowed. There is a possibility that these claimants may be assisted via one of the other land reform programmes, but not via the restitution programme since one of the formal conditions had not been complied with, namely, the lodging of claims within the set period of time.

Notices

Several notices were published, most of which relate to the Free State, Northern Cape and Mpumalanga (eg the Free State and Northern Cape (Francis Baard and Harrismith with 2 each; Motheo 5; Siyanda 4; Ljweleputswa 2; Thabo Mofutsanyana 7; and one each for Lindley,

Dikgatlong, Ladybrand, Kai Garieb Municipality, Hondeklipbaai, Phofung Municipality, Barkly West, Ventersburg, Kgalagadi, Phumelela, Taemane, Fouriesburg, Pixeley ka Seme and Richtersveld; amendment notice 1); Gauteng and North West (Johannesburg and Tshwane 2 each; Moretele, Heidelberg, Bronkhorstspuit, Ventersdorp and Lichtenburg 1 each; Bojanalo 4, Bophirima 3; no district 1); Limpopo Province (no district 4; Waterberg 2, Mopani 5, Sekhukhune and Vhembe 1 each; Polokwane 3; withdrawals 2); Eastern Cape (East London, Cathcart, Breidbach, Albany, Queenstown, Lady Frere, Steynsburg, Bedford and Umthatha 1 each; Stutterheim and Glen Grey 2 each; King William's Town 15); Western Cape (Laingsburg, South Peninsula, various districts including Montague, Ceres, Robertson, Facticeon, Elsie's River, Worcester 1 each; Cape Metropole 4; Plettenberg Bay, Heidelberg, Helderberg 2 each; District Six 4; amendment notice 1); KwaZulu-Natal (Impendle, Utrecht, Lower Umfolozi, Mount Currie and Ingwavuma 1 each; Vryheid 8; Ixopo 3; Durban, Pietermaritzburg 2 each, amendment notices 4); Mpumalanga (Steve Tshwete 5; Nkangala 6; Emalahleni, Belfast, Ermelo, Barberton, Delmas, Msukalizwa, Thembisile, Ehlanzeni and Thaba Chweu 1 each; Mbombela 6; Mkhondo, Middelburg and Nelspruit 2 each; Gert Sibanda 5; amendment notices 8).

In the Limpopo Province 10 amendment notices were published in order to amalgamate conflicting claims. Several of the above-mentioned claims pertain to state land, land held by National Parks or mining land. In some instances vast tracks of land are claimed which complicate the finalisation of claims, especially in Mpumalanga and Limpopo.

Case law

Two previous decisions were handed down in relation to the present case of *MM Mphela and 217 Others v Haakdoorn Boerdery CC* ([2008] JOL 21778 (CC), 8 May 2008), namely that of the LCC (*Mphele v Engelbrecht* [2005] 2 All SA 135 (LCC)) and the SCA (*Haakdoorn Boerdery CC v Mphele* 2007 (5) (SCA)). The LCC upheld the restitution claim lodged by the present applicants and ordered that all four subdivisions of the land be restored to the claimants. On appeal, the SCA upheld the appeal and ordered that 86% (three of the four portions) be restored. The matter was further remitted to the LCC to determine if, and on which conditions, the communal property association had to contribute to the acquisition. The applicants now seek an appeal against the order that diminished the restitution. The appeal in the Constitutional Court (CC) is aimed

at determining the extent of restitution to which the applicants are entitled.

The members of the Mphela family are the descendents of Klaas Phali Mphela who was the registered owner of the farm Haakdoorn. This particular farm, however, was considered to be a 'black spot' in an area earmarked for occupation by persons from the white community only. The erstwhile land occupation policies resulted in an involuntary sale of the farm by the Mphela family to the Botha family, one of the neighbours, in 1951. The proceeds of the sale were used to purchase another farm, Pylkop. Despite having bought Pylkop, the family refrained from relocating until they were finally forcibly removed to Pylkop in 1962. They were not compensated for structures erected on Haakdoornbult and had to start from scratch on Pylkop. Haakdoornbult was thereafter subdivided into four sections.

In the LCC, the claimants made out a good case for the restoration of the whole of Haakdoornbult, whereas the land owners argued that the restoration of Haakdoornbult without a corresponding order to return Pylkop, would amount to double compensation (para 11). The restitution order was, however, granted in favour of the claimants. In the SCA, the issue was whether the claimants had made out a good enough case for *all four* portions of the farm in question to be restored. In the SCA, it was reasoned that, even if the market value of the farms as at 1962 was more than the purchase price paid for them, as the LCC found, and even if Pylkop were to be regarded as compensatory land to which could be added the unquantifiable losses and trauma suffered by the family when they were forcibly removed, the family would be substantially over-compensated were restoration of the whole farm to be ordered (para 14). In reaching its final decision, the SCA considered all four portions of the farm individually and as a consolidated block. Concerning the fourth portion, the so-called remaining extent, it found that it had no water allocation and that, if restored, it would become dry land which could only be used for grazing a small number of cattle. Thus, relating to the question of feasibility and the current use of the land, the SCA finally decided that the restoration of the fourth portion would be counter-productive (para 18).

However, the applicants in the present application for leave to appeal contended that the main thrust of section 25(7) of the Constitution was that the *actual* land that was lost, had to be restored and that this ought to be the general approach despite the rather wide discretion granted to courts adjudicating these matters (para 19). It was further argued that, once the LCC had found that the possibility

of over-compensation had to be dealt with in terms of section 35(2)(b) and (f) of the Restitution Act, the SCA had no basis to interfere with the order of the LCC that the whole farm had to be restored (para 20).

The CC per Mpati AJ set out the general background to dispossession in South Africa and the concomitant hardship it generally caused (paras 28-30). The important matter, however, was how these injustices must be redressed. The CC identified the following as the main point of departure (para 32): 'That where land which was the subject of a dispossession as a result of racial discriminatory laws is claimed, and the claim is not barred by section 2(2) of the Act, the starting point is that the whole of the land should be restored, save where restoration is not possible due to the compelling public interest consideration'.

However, claimants are only entitled to restitution 'to the extent provided for by an Act of Parliament' which is, in this case, the Restitution Act. The Act provides for restoration and/ or compensation, depending on the particular circumstances and not restoration only (para 33). A measure of over-compensation is not necessarily excluded in the Act, although it is not ideal that more land than that to which the claimant is entitled, is returned (para 36). Although the SCA was concerned with the possibility of over-compensation, it was not on that basis that restoration of the fourth portion of land was declined. It has to be kept in mind that feasibility and the particular characteristics and features of that particular portion of land were especially analysed. In these circumstances, the SCA finally found that it would be 'counterproductive' to also award the fourth portion of land (paras 42-43). Under section 33 of the Act various considerations have to be taken into account when the possibility of restoration arises. Feasibility is certainly one of these considerations. In these particular circumstances the fact that the remaining extent did not have a water allocation was particularly relevant (para 49). The CC, per Mpati AJ, consequently found that the applicants did not make out a clear case for the CC to interfere with the SCA's exercise of its discretion (para 50).

The CC next turned to the remittal order issued by the SCA, namely that the case be remitted to the LCC to determine if, and to what extent, the communal property association should make a contribution (in case of over-compensation). The CC found that a remittal would prolong the finalisation of the matter unnecessarily (para 54). The State also indicated that it did not seek any contribution from the applicants. It is also significant that the SCA did not find that the return of three out of four portions would amount to over-

compensation - it did find, however, that the return of the whole farm would amount to over-compensation (para 54). The CC further emphasised that the farm Pylkop cannot be seen to have been compensation in one form or another since it had been acquired by the proceeds from the sale (para 56).

The applicants were finally granted leave to appeal and the appeal was partially upheld. Paragraph 4(a) of the SCA's order, which embodied only the remittal order, was set aside. The rest of the order stands. This has the result that only 3 of the 4 portions of land are to be returned to the claimants, and that Pylkop had no bearing on the matter. What is important, however, is that the CC underlined the principle that, although specific restoration is ideal, it is not always possible and that various considerations, including the physical layout of land and its attributes (or lack thereof), have to be taken into account. Specific restoration would only be awarded when it really is the most ideal option among all the relevant considerations. In light of South African history and the manner in which dispossession occurred, invariably, over a long period of time, and not necessarily as a 'once-off', it is obvious that specific restoration cannot be guaranteed to the claimants. It is therefore understandable that section 25(7) of the Constitution links the right to redress to the Restitution Act in which the various scenarios and options are spelled out.

Afriblaze Leisure (Pty) Ltd v Commission on the Restitution of Land Rights (case no LCC16/07, 2008-05-22) deals with a section 14 application, something seldom dealt with in the case law. Section 14 of the Restitution Act provides that if a claim that was lodged cannot be resolved, it has to be referred to the LCC for adjudication. The present case entails an application to exactly that effect.

The claim in question was lodged by the third respondent, one Hendrik Motsegoa Lesiba on 1998-03-18. It was published in the *Government Gazette* on 2006-03-03. In response to the published claim, the applicants submitted full representations under section 11A of the Act on 2006-10-09. Essentially, the response was that the claimant did not hold rights in the identified land (either individually or on behalf of a community) and accordingly could not have been dispossessed of any rights (para 3). When the applicants' response received no reaction from the Commission (1st respondent) or the Regional Commissioner (Limpopo Province) (2nd respondent), the present application was launched in February 2007. Further investigations into the claim were thereafter conducted. However, a notice of bar was finally served on 2007-07-31 on the relevant state attorney. Developments thereafter indicated a willingness to

negotiate which may have made a section 14 referral not ideal at that stage (paras 6-7). However, both sets of parties remained adamant in their views, of which one component related to the validity of the claim which was essentially a dispute in law and not something that could be 'negotiated'. Apart from the legal dispute, many factual disputes also arose.

The Commission argued that, before a claim may be referred to the LCC, it first had to file a report indicating attempts to mediate the problem and that that requirement impacted negatively on the time frame. It was argued that section 13 placed an obligation on the Commission to mediate. Judge Meer disagreed and found that section 13 gave discretion to the Chief Land Claims Commissioner to direct parties to go to mediation if at any stage during the investigation it became evident that there was any other issue which might usefully be resolved through mediation (para 9). In this case the Regional Commissioner did not identify such an issue. Furthermore, the basis of the dispute was in law which ought to be argued before a court. In these circumstances, the issue did not lend itself to mediation (para 10). Nine months have furthermore passed since indication was given that the claim was at the stage of negotiation and since then, nothing further has happened.

The Court emphasised that both parties have vested interests in the process. On the one hand, the applicants, who were land owners, have a constitutional right to have a legal dispute that impacts on them be resolved in a court of law. The claimant, on the other hand, has a right to have his claim adjudicated efficiently and expeditiously. It could never have been the intention of the legislature to have a claim unresolved and not referred to court ten years after it had been lodged (para 11). Accordingly, the applicants were granted their application and the referral was confirmed.

Regarding costs, it is acceptable practice in LCC litigation that the general rule of 'costs follow the event' yield before equity and fairness and the public nature of litigation of these matters. Thus, costs orders are generally not made. In this particular case, Judge Meer departed from the tradition not to award costs. The present application was necessitated because the first and second respondent failed to deal expeditiously and efficiently with the third respondent's claim. Landowners are already adversely affected by claims lodged against their property in that they cannot sell or develop their land. They are further burdened when they have to incur costs in order to ensure that the Commission does what it is supposed to do, as

expediently as possible. Accordingly, a costs order was made against the first and second respondents.

The *Republic of the RSA and the Regional Land Claims Commissioner (Limpopo) v SJ Meintjies* (LCC44/99) deals with the joinder of parties under the LCC Rules. The applicants sought the joinder of the second applicant as well as the third to ninth respondents in the main action for the restitution of land rights. The background of the lodging of the claim, and the merits thereof, need not be scrutinised in this discussion as the focus will be on joinder (see paras 22 and further). Rule 12(1) of the LCC Rules provides that more than one party may be joined if their claims relate substantially to the same question of law or of fact. The test was, thus, whether or not a party had a direct and substantial legal interest in the subject-matter of the action, which may be affected prejudicially by the judgment of the court (para 23). The previous case law applied a two-pronged test to determine whether the parties had a direct and substantial interest in the litigation (see *Amalgamated Engineering Union v Minister of Labour* 1949 3 SA 637 (A)). The first leg was to determine whether the party would have *locus standi* to claim relief concerning the same subject matter. The second leg was to examine whether a situation could arise in which, because the third party was not joined, any order the court might make would not be *res judicata* against him, entitling him to approach the court again concerning the same subject matter and possibly obtain an order irreconcilable with the first order. In the present instance, the 7th, 8th and 9th respondents all lodged competing claims to the same land and the question was posed whether this would impact on the matter of joinder. Since the main application of restitution dealt with monetary compensation, the mere fact that the claims were competing would not, in itself, rule out joinder. The basis of the applicant's claim was entirely different from any other claim that may have existed in relation to the land. Accordingly the rights of other claimants could not be prejudicially affected by any judgment or award in respect of Mr Meintjies' claim (the main claim for compensation). Therefore the 7th, 8th and 9th respondents did not have a direct and substantial interest in the issues to be decided. Accordingly, so Ncube AJ found, the joinder in relation to these three respondents could not succeed (para 26). The 6th respondent did not lodge a claim and could therefore not benefit from being joined in the main application. As far as the joinder of government departments was concerned, the court found that they were already before the court under the umbrella of the first applicant. They were also at liberty to intervene in terms of rule 13(3) of the LCC Rules. They have also delivered notices to participate in the case. The Minister of Land

Affairs was similarly also already before the court, as well as the Commission, being an organ of state. Accordingly, due to there being no need, the application calling for the joinder of respondents 2-9 was dismissed.

Land redistribution

Government would most probably not reach its set targets of transferring 30% of agricultural land from white owners to historically disadvantaged individuals or communities as transfer of land ‘has increased by less than a half percent, from 4.3% of commercial land to 4.7%’ - the costs amounted to R74 billion (Anon ‘Warning on deteriorating land restitution process’ *Mail&Guardianonline* (2008-05-06); Bruce *Words and Deeds* (2008-03-17)). More than half of the land projects failed and the Department is considering alternative ways to meet the land target of 30% by 2014. The allegation is also made that land reform hampers agricultural production, especially in the sugar and timber industries (*Legalbrief Today* (2008-05-07)). The Land Bank lost billions of Rand due to lack of control and mismanagement (*Legalbrief Today* (2008-08-14)).

The Department of Trade and Industry published the AgriBEE Sector Charter on Black Economic Empowerment in terms of section 12 of the Broad-Based Black Economic Empowerment Act 53 of 2003 on 2008-03-20 (GN R314 in GG 30886 of 2008-03-20). AgriBEE, the transformation charter for agriculture, is applicable to any enterprise which derives a majority of its turnover from (para 2.1): ‘the primary production of agriculture product; the provision of inputs and services to Enterprises engaged in the production of agriculture products; the beneficiation of agriculture products whether of a primary or semi-beneficiated form; and the storage, distribution, and/or trading and allied activities relating to non-beneficiated agriculture products’. The AgriBEE Charter also applies to multinational businesses and South African multinationals (para 2.3). Agricultural enterprises with a five year moving average annual turnover of between R5m and R35m qualify for BEE compliance according to the Indicative AgriQSE scorecard (para 2.5). All agricultural enterprises with a five year average turnover of less than R5m are to be classified as exempted micro-enterprises (EMEs) (para 2.6). They will enjoy a deemed BEE recognition level of Level R4, without having to provide proof of contribution to BEE verification (para 2.6).

The seven key elements as contained in the AgriBEE scorecard are ownership; management control; employment equity; skills development;

preferential procurement; enterprise development, and rural development, poverty alleviation and Corporate Social Investment (CSI).

Land reform

Extension of Security of Tenure Act 62 of 1997 (ESTA)

Under section 19(3) of ESTA all eviction orders granted by magistrates' courts are automatically suspended in lieu of the review proceeding by the LCC. When the review procedure was first introduced the majority of eviction orders were either set aside or remitted to the magistrates' court to clarify outstanding matters. However, over the years the automatic review proceedings started to become standard practice. Not only were court officials informed about the process, and the mechanics thereof, but the more the provisions of the Act became imbedded in legal practice, so fewer and fewer eviction orders needed to be overturned by the LCC.

However, when scrutinising the judgment handed down by Ncube AJ in *AL van Heerden v Magaga* (LCC 48R/2007, decided on 2007-07-11) resulting from the automatic review procedure, one would indeed doubt whether automatic review proceedings have really become common practice. In the present case, an eviction order was granted against the respondent and other persons occupying through her by the magistrate's court in March 2007. Not only was the court record and corresponding documents not immediately submitted to the LCC, but the ejection order was never suspended. When the documents finally reached the LCC for automatic review, the court file was so incomplete that the LCC had to return the whole file to the court *a quo* in order for it to be supplemented. To make matters worse, the eviction application was lodged under section 15 of ESTA which provides for urgent eviction proceedings, emphasising that time was of the essence. Despite the incomplete file reaching the LCC by May 2007, the eviction order was executed on 2007-05-12. Thus, when the file was returned to the lower court to be supplemented, the eviction order had already been carried out - without being reviewed and without the LCC being informed of these developments. As it happens, the final review of the complete file only took place much later, which review emphasised that all of the requirements set out in ESTA in relation to section 15 had not been complied with at all. These developments led to the LCC handing down this judgment in which the original eviction order was set aside and the occupation of the respondents restored. There is just one problem: the

respondents vacated the land when they were ordered to do so resulting in their whereabouts being unknown at the time the judgment was handed down. For these respondents, justice arrived too late. This case is testament to the fact that, despite carefully legislating possible scenarios, justice is not guaranteed to take place in all instances. It is ironic that ESTA makes the eviction from land in contravention of its provisions an offence. In these circumstances the landowner followed the letter of the Act and proceeded to court. The final ejection from the land did, however, occur in contravention of ESTA's provisions since the eviction order was not suspended and the review proceedings had not followed its due course. These developments can, however, not be attributed to the landowner or private individuals, but to the particular court officials involved in this case.

Land Reform (Labour Tenants) Act 3 of 1996

Brown v Mbhense (119/07) [2008] ZASCA 57 (2008-05-28) concerns the question whether a 67-year-old woman is a labour tenant for purposes of the Land Reform (Labour Tenant) Act 3 of 1996. The matter was decided in her favour in the LCC whereafter an appeal was lodged by the landowner. For purposes of the classification of rural dwellers as labour tenants, as opposed to farm workers or occupiers, three legislative provisions in the Labour Tenant Act are relevant here:

- (a) section 1 that sets out the definition (and requirements) of labour tenancy consisting of three paragraphs,
- (b) section 1 that also provides for a definition of 'farm worker'; and
- (c) section 2(5) that states that, if it is proved that a person falls within paragraphs (a), (b) and (c) of the definition of labour tenant set out in section 1, that person is presumed not to be a farm worker, unless the contrary is proved. The latter provision was added to alleviate, to some degree, the onus placed on applicants.

In the present instance the respondent had been living on the land all her life: she was born there, married there and had continued to stay and work on the farm. In return for the labour provided by herself and her husband (now deceased), she and her husband had cropping rights on the farm. She insisted that these rights constituted part of her pay (see para 8). The court *a quo* was satisfied that the respondent had in fact exercised cropping rights (para 10). She even continued cropping after her husband passed away. The issue, however, was whether she had the 'right to use cropping land and

whether she provided labour in consideration of such right' (para 10). The SCA accordingly, had to decide whether the right to cropping vested in her personally, or in her husband, other family members or perhaps even in her parents only.

Reference was already made to section 1 of the Act containing the definition of 'labour tenant'. It consists of three separate requirements that all have to be met. The SCA was satisfied that paragraph (a) of the definition had been met, namely that the person has or had a right to reside on the farm. Paragraph (b) requires that the person must have, or must have had, the right to use cropping or grazing land on the farm and that the use must be, or must have been, in consideration of providing labour. Accordingly, the issue of cropping rights was essential to determining her status. In this regard Van Heerden JA first set out the background relating to labour tenancy in general (para 22) and thereafter referred to the CC judgment of Moseneke DCJ in the *Goedgelegen Tropical Foods* case where he emphasised the common law fictional approach to the consensual nature of labour tenancy contracts (para 23). Concerning the interpretation of the Restitution Act in the *Goedgelegen* case, Moseneke DCJ opted for a 'generous construction over a merely textual or legalistic one' (para 24). With reference to the Preamble of the Labour Tenant Act, van Heerden JA found that the same approach should be followed than that proposed with regard to the Restitution Act (para 25). This approach is furthermore supported by the fact that labour tenant 'contracts' were entered into without legal assistance by a very vulnerable section of the population within an imbalanced relationship (para 27).

The particular arrangements concerning the provision of labour may have differed from family to family and may even have mutated over a period of time depending on the changing requirements of the farm and the demands of the landowner. The court particularly focused on the possibility that the respondent was merely discharging the labour tenancy obligations of her father and, thereafter, of her husband. Concerning the cropping rights it was argued that she cropped merely because she was living on the farm: first with her father and his family, and thereafter, with her husband, and that she did not crop in consideration of any obligation on her part to provide labour (para 29). On the facts, however, it was clear that the appellant in her own capacity provided labour for a period of 17 years. The particular approach to interpreting these forms of agreements was highlighted as follows (para 30): 'To gauge the existence of a labour tenancy agreement in the technical and precise manner akin to that applicable

to usual residential or commercial tenancies is far too restrictive an approach and one that goes against the objective and general tenor of the Act’.

Accordingly, on the facts and having regard to the overall effect of evidence on this aspect, the SCA confirmed the court *a quo*’s finding that paragraph (b) of the definition had also been met (para 31). Paragraph (c), which provides that the parents or grandparents of the particular applicant also should have had rights to cropping and grazing, was equally found to have been met (paras 32-35). The decision of the court *a quo* was thus confirmed by the majority decision in which Mthiyane JA and Maya JA concluded.

A dissenting judgment was handed down by Nugent JA. His judgment was based on a different construction of the evidence presented and concluded that the respondent’s father and husband had been labour tenants. In this regard it was found that there never existed an independent obligation on the respondent to provide labour resulting in no independent right to cropping (paras 48, 52). Scott JA concurred with the dissenting judgment.

Provision of Land and Assistance Act 126 of 1993

In terms of the Provision of Land and Assistance Amendment Bill [B40-2008], the Minister of Land Affairs will obtain far-reaching powers to expedite land reform. This Bill provides the statutory framework for the implementation of the recently announced strategy for the pro-active acquisition, management and eventual transfer of land by the state to land reform beneficiaries (PLAS - Pro-active Land Acquisition Strategy).

One of the main objectives of the Provision of Land and Assistance Amendment Bill (published on 30 May 2008 - GG 31102 of 2008-05-30) is to promote further redistribution of land within the general overall land reform programme. Apart from the overall aim of redistribution, other connected objectives are to ‘effect, promote, facilitate or support the maintenance, planning, sustainable use, development and improvement of property contemplated in this Act’ (newly amended s 1). In order to achieve these objectives, the concept of ‘property’ is defined as follows: “‘property’ means movable or immovable, corporeal or incorporeal property and includes shares, rights, title or interest in or to a juristic person, other entity or trust’ (cl 1). In light of the main objectives of the Bill and the definition of property, various powers to achieve these objectives and corresponding

processes and procedures to embody them, have been provided for in the Bill. Clause 10 embodies the main thrust of the Bill for achieving these objectives, and impacts on both state-owned and private land. In the first instance, it provides that the Minister may make state land available for purposes of the Act. This is not a new measure, as it has been incorporated in the Act previously. However, clause 10(1)(b) now provides that the Minister may acquire immovable and movable property (including incorporeal property); a business or other economic enterprise as a going concern, shares in or the right, title or interest in or to a juristic person or other entity or a trust owning, controlling or administering property. This provision has particularly made commentators and farmers' unions nervous. Some fear the abuse of this clause it may allow government to expropriate the shares of a thriving mining company, for example, for poverty alleviation schemes.

The Minister may, from money appropriated by Parliament, maintain, plan, develop or improve property or cause such maintenance, planning, development or improvement to be conducted by a person or body with whom an agreement to that effect had been concluded (cl 10(1)(c)). The motivation for this provision is clear: merely distributing land is not enough and does not guarantee success. Instead, additional support is invariably essential to ensure better success rates. It is believed that these provisions for additional support would have the desired effect. In addition to these new measures and the provision enabling the acquisition of property, as defined in the Act, further powers have also been assigned to the Minister to maintain property (including state land); to conduct a business or other economic enterprise or exercise the rights of a holder or shares or a right in a juristic person, other entity or trust. Thus the new provisions would make it possible to acquire the land and enterprises linked with it as well as all the powers connected with the running, and general maintenance, of the enterprises.

Concerning the transfer of ownership of property, it is passed and registered directly from the owner of such property to a person to whom the Minister has disposed of such property (cl 9(8)(a)), thereby avoiding section 14 of the Deeds Registries Act 37 of 1947 that provides that deeds should follow the sequence of their relative causes. The laws generally relating to the use, subdivision and consolidation of land are not applicable, except if the Minister so provides (cl 10(2)). This essentially means that the Prohibition of the Subdivision of Land Act 70 of 1970 does not apply. Although it has

been for many years the objective of the DLA to repeal this 1970 Act, it is still formally in force.

Clause 11 furthermore enables the Minister to exchange, sell, donate, lease, award or otherwise dispose of or encumber any property contemplated in the Act or, if such property is no longer required for purposes of this Act, 'for any other purpose'. These powers, especially the last portion enabling the Minister to employ the property for any other purpose if it is no longer required for purposes of this Act, are extremely wide and seem to transgress the traditional 'boundaries' of redistribution. This is an indication that the Bill, when promulgated, is aimed at much more than merely promoting redistribution. The Minister's powers in relation to financial matters also seem very wide. For example, section 10(1)(e) provides that the Minister may authorise the transfer of funds to various bodies or institutions 'which he or she considers suitable for the achievement of the objects of this Act, whether in general, in cases of a particular nature or in specific cases'. This may be problematic in light of the recent developments in which control of the Land Bank has been revoked from the Minister (of Land Affairs) and transferred to the Finance Minister.

The provision dealing with the maintenance of land for land reform purposes is interesting. Although it makes sense to include such a provision, it is not clear how this will pan out in practice. One can only deduce that maintenance will be regulated and possibly linked with certain time frames. It is inconceivable that maintenance will continue ad infinitum.

Land was designated in terms of the Provision of Land and Assistance Act in the Umngeni Municipality for settlement purposes under certain conditions (GN 573 in GG 31041 of 2008-05-16; see also with regard to Umngeni - GN 647 in GG 31130 of 2008-06-13 and Okhahlamba Local Municipality - GN 889 in GG 31341 of 2008-08-22).

Communal Land Rights Act 11 of 2004

The Director-General of Land Affairs indicated on 2008-04-04 that the DLA would have to create 1 220 posts to fully implement the Communal Land Rights Act 11 of 2004 (Anon '1 220 posts needed to administer Communal Land Rights' <http://www.capetimes.co.za/indept.php?fArticleId=4335710>) (2008-04-04)).

Four communities (Kalkfontein, Makuleke, Makgobistad and Dixie) have filed papers in the Pretoria High Court in order to have the Communal Land Rights Act 11 of 2004 declared unconstitutional. Some

of the main arguments are that the incorrect procedure was followed by Parliament (by not referring the matter also to provincial legislatures in terms of section 76 of the Constitution), that customary law, traditional leadership and provincial government are affected, and that in effect a fourth sphere of government has been created by providing traditional leaders with 'undemocratic and unprecedented powers'. All of this will have the result of decreasing security of tenure. Other matters include potential changes to the structure of traditional community, discrimination against black owners of property, increasing insecurity of tenure for women, and the unconstitutional granting of executive powers to traditional councils (*Legalbrief Today* 2008-10-13).

Land Bank

A number of recent reports indicated that extensive corruption is endemic in the Land Bank. It is alleged that promissory notes and bills of exchange to the value of R28m were stolen. In addition, it is alleged that a bond was granted to a company which was thought to have defrauded the Land Bank on an earlier occasion, and a director of which was, in terms of the Companies Act 61 of 1963, not allowed to be appointed as a director. The forensic investigation into these allegations has not been made public. In addition, a number of internal procedures in the granting of Land Bank loans were not followed in order to benefit a number of officials and third parties. Payments to the value of R75m were made on the basis of alleged falsified invoices. (Rademeyer 'Bank glo stil ná bedrog' *Beeld* (2008-08-21)2). The control over the Land Bank was transferred from the Minister of Agriculture to the National Treasury in July 2008. (Willemse 'Bohaai oor mank Landbank broodnodig' *Sakebeeld* (2008-07-06)12).

After a new Board for the Land Bank had been appointed in January 2008, and interim co-management powers were informally vested in the Board, the Minister sacked the newly appointed chairperson. It is also alleged that the appointment of a firm of auditors to do a forensic audit of the Land Bank was invalid, as the Minister did not have the necessary authority, and only the Board could have made that appointment (Alcock and Basson 'Lulu "overstepped her powers"' *Mail&Guardian* (2008-07-18 to 24) 3). According to a recent newspaper report, the Land Bank Chief Financial Officer presented a dossier on alleged irregularities (including the transfer of millions of rands from

the Department of Agriculture's AgriBEE fund via the Land Bank) to the acting Land Bank Chief Executive. Allegations were also published in respect of files handed over to the Minister of Agriculture implicating a previous CEO (Basson and Alcock 'Land Bank dossier dams Xingwana' *Mail&Guardian online* (2008-07-27)) (Donnelly 'Tourniquet needed for Land Bank' *Mail&Guardian* (2008-07-18 to 24)) (Duvenhage 'Land Bank op die rand van ondergang' *Sake Rapport* (2008-04-27)1).

Unlawful occupation

There have been numerous attempts to amend the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE) since the watershed SCA decision in *Ndlovu v Ngcobo and Bekker v Jika* (2003 1 SA 113 (SCA)). This judgment extended the application of PIE to also include persons who started off being lawful occupiers but later became unlawful, also referred to as 'holding over' cases. The Prevention of Illegal Eviction From and Unlawful Occupation of Land Amendment Bill of 2007 was published for comment in (GG 30459 of 2007-11-16) and subsequently tabled in Parliament (*Legalbrief Today* (2008-03-11)). This Bill is a direct consequence of the Draft Bill that was previously published on 2006-12-22 (GN 1851 in GG 2950 of 2006-12-22). The latest version of the Bill was published on 2008-03-07. A study of this version confirms that the main points of the 2006 Draft Bill had been incorporated without change in the 2008 Bill. Accordingly, the whole Bill will not be discussed here again.

The essential matters that need to be highlighted are the following:

- (a) 'constructive eviction' is provided for which includes cases where occupiers are 'encouraged' to vacate land since their access to essential natural resources have been denied. Denying access to these resources (eg water) would thus constitute eviction and would make the Act applicable (cl 1);
- (b) the scope of PIE is to be restricted to 'classical' cases of unlawful occupation since the following categories of occupiers are specifically excluded:
 - (i) tenants;
 - (ii) persons who occupy in terms of a lease or other agreement; and
 - (iii) owners who continue to occupy after the basis for their occupation (or ownership) had lapsed. Instances of holding over are thus excluded from the ambit of the Act (cl 2);

- (c) there is no further distinction between classes of occupiers who have occupied unlawfully for a period less than, and longer than, six months. This is the new position in relation to applications by both individuals (under cl 4) and organs of state (under cl 6). The period of occupation is now generally one of the factors that have to be considered in each eviction application;
- (d) service of notice has been amended to also include the relevant provincial Department of Housing and the local authority (s 5). The insertion of this section is crucial, as has been clearly illustrated in recent case law, discussed below, where local authorities had to be joined in order for the eviction applications to be heard; and
- (e) new offences had been inserted, namely, the organisation or arranging of an act of invasion or unlawful occupation is now an offence in terms of clause 3(1).

Case law

Balduzzi v Rajah ([2008] JOL 21731 (W)) raises the main question of unlawfulness as one of the prominent requirements for instituting an eviction application. The facts are briefly the following: In 1986, the plaintiff purchased certain residential property situated in Orange Grove, Johannesburg, after which he was the registered owner. In October 1990, the plaintiff and the defendant's husband, Mr Rajah, concluded an agreement in terms of which the property was sold to Mr Rajah. Due to racially discriminatory legislation the property was never registered in the name of Mr Rajah. Instead, the parties agreed that the plaintiff would remain the registered owner, but as a nominee or 'front' for the real owner, Mr Rajah (para 5). Thereafter, Mr Rajah acted in all ways as if he were the owner: he paid the registered bond in full by 1999, paid all taxes and levies and maintained and improved the property. When Mr Rajah passed away, his widow - the defendant - continued to occupy the property and acted as owner.

The present application was lodged by the plaintiff, as registered owner, to evict Mr Rajah's widow. The defendant raised the defence that she, as heir of her deceased husband, was the owner. To this defence the plaintiff raised an exception that the plea failed to sustain a defence. This was based on the failure of the defendant to prove that section 2(1) of the Alienation of Land Act 68 of 1981 had been complied with, accordingly that she was unable to prove her

ownership of the property and concomitant occupation (para 9). Reliance was placed on case law that confirmed that contracts that did not meet the legislative requirements were null and void. Since the oral contract was not reduced to writing and signed by the parties, it was void, resulting in the defendant failing to disclose a valid defence.

The approach followed by Berger AJ was first to determine whether the defendant's occupation was unlawful for the purposes of PIE. Once that had been established, the court would proceed to matters of 'justice and equity' as required by PIE (para 16). An unlawful occupier is a person who occupies property without the express or tacit consent of the owner or person in charge of the property (s 1). When the plaintiff entered into the original agreement with Mr Rajah, the plaintiff consented for Mr Rajah to occupy the erf, even though ownership did not formally pass due to the statutory provisions prevalent at that time. There was no indication that occupation would revert to the plaintiff after Mr Rajah's death. Instead, his widow continued in peaceful occupation thereof and conducted herself as owner. On that basis the court was satisfied that the defendant was not unlawful which in itself disclosed a defence (para 20).

Furthermore, the commencement of the Abolition of Racially Based Land Measures Act 108 of 1991 also impacted of Mr Rajah's (defective) title and that of his wife. Section 48 of the Abolition Act acknowledged that transactions may have occurred in contravention of land legislation and that 'nominee owners' could have been created in the process. To that end the Act was also aimed at legalising and regulating such transactions. Accordingly, the 'illegal' transaction between the plaintiff and Mr Rajah has, since the commencement of the Abolition Act, been deemed to be legal. The Act also provided that applications may be lodged within 30 months to the Registrar to amend the register to reflect the true title holder. In these circumstances no such application was lodged by Mr Rajah (probably because he did not have knowledge of the procedure). However, a purposive interpretation of section 48 would probably support a condonation of a late application, although the court did not decide this particular matter. The court did, however, take into account that legal machinery had been put in place to regulate transactions like the one entered into by Mr Rajah as one of the factors that have to be considered in the question of whether it would be just and equitable to order the defendant's eviction (para 25). Taking into account all the relevant circumstances the court was satisfied that the

defendant's plea contained a sustainable defence. The exception was dismissed with costs.

A well-documented case dealing with destitute respondents, is the *Thubelisha Homes v Various Occupants* (Case no 13189/07, Cape Provincial Division, decided on 2008-03-10) case per Hlophe JP. This case made headlines in both the published and audio video media and entailed the removal of large numbers of occupiers to alternative accommodation *in lieu* of formalising the Joe Slovo informal settlement in accordance with the N2 Gateway Housing Development scheme. Due to many considerations it was not a 'normal' eviction, *inter alia* because occupiers would not be left destitute but would be moved to other (interim) suitable accommodation, the relocation was an indispensable consideration to the success of the overall housing delivery scheme and because it constituted a 'structured' eviction as the court order would incorporate 'report backs' at set intervals.

Initially the application was opposed on the basis that the occupiers were not unlawful as the local authority had tacitly consented to their being on the land by way of providing essential services to the community as a whole (para 37). On testimony the former executive mayor of Cape Town testified that the rendering of service was on a humanitarian basis only and it was never intended to convey permission. Instead, it has always been made clear that the community would inevitably be removed (para 38). Satisfied that the respondents were indeed unlawful, the court proceeded to analyse the application of PIE in light of the relevant facts and circumstances.

Section 5, dealing with urgent applications, was employed by the applicants and section 6 in the alternative. The court was satisfied that the applicants, although not owners of the property, were in control of the property for purposes of PIE and accordingly had the necessary *locus standi* to lodge the application (para 35). The applicants (including the Minister of Housing) further met the requirements of 'organ of state' and accordingly also met the requirements of section 6. Having dealt with *locus standi*, the court set out the housing crisis in South Africa in relation to PIE (para 39) and thereafter gave a broad overview of the N2 housing development scheme (paras 42-43). Thereafter the granting or not of an eviction order was considered. Because of the density of population in the Joe Slovo settlement, there was no other way to upgrade and redevelop the area than to remove the occupiers and clear the area, which constituted a so-called 'roll-over-development' (para 58). Concerning the question of the availability of suitable alternative accommodation, the court

stated that it was *one* of the factors that needed to be considered when evaluating the possibility of granting eviction (para 66). The application was accordingly granted in which the respondents were ordered to relocate to another area demarcated for their occupation.

The various occupiers in *Transnet (Pty) Ltd v Zaaiman* (Case no 326/07, South Eastern Cape Local Division, delivered on 2008-03-11) occupied residential units in terms of individual lease agreements. These occupiers thus started off being lawful occupiers, but became unlawful after their lease agreements were terminated under law. Since the *Ndlovu v Ngcobo and Others* case, referred to above, was decided by the SCA, PIE is also employed to evict this category of unlawful occupiers. As explained above, one of the main aims of the Draft Amendment Bill relating to PIE is to exclude this category of occupiers from the ambit of PIE. Since the Bill has not yet been accepted by Parliament, PIE is still the relevant Act in these particular circumstances (also see para 18). Being an organ of state it was argued that the applicant ought not to have employed section 4 of PIE, but ought to have used either only section 6 (providing for eviction applications by organs of state) or used both section 4 (for the private owner) and section 6 (para 21). Erasmus J set out the difference between sections 4 and 6 (see paras 23-27) and concluded that the correct provision to employ was indeed section 4 since the applicant acted in relation to its own property and not in relation to other persons' or bodies' property, which action would inevitably also have to be in the public interest. Section 6 is especially relevant where an organ of state decides to act in relation to property it does not own, but is motivated to do so in light of public interest considerations. Here the judge emphasised that more affluent respondents are, in contrast to the poor and destitute, 'less deserving of the protection in the circumstances surrounding their occupancy. They do not come within the legislative land reform programme which is basic to the Constitution; they do not enjoy special regard under the Constitution; they do not as a class qualify for special mention in PIE' (para 34).

Each of the particular circumstances of the individual respondents was then scrutinised. The conclusion was reached that it would be fair to grant an eviction order in these particular circumstances, but that the respondents should be granted enough time to find suitable housing. The application was thus successful.

Chieftain Real Estate Incorporated in Ireland v City of Tshwane Metropolitan Municipality, Government of the RSA and MEC Housing,

Gauteng (case number: 36775/06 (TPD)) concerned an application for joinder of the second and third respondents. It is evident from the judgment that the final aim of the joinder was inevitably to compel the municipality to relocate unlawful occupiers from the applicant's property at the local authority's cost. Such an agreement had been entered into previously but the relocation never happened. The applicant, being a company incorporated in Ireland with an address in Polokwane, purchased the property from the erstwhile owner, Kaywell. The latter was unable to remove the squatters and relied on the local authority to do so. The agreement to relocate the occupiers, referred to above, was thereafter negotiated. The respondents, opposing the joinder applications, argued that the applicant had no dealings with the municipality and had no contractual relationship with it and could therefore not compel it in any sense. It was also argued that the application had no cause of action and that there were no factual allegations to which government had to plead or answer. It was furthermore argued that there existed no 'duty' on local authorities to apply for the eviction of occupiers under section 6. Instead, it was primarily the landowner's responsibility to apply for the eviction and removal of squatters (paras 9-11). The court, per Makhafola AJ, first set out the various relevant legislative measures, including the relevant portions of PIE and the Constitution that may impact on the present situation. Both parties relied heavily on the *Modderklip* case. This particular case was, however, different to that of the well-known *Modderklip* case in that unlawful occupiers *in casu* were about 20 000 people and the landowner had not yet applied for eviction since the local authority had given an undertaking to relocate the occupiers. Presently the occupiers were aggressive and refused to move. The local authority had been unsuccessful in trying to negotiate with the occupiers and did not have the capacity to evict (para 29). The state's responsibilities in terms of sections 25(5) and 26 of the Constitution were emphasised by the court. The second and third respondents, as higher echelons of the organs of state, have a direct and substantial interest in the matter resulting in the application for joinder being successful.

JT Theart v Deon Minnaar (case number A99/2008) (CPD) decided 2008-08-07) concerned an appeal against a judgment handed down by a Stellenbosch magistrate and related to the interpretation of section 4 of PIE. The issue in question was whether two notices were required when dealing with eviction applications. Appellants contended that they were entitled to two notices, namely a notice under section 4(2) of PIE as well as a notice in terms of rule 55 of the Magistrates' Courts Act in proceedings that were brought by way of motion. The underlying argument was

that the final court date could only be determined once all the papers had been served and that the court would then only be able to authorise a section 4(2) notice (see para 4). However, a similar procedure was not available in the magistrates' court since the Rules did not provide for it. This particular procedure would be possible in High Courts and only in relation to motion proceedings. In the present proceedings a notice containing an *ex parte* application was delivered at the court together with a supporting founding affidavit setting out all the information required in section 4(5) of PIE. The notice of motion and supporting affidavits were thereafter served on the appellants, more than 14 days before the hearing, as required by section 4. The eviction hearing, however, focused on one aspect only, namely the issue of whether the appellants ought to have received two notices. They argued that since only one notice was served, the application ought to have been dismissed. After having heard the arguments and considered the relevant circumstances the point *in limine* dealing with the notices was dismissed by the magistrate and the application for eviction was granted. Keeping in mind the purpose of PIE, Cleaver J, on appeal, was satisfied that the notice received by the appellants complied in all respects with the provisions of section 4(5) (para 15). There was no reason why the two notices which the respondent was required to give could not be combined into one. The court also emphasised that, in cases where formalities required by the state were peremptory it had to be considered whether the object of the statutory provision still had been achieved when the formalities had not been complied with (para 17). The underlying motive behind section 4(2) was to ensure that the occupiers had sufficient opportunity to place all relevant circumstances before the court. The appellants had been represented by an attorney who knew full well what case they had to meet. Yet, they refused to put their circumstances before the court, arguing instead that their procedural rights had not been observed. The court found that the papers served did comply substantially with the requirements of section 4(2) and (5) and the appeal was accordingly dismissed with costs.

Odendaal v Ferraris (case number: 422/07 (SCA) delivered 2008-09-01) dealt with an appeal against a judgment refusing an eviction order. The appeal judgment handed down by Cachalia JA (and concurred with by Mpati P, Cameron JA, Navsa JA and Leach AJA) focused mainly on the question of whether a *voetstoots* clause was relevant in relation to immovable property that did not comply with statutory requirements and did not really deal with eviction as such. The court *a quo* refused an eviction on the basis that the appellant cancelled the particular purchase

agreement unlawfully and therefore was not entitled to an eviction order (see paras 16-17). In the appeal judgment it was found, however, that the *voetstoots* clause did in fact protect the appellant against the fact that the outbuildings and the carport did not comply with planning regulations. The respondents' allegations in relation to these 'defects' were furthermore vague, unspecific and devoid of evidential support. He failed to lay the basis for a finding of fraud on the part of the appellant and could thus not avoid the consequences of the *voetstoots* clause (para 42). Accordingly the agreement was cancelled by the appellant as was her right to do, which in its turn would form the basis of an eviction application. Concerning the eviction, the court only stated that the respondent had placed no facts before the court that it would be just and equitable not to evict him from the property (para 44). An eviction order was consequently granted and an appropriate date was set for eviction (para 45).

Secrivest Twenty (Pty) v Mazisi Nyubuse (case number: EL214/07 (ECD) delivered 2008-08-14) also dealt with an eviction application following the cancellation of a purchase agreement of a unit forming part of a township development. In this instance the respondent only managed to pay the deposit of R10 000 and failed to secure a loan for the outstanding amount. The purchase agreement was then cancelled, thereby resulting in the respondent's occupation of the property being unlawful. Again, the particulars of compliance with PIE do not appear in the judgment itself. The court per Dambuza J, found that a good case had been made out for the eviction order of the respondent (para 12). The only thing that remained was to determine a just and equitable date for eviction. The eviction order was granted and the eviction date was set at one month from the date of the order.

During April 2008, the Blouberg Municipality in Limpopo was found in contempt of court as that they did not rebuild shacks as ordered by the court. The court stated that if, within 14 days, the Municipality again failed to comply with its order, the municipal manager and all councillors would be fined R25 000 or sent to jail for six months. The municipality must also carry the costs of the residents, namely R1m. The residents also instituted a claim for R23m for damages (*Legalbrief Today* (2008-09-09)).

Housing

The recently published Towards a Fifteen Year Review indicates that asset poverty is alleviated by the RSA government's programmes in

respect of housing and land reform (http://www.info.gov.za/otherdocs/2008/toward_15year_review.pdf). As regards progress made from 1994 to 1998 in respect of housing, the *Fifteen Year Review* states as follows (p.28):

From 1994 to 2008, 3 132 769 housing subsidies were approved, and 2 358 667 units were completed as a result of expenditure of R48.5 billion. This brought housing to 9.9 million citizens who could access state-subsidised housing opportunities. Of the subsidies, 53% went to women-headed households. Given the increase in the total number of households (from just over nine million in 1996 to 12.5 million in 2007), this is a major achievement. By 2006, however, the programme was barely keeping pace with the expanding number of households. The programme is well-targeted - between 1993 and 2004, access to formal housing grew by 42% and 34% for income deciles one and two respectively and 21% and 16% for deciles three and four.

Various challenges facing the provision of housing are also identified, eg obstacles in the release of well located land for housing development, that is, in the vicinity of employment opportunities, insufficient spatial concentration in urban areas, rising costs and capacity limitations. These and other challenges will hopefully be addressed by the establishment of the planned housing development agency. Although there has been a move from traditional to formal dwellings, residential segregation is still a key characteristic of the current South Africa spatial distribution.

The Rental Housing Amendment Act 43 of 2007 was published on 2008-05-13 (GG 31051 of 2008-05-13). A definition of 'unfair practice' was substituted to read '(a) any act or omission by a landlord or tenant in contravention of this Act; or (b) a practice prescribed as a practice unreasonably prejudicing the rights or interests of a tenant or a landlord' (s 1). The Act also amends articles relating to the Rental Housing Tribunal and states specifically that the Tribunal does have jurisdiction over eviction orders (s 13(4)(d) as amended by s 6). A new offence is created, namely for a person to 'unlawfully lock out a tenant or shut off the utilities to the rental housing property' (s 16(hA)). The terms of a lease contract is extended to include that 'any costs in relation to contract of lease shall only be payable by the tenant upon proof of factual expenditure by the landlord' (s 5(c)).

A Built Environment Profession Bill will be introduced in parliament (GN 668 in GG 31093 of 2008-05-30; see also GN 337 in GG 30852 of 2008-03-07 for the policy document in this regard). The purpose of the Bill is *inter alia* to regulate the built environment professions. The

reasons for the introduction of the Bill is to consolidate the control over the six built environment professions under one body, namely, the South African Council for the Built Environment (para 5). The current professional bodies will fall under the jurisdiction of the Council, but will retain primary responsibility for their own professions regarding the training and accountability of their members (paras 5 and 6). Registration would be compulsory before a person would be allowed to practise any of the built professions (para 7). Several Acts will be repealed (namely the Council for the Built Environment Act 43 of 2000, the Architectural Profession Act 44 of 2000, the Landscape Architectural Profession Act 45 of 2000, the Engineering Profession Act 46 of 2000, the Property Valuers Profession Act 47 of 2000, the Project and Construction Management Professions Act 48 of 2000 and the Quantity Surveying Profession Act 49 of 2000).

Draft Procedural and Unfair Practice Regulations were also published for comment (GN 340 in GG 30863 of 2008-03-14). The Procedural Regulations deal *inter alia* with the lodging and receipt of complaints, mediation, spoliation and interdict procedures, while the Unfair Practices Regulations deal with disclosure, leases, rentals, eviction and changing of locks, house rules and municipal services.

Land use planning

The Land Use Management Bill was first published in 2001. It has been published again in 2008 (B27 of 2008), mainly to address the still-fragmented approach to land use management and planning in South Africa. Although the Development Facilitation Act 67 of 1995 was promulgated in 1995, also to address these issues, that measure was only an interim measure and now stands to be repealed in whole. The overall objective of re-thinking the planning and land use management system was to streamline all the relevant policies, legislative and regulatory frameworks. Investigation into these matters resulted in the publication of first the *Green Paper* in 1998 and later the *White Paper on Spatial Planning and Land Use Management* in June 2001.

The main aim of the Bill is to address the still-remaining racist spatial legacy of the pre-constitutional dispensation in order to transform the settlement patterns in the country. The Bill is closely linked with the Local Government: Municipal Structures Act 117 of 1998 and draws heavily on active participation and involvement at local government level. In this regard provision is made for directive principles, compulsory norms and standards and land use schemes in

decision-making. In applying these principles it is believed the following will be promoted: (a) co-operative governance; (b) socio-economic benefits; (c) the achievement of land reform objectives and (d) sustainable and efficient land use. New institutions and bodies are also provided for, namely, land use regulators and the National Land Use Commission.

The Bill consists of 7 Chapters. Chapter 1 contains introductory provisions and also provides for the directive principles and compulsory norms and standards. All decisions by organs of state dealing with land use management issues have to be informed by the directive principles listed in clause 4(1) with equity in access to land being one of the guiding principles. Compulsory norms and standards are provided for in clause 5. The aim is that the fragmented approach in land use management will be addressed by way of these norms - yet to be formulated by the Minister of Land Affairs. Chapter 2 provides for intergovernmental support in general and consists of two sections respectively providing for both national and provincial support and monitoring. Land use regulation, as such, is set out in Chapter 3 of the Bill and consists of three separate parts. Part 1 deals with municipal land use committees, Part 2 with provincial land use tribunals and Part 3 with the powers and duties of land use regulators. According to clause 8, municipal land use committees perform the role of land use regulators on the municipal level. Depending on the jurisdictional area, more than one such committee may be established. These committees have to consider and decide all applications that are lodged with the municipality in line with the directives, norms and standards referred to above. Provincial land use tribunals are provided for in clause 17, one in each of the provinces. The composition of the tribunal is set out in clause 18. The main function of the tribunal is to consider and decide all applications lodged with it, or directed to it, as well as to hear appeals (cl 20). The general powers and duties of land use regulators are provided for in clauses 26-39. The main land use regulators are the various committees, the tribunal and in some instances, the Minister herself (see cl 28(2d)). Where necessary, land use regulators have to investigate (cl 34) and hold public hearings (cl 35). Appeals against decisions made by committees are dealt with by provincial tribunals and appeals against decisions finalised by tribunals lie with the Minister herself (cl 39). Chapter 4 sets out the relevant provisions relating to land use schemes. Provision is specifically made for the participation of traditional councils in drafting and finalising schemes, especially in areas where the Communal Land Rights Act 11

of 2004 operates (see cl 40(2)). The adoption and revision of such schemes are set out in clauses 41 and 42 and the particular content of such schemes are provided for in clause 46. After its adoption (cl 43), land use regulators are also empowered to amend the schemes in certain circumstances (see cl 49). Operational procedures for land use regulators are catered for in chapter 5 of the Bill. These provisions deal mainly with meetings and all the details surrounding such meetings as well as the use and employment of technical and other advisors (cl 55). Chapter 6 essentially deals with the office, powers and responsibilities of the national land use regulator, meaning the Minister of Land Affairs. Provision is also made for the National Land Use Commission in clause 58. The main function of the Commission is to advise and assist the Minister in land use management issues. General provisions are incorporated in chapter 7.

The Bill thus provides for the uniform regulation of land use management in South Africa and affects all three spheres of government. Provinces will still be able to legislate in the functional areas provided for in schedule 5 of the Constitution, but will be subordinate to section 146(2) of the Constitution. Section 146(2) deals with the national legislation that prevails over provincial legislation and which is subject to certain conditions.

Strong criticisms were voiced against the provisions of the Land Use Management Bill [B27-2008]. Submissions to the Portfolio Committee on Agriculture and Land Affairs included a number of objections, amongst others, that the constitutionally vested powers of provinces and local government (as contained in schedules 4 and 5 of the Constitution) would be infringed upon by the powers of the Minister. It would also affect the section 139 power of provinces to intervene under certain specified conditions in the affairs of a municipality. In addition, the Minister would be empowered to repeal or integrate existing land legislation outside of the parliamentary process, on receipt of a report by a technical committee appointed by the Minister. (De Waal 'Wetsontwerp stel "superminister met te wye grondmagte" voor' *Sake Beeld* (2008-07-31) 3).

Expropriation

An explanatory summary of the Expropriation Bill, 2008 was published (GG 30963 of 2008-04-11). The Bill was subsequently referred back by the Parliamentary Committee after several comments were received. The constitutionality of the Bill was *inter alia* in question. According

to recent newspaper reports, the Chairperson of the Portfolio Committee on Public Works announced that the controversial Expropriation Bill [B16-2008] would therefore not be finalised during the 2008 parliamentary session (Anon 'Ministers fume as MPs block Bills' *Independent online* (2008-08-31); Isaacs Essop and du Toit 'Wet wat onteien straks onttrek' *Beeld* (2008-09-15)¹; Steenkamp 'Groot geldmag stuit wet om te onteien' *Rapport* (2008-08-17)¹⁴; Nel 'Sulke "hervorming" sal Grondwet wegkalwe' *Beeld* (2008-06-06)¹⁵).

Sectional titles

In *Seascapes v Ford* (639/07 [2007] ZASCA 109 (2008-09-23)) the appellant, in a notarial agreement, granted Seascapes' neighbours the right to use the parking bays in the sectional title scheme. The appellant, however, contested these rights as they were not part of the original agreement. The corporate body approached the Cape High Court to declare the agreement to be null and void. The High Court dismissed the application, but granted leave of appeal to the SCA (para 1). The High Court's order was confirmed by the SCA. During the construction of the sectional title scheme, the neighbours objected to certain departures from the town planning scheme. They agreed to withdraw their objections in exchange for six parking bays in the development. The developer had to register these rights in favour of the six respondents. When a developer applies for the opening of a sectional register, he or she may also impose conditions in terms of section 11(2) of the Sectional Titles Act 95 of 1986. On the date when a person other than the developer becomes the owner of a unit, a body corporate is deemed to be established. The purchasers signed a document that formed the minutes of a meeting where a resolution was taken that the developer could 'sign all documents and do all things necessary to give effect to the resolution'. On transfer of ownership the new owners became members of the body corporate which constituted more than 75% of all members in the sectional title scheme. These members were aware of the granting of the servitudes. The developer ensured that registration of the notarial agreement took place. The body corporate later objected to the granting of the servitudes, as a special resolution was necessary to execute the agreement and that such a resolution has not been adopted by the members of the body corporate (para 13). The court rejected this argument (paras 14-15).

Deeds and registries

The Deeds Registries Amendment Bill of 2008 was published for comment on 2008-03-14 (GN 360 in GG 30871). The proposed amendments are consequential to the promulgation of the Mineral and Petroleum Resources Development Act 28 of 2002 which provides for the discontinuation of the registration of mineral rights in a deeds registry. The other main aims of the Bill are to remove obsolete terminology (eg replace Supreme Court with High Court), to provide for the extension of the duties of the Registrar, to ensure the full disclosure of the full names and marital status of persons in all deeds and registries (cl 2 to amend s 17(2)), to provide for the issuing of certificates of registered title to replace lost or destroyed deeds (s 38(1) and (2)), as well as for replacement certificates relating to lost or destroyed mortgage bonds (new s 60A proposed by cl 3(b)) and to amend the definition of 'Master' (cl 5). The latter is consequential to the change of name of the High Court. Since Registrars are not obliged to follow the practice and procedure directives that are issued by the Chief Registrar of Deeds, different practices and procedures are followed in the various offices nation-wide. Clause 2(1)(b) seeks to eliminate this problem by obliging Registrars to comply with directives and thus promote consistency.

Minerals

A group of vegetable farmers challenged the award of a mining authorisation to a BEE company stating that they were not consulted during the environmental impact assessment process. The coal mining could impact on their production due to the pollution caused to groundwater (*Legalbrief Today* (2008-03-21)). Another community sued Anglo Platinum Ltd for compensation for loss of grazing land as a result of its increased mining operations (*Bruce Words and Deeds* (2008-04-01)).

In *Meepo ya Secaba v Kotze* ([2007] ZANHC 47), the Northern Cape High Court held that prospecting permits issued by Regional Managers are null and void (see also Roodt 'Court decision undermines validity of mineral prospecting rights' (2008-03-14 www.belldewar.co.za)).

Black Administration Act 38 of 1927

The Repeal of the Black Administration Act and Amendment of Certain Laws Amendment Act 7 of 2008 was published (GG 31199 of 2008-06-

27) in order to extend the date of repeal from 2008-06-30 to 2009-12-30. The Act commenced on 2008-06-29.

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