

Land affairs and rural development; agriculture: 2009 (1)

1 General

Only 59 of the 13 194 land claims of the Gauteng and North West provinces still need to be settled. Some of the resettlement projects in these provinces were, however, not successful and their failure is blamed on a lack of skills and resources (*Legalbrief Today* (2009-03-25) www.legalbrief.co.za). Approximately 37-48% of Mondi's land is subject to land claims. Mondi has already transferred land to two local communities based on an agreement that the land itself will not be restituted and that Mondi will lease the land and keep the ownership of the forests and their produce (*Legalbrief Today* (2009-02-27)). Mondi settled another land claim with 2000 claimants in Kranskop, KwaZulu-Natal. The claimants received 3 933 ha of timber plantations. Mondi will lease the land from the community for 20 years at a cost of R1 million per year. Mondi received R20.5 million for the land (*Legalbrief Today* 2008-10-30)). Government contemplates the possible extension of the deadline for the transfer of 30% of agricultural land from 2014 to 2025. To meet the current target of 2014, 19.8m ha of land would have to be transferred (*Legalbrief Today* (2008-11-13)). In his State of the Nation Address of 6 February 2009, President Motlanthe acknowledged the fact that the land redistribution programme and the post-settlement support initiative could have been handled better, and faster (State of the Nation Address (2009-02-06) (www.gov.za)).

The SADC Tribunal ruled that the Zimbabwean government must pay compensation to farmers that were evicted from their farms, but Zimbabwe has chosen to ignore the ruling (*Mail&Guardian Online* www.mg.co.za (date of access 2008-12-03)). In South Africa the land deprivation debate also continues. Agri SA made a statement that Minister Xingwana's threat to take land away from people who do not adequately make use of it (through the so-called 'use it or lose it' principle), is founded on the assumption that people who benefit from land reform purposefully neglect their land. Agri SA argues that

the problem is caused rather by the lack of financial support from government. In addition, conflict amongst beneficiaries, uncertainty over rights, inadequate development support and a lack of expertise are some of the problems that emerging farmers are experiencing. It takes approximately 46 months to finalise a land claim, and then another three years for the transfer of funds to the community. If these two processes are synchronised, it will assist with the seamless continuation of farming activities. Last year 77 farms were taken back in Limpopo alone, and the DLA admits that 566 transferred farms failed. In addition, the Limpopo Provincial Government acknowledges that agricultural production decreased by 37% during the last five years. Agri SA concluded that it would be helpful if government and government officials engage with farmers and their organisations as willing partners (Van der Walt 'Agri SA steun nie Minister se "gebruik dit of verloor dit"' *Beeld* (2009-03-10) 1).

The annual Senior Management Service Conference of the Department of Land Affairs (DLA) (26 March 2009) discussed a number of key issues, including those mentioned above. The 'use it or lose it' principle was, for example, clarified. It was stated that people not committed to farming will be removed and replaced with people with a passion for farming. It was further emphasised that food security is seriously compromised when agricultural land is not fully utilised. Unutilised land will be transferred to emerging farmers and cooperatives, and they will be provided with the necessary training.

The DLA's policy priorities for 2009-2010 will be based on the Willing Buyer-Willing Seller principle, a review of the White Paper on Land Reform, the Policy on Land Ownership by Foreigners (PLOF) and a Rural Development Strategy.

Regarding restitution, it was announced that the Commission for the Restitution of Land Rights (CRLR) has settled 95% of claims lodged, enabling the restoration of at least 2.3 million ha to 302 000 households who were victims of racial dispossession. A number of challenges were also identified, namely, increasing property prices; many claims still to be adjudicated in the Land Claims Court due to disputes, and the need for additional funding to finalise the complex outstanding claims. In this regard the Commission is engaging role-players from government and the private sector concerning packaging and implementation models to ensure sustainability in order for affected communities to enjoy the tangible benefits that arise from the settlement of their claims; and the need for the Commission to review its methods and tactics to speed up the finalisation of 4 560 outstanding claims.

Concerning land and tenure reform the Commission has delivered 165 773 ha of land to farm dwellers and farm workers, mostly to those evicted from farms. During the next three years, the Commission intends to assist 38 000 land tenure beneficiaries to have access to land through land acquisitions programmes. A renewed focus on capacity building for the Land and Tenure Reform Branch and beneficiaries was also underlined. The Minister deemed it necessary to intervene and has divided the Branch into two regions: Region 1 consists of the Western Cape, Eastern Cape, Northern Cape, Mpumalanga and Gauteng; while Region 2 consists of KwaZulu-Natal, Free State, Limpopo and North West. The land reform products (LRAD, SPLAG, LASS and PLAS) were also restructured to address the different categories of land reform beneficiaries who have different interests and are at different levels of development, namely Category 1: Landless households; Category 2: Commercially-ready subsistence producers; Category 3: Expanding commercial smallholders; and Category 4: Well-established black commercial farmers.

In the implementation of land reform for the different categories, the Commission needs to address the specific needs of each category in order that post-settlement support programmes will help beneficiaries to be meaningful role-players in economic development. Rural development is the central pillar of the struggle against poverty, inequality and destitution; especially in light of the fact that rural poverty is the most important cause of informal settlements in towns and cities. Smallholder family farming will thus be supported as a safeguard against food insecurity and dependency, by strengthening self-sufficiency.

The DLA furthermore seeks to position itself as a catalyst to rural development by providing access to productive agricultural land to suitably qualified land reform beneficiaries and releasing state land for housing, local economic development and for agriculture in communal areas. It is the task of the Land Rights Management Facility (LRMF) to address continuing insecure tenure rights. Lastly, the authority to approve item 28(1) Certificates for the confirmation of vesting of ownership of state land (in the name of the national or provincial government) was delegated to the Director-General (Senior Management Service (SMS) Conference for DLA: Address by DG Thozì Gwanya (2009-03-26) www.dla.gov.za).

To assist farmers in land and agrarian reform, a school of excellence with its main aim being skills transfer, has been launched in Heidelberg (Ekurhuleni). The project is a partnership between NAFU, Women in Agriculture and Rural Development, Youth in Agriculture and Rural Development and white commercial farmers. One such project already

in operation is in Mpumalanga, where Tongaat Hulett Starch and Xtrata are assisting beneficiaries in maize farming. An MOU has also been entered into with the Anglo Group to fast track the settlement of mineral claims with anticipated models to benefit both the community and Anglo as an example to other mining houses. Another MOU includes Forestry South Africa, SAFCOL and First National Bank. (See Department of Land Affairs Statement on recent media reports on land and agrarian reform www.dla.gov.za; De Waal 'Linkses beheer nie ekonomiese beleid - Phosa' *Die Burger* (2009-04-16) 13).

According to Agri SA, TLU SA and NAFU, the appointment of Joemat-Petterson as Minister and Mulder as Deputy Minister of Agriculture, coupled with the reorganisation of various government departments, indicate that the Zuma administration realises that politics should be kept out of agriculture (Duvenhage 'Landboueiers glo nuwe besems wys Zuma wil politiek uit landbou hou' *Sake24* (2009-05-11) 1).

The budget allocated to the Department of Agriculture and Land Affairs during the next three years will be the highest yet. Land reform receives R3,4 milliard in the 2009/2010 financial year, and by 2011/2012 this will increase to R4,7 milliard. The total budget of R20 milliard until 2011/2012 is, however, far too little according to Mr Thozzi Gwanya, DG of Land Affairs. He estimates that in order to finalise land reform by 2014 would cost in the region of R74 milliard. Mr Andrew Mphela, acting chief commissioner of land claims, told reporters that approximately R50 milliard would be necessary to finalise the restitution process by 2014. The land reform budget will grow at a rate of 17,8% from the 2009/2010 to the 2011/2012 financial year, as a result of increased funding for LARP. For 2009/2010 the DLA will receive around R6 milliard, less than the total R6,65 milliard that was budgeted for last year. An additional R300 million has been awarded to redistribute 100 000 ha of land, and R400 million to finalise the last 4707 restitution claims by 2011/2012. By 2011/2012 the Department will receive R7,6 milliard (De Waal 'Grond prioriteit vir regering' *Sake24* (2009-02-12) 8).

The agricultural sector and the Department of Water Affairs and Forestry (DWAF) are locked in a battle over the assignment of water rights for agricultural purposes. The Department attempts to empower black farmers with the assignment of water rights, but farmers argue that the Department is not keeping to the requirements set for empowerment. In a letter to the Department, Agri SA requested the Department to explain how water rights can be granted to black farmers if they do not have usable land upon which to use the water. The empowerment codes of the Department of Trade and Industry (DTI) determines that

enterprises (including farms) with a turnover of less than R5 million per year are exempted from the empowerment requirements. Enterprises with a turnover of less than R35 million are subject to limited requirements. All such enterprises are seen as empowered, even if they do not have any black shareholders, implying that they are all entitled to consideration with the awarding of water rights. DWAF, however, sets its own requirements over and above those of the DTI, and requires black ownership. Agri SA argues that this practice is not in line with the empowerment manifesto for agriculture that was adopted last year (Duvenhage 'Landbousektor en staat is haaks oor waterregte' *Rapport* (2009-02-15) 15).

In this note the most important measures and court decisions pertaining to restitution, land redistribution, land reform, housing, land use planning, deeds, minerals, property tax, agriculture and rural development are discussed.¹

Land restitution

The Kwandabeni Communal Property Trust elected 11 trustees to oversee the Ndabeni restitution project. The project has been characterised by disputes for a period of 10 years and allegations of corruption have been made. The election process was overseen by Bam J of the Land Claims Court (LCC). Only beneficiaries listed on the original claim were allowed to vote (see *Legalbrief Today* (2009-05-11)).

A farmer was paid R2 million for his farm four years ago but was allowed to continue farming the land - the farm was never transferred to the Makhutswe Communal Property Association. Members of the Association were arrested for picking fruit but the magistrate held that they could not be found guilty for 'stealing' their own fruit (*Legalbrief Today* (2009-02-26)). Another farmer is suing the Minister of Land Affairs for non-payment for land that he voluntarily sold to the DLA to settle a land claim (*Legalbrief Today* (2009-01-15)). Government decided that land will not be transferred to claimants in the Kruger National Park. Claimants would instead receive compensation or alternative land (*Legalbrief Today* (2009-01-29)).

According to a statement of the Commission on the Restoration of Land Rights (CRLR - Media Statement (2009-02-03) www.dla.gov.za) a task team consisting of the DLA, CRLR, various government departments

¹In this note the most important literature, legislation and court decisions are discussed for the period 2008-09-15 to 2009-04-15.

as well as SAFCOL has been set up to work on settlement models for claims on SAFCOL land. In addition, a task team has been established with the Forestry Industry. In order to ensure a sustainable forestry sector, lease agreements are signed with forestry companies that make provision for the transfer of skills to restitution beneficiaries. Claimants eventually acquire the trees at the end of the lease period. The Commission is finalising the District Six claim in the Western Cape, and has approved the release of R13 million worth of grants to the Funds Administrator towards the development of 114 houses.

In the speech by the Minister for Agriculture and Land Affairs, Xingwana, at the land hand-over ceremony for the Makgoba Community Claim, Limpopo Province ((2009-04-04) www.dla.gov.za), mention was made that the land handed over to the Makgoba community comprises both state and private land. To make progress, a phased process was adopted by which parcels of land are restored to the community as they become available for transfer. The settlement of the first phase of the claim involved four state-owned properties measuring 768 ha. The Minister stated that she was aware of the challenges within the community regarding the claim, and advised the community that there could be no productivity in a climate of disputes and internal fighting. It was of the utmost importance for the Trust and the Royal Council to work together. She reminded the community that land reform should 'promote the objectives of reconciliation and unity, economic empowerment, job creation, food security and poverty alleviation', that the land should be farmed in a sustainable manner, and that the 'use it or lose it' principle was being implemented where land went to waste. The community would have the opportunity to participate in various value chain activities in terms of the agreement on the joint venture on the timber business. The turnover for the business is approximately R6 million per month realising a good profit.

Notices

Several notices were published, (eg Gauteng and North West (Taemane Municipality 1; Bojanalo 4 ; Suikerbosrand Nature Reserve 1); Eastern Cape (Cofimvaba 1; Keiskammahoek 1; King William's Town 6; Elliot 1; Umthatha 1; Steynsburg 1; KwaMkhonde 1; Luxeni 1; Mthatha 12; Centane 1; Uitenhage 6; Aberdeen 1); Western Cape (Greater Cape Town area 6; Malmesburg and other areas 2; George 3; Knysna 1; Oudtshoorn 1; Great Brak River 1); KwaZulu-Natal (Lower Umfolozi 2; New Hanover

1; Lions River 6; Eshowe 1; Vryheid 1; Durban 3; Mthonjaneni 1; Pietermaritzburg 2; Vryheid 4; Paulpietersburg 1; Impendle 1; Glencoe 1; Mount Currie 1; Bergville 1); Mpumalanga (Nelspruit 3; Tzaneen 1) and Free State and Northern Cape (Keimoes 2; no district 5; Masilonyana Local Municipality 1; Thabo Mofuntsanyana Local Municipality 2; Dikgatlhong Local Municipality 1; Gordonias 2; Siyanda 4; Fezile Dabi District 1; Ditlhabeng Local Municipality 1). In the Limpopo Province, 3 amendment notices were published and in KwaZulu-Natal 8; Mpumalanga 1; Free State and Northern Cape 4 and Eastern Cape 1. In Gauteng and North West, two withdrawal notices and one in KwaZulu-Natal were published.

Notices that were published with regard to the Bojanalo District listed the interested parties only as 'current land owners claimants' which may not suffice as proper notice of a land claim to interested parties (see, eg, GN 261 in GG 31987 of 2009-03-13); in the Free State and Northern Cape, farm numbers and portions of farms are listed without any indication of the owners or interested parties (see, eg, GN 1560 in GG 31715 of 2008-12-19). It is also confirmed by farmers in the Northern Cape that they are only now informally informed about 'late or lost claims' that were filed on their farms. The possibility of fraud in this regard is also investigated. In May 2009 the Land Claims Commission announced that it is going to degazette a number of farms in various provinces. The reason being that it became apparent that some of the land was not claimed, that the number of claimants had increased since the cut-off date and that officials made mistakes when interpreting vague claims (*BusinessDay* (2009-05-11)).

Case law

Mariti Landgoed (Pty) Ltd v Minister of Land Affairs ((LCC 132/06) decided 2008-10-28), concerns the practice of the LCC not to grant costs orders, except in specific circumstances. In the present case a restitution claim was lodged against property belonging to the applicant. The applicant was prepared to sell the land to enable the first respondent to restore the land to the claimants, being the fourth respondent. Three agreements to sell the land were entered into respectively, all conditional upon the Minister's approval. In none of these instances could the Minister's approval be obtained timeously or at all (para 3). Accordingly, the applicant brought an application to the LCC for relief under the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Before the hearing, however, the applicant

amended its motion by inserting an additional prayer that the third respondent (the Regional Land Claims Commissioner - Mpumalanga) refer the restitution claim within one month to the LCC (or within a time period determined by the court). The amendment was opposed, resulting in a postponement of the main application. Ultimately a settlement was concluded by all parties involved.

The present matter before the court was an application for a costs order against the first, second (CRLR) and third respondents on the basis that these respondents allegedly behaved improperly in their conduct and negotiations for the sale of the land and that their attitude was ostensibly high-handed. There were, furthermore, groundless accusations of unlawful and improper conduct made against the applicant in the respondents' answering affidavits. The third ground proffered, was the respondents' failure to perform duties expeditiously. The court, per Gildenhuis J, confirmed that the basic point of departure in the LCC is that costs orders should generally not be granted. The underlying reason is that litigants should not be discouraged from approaching the court to enforce their claims and rights through fear of an adverse costs order (para 8). However, this approach may be deviated from where the conduct of one the parties is discreditable or where fairness requires otherwise. It was argued by the applicants that the practice not to award costs orders ought not to apply in cases against the State, especially of the State takes an indefensible position. The court rejected this argument, stating that any party bears the risk of an adverse costs order, irrespective of whether it is the State or somebody else (para 10). Since the main matter was not argued, but the case was settled instead, the court could hardly deviate from the LCC's general policy without investigating the merits of the claim. The final result was beneficial to all parties, including the applicant. Accordingly no award for costs was ordered. This judgment confirms that in the LCC costs orders will only be awarded where necessary and that the State, for purposes of costs awards, is approached in the same way as any other party in the LCC.

Qoqisizwe Community v Drakensburg Gardens Leisure Resort and Hotel (LCC 155/08, decided 2008-12-22) deals with an urgent application under section 11(7) of the Restitution Act 22 of 1994 to interdict and restrain the undertaking of earthworks on land on which a land claim was lodged. The judgment handed down did not deal with the merits of the case as such, but focussed on two main issues, namely (a) the amendment of the papers in order to join further respondents and (b) points raised in *limine*, namely, the urgency of the matter which was contested. Regarding the joinder, the

applicants endeavoured to join further respondents (holding companies as were set out in the replying affidavit of the first respondent) by merely amending its notice of motion. As it stood, the papers indicated 7 respondents. The amended notice of motion indicated 11 respondents (additional 8th to 11th respondents). It was argued that the amendment was in order because it was in line with the directives issued by the LCC at an earlier stage during a pre-trial conference (para 9). However, when scrutinised more closely it was clear that the directives issued indicated that the *directives themselves* could be amended by way of fax or email and not that the papers as such could be amended. Apart from this matter, the mere amendment of papers could not join additional parties. No party could be joined without having received notice of the joinder. Joinder should thus have to take place in accordance with the LCC Rules, especially Rule 12 (para 11). The application for amendment was thus dismissed.

Concerning the urgent application as such, the necessary background to the land claim and this application was provided in paras 4-7). Once a notice of a land claim has been published, section 11(7) of the Restitution Act 22 of 1994 places a general restriction on the land in question in that transactions relating to the land may generally only be concluded with the written notices to the Regional Land Claims Commissioner. The underlying reason is that the *status quo* of the land in question be conserved as far as possible for the duration of the land claim. The development of land is also covered in section 11(7)(aA)(ii). It was argued that the earthworks constitute development and that it had to be stopped immediately, on an urgent basis, without having to follow the normal routes for urgent applications (see prayers in application in para 1). On the facts, however, it transpired that the applicant had become aware of the development in April 2008 already but had only lodged the urgent application in October 2008. The court emphasised that various cases have to be approached differently since there were degrees of urgency (para 18). Depending on the circumstances, 5 months may be reasonable whereas in other instances a delay of 5 months would be unacceptable. In the present case the court found that the delay of 5 months was unreasonable. However, the whole handling of the case by the applicants' legal team was found to be very unsatisfactory since the matter of urgency was raised by the respondents in their answering affidavit and the applicants still did not find it necessary to file a replying affidavit. The correct respondents were furthermore

not identified, nor had the specific parcel of land that was affected, been identified in the papers. In these circumstances the application for the amendment was dismissed, the point in *limine* relating to urgency was upheld and the main application was struck from the roll. However, the applicants were granted leave to, on a proper notice, renew the application on the same papers, but supplemented with further documentary evidence (see 'order' in para 21).

Land redistribution

Some land redistribution cases fail while others thrive. In the Eastern Cape the lack of success is attributed to infighting, as well as a lack of technical skills and access to capital, despite government spending millions of rands on such projects. It seems that joint ventures between communities and former farmers are more successful (*Legalbrief Today* (2009-04-27)).

Ms Veronica Moos, a farmer who benefited from land reform, took the Minister of Agriculture and Land Affairs to court on the basis of the Minister's 'use it or lose it' campaign after she was evicted from her farm. Advocate Van Garderen, national Director of Lawyers for Human Rights, argued that Moos did not receive the necessary support from the Department (apart from a R200 000 subsidy). Moos received a letter from the Department ordering her to leave the farm at her earliest convenience as she did not manage the farm according to the Department's policies. Lawyers for Human Rights applied to the Pretoria High Court for an order that would allow Moos to return to the farm. Mr Eddie Mohoebi, Xingwana's spokesperson, told reporters that ten members of Women in Agriculture and Rural Development will cultivate the farm while the court case is pending (Scholtz 'Xingwana jaag boer van plaas' *Beeld* (2009-04-17) 11). A settlement was reached between Ms Moos and the Minister stating that Moos could return to the farm pending the outcome of the court case. In terms of said agreement nobody else, except two security guards currently on the farm, may enter the farm (Scholtz 'Vrou is vir eers weer baas van die plaas' *Beeld* (2009-04-23) 13).

The proposed model for settling claims on forest land makes it possible for the state to purchase the land for the beneficiaries, excluding the trees. The community leases the land to the forestry company for an agreed period (linked to the rotation of trees), with the supply of trees for two rotations (with an option for the beneficiaries to buy the trees and do the planting themselves after

the first rotation). The claimants thus receive financial compensation even though they will not take ownership of the trees immediately (Ministerial speech (2009-04-17) www.dla.gov.za).

According to De Jager, Vice-President of Agri SA, it makes sense to prioritise farm workers when deciding on land redistribution beneficiaries. The reason behind this line of thinking is that these workers, who often work on farms for a lifetime, have the experience and practical knowledge to successfully manage farms on their own. He commented on the acknowledgement by the Minister of Agriculture that land restitution beneficiaries (based on historical rights to land) are rarely successful. De Jager further argues that it takes up to 30 months after land is awarded for financial assistance to arrive. In addition, there is a lack of agricultural experience and training of the rural poor. One possible solution for land owned by a great number of beneficiaries would be to lease the land to a third party, instead of using it for accommodation or subsistence farming (Van Rensburg 'Agri SA: Gee restitutieplase vir plaaswerkers' *Sake-Beeld* (2009-03-26) 4).

Disgruntled land reform beneficiaries invaded and seized the farm Foroma (part of Tenbosch - a R10 billion land restitution project). Umlimi (the farm management company) said the invasion was the consequence of unreasonable profit expectations created by trustees. The invasion affected productivity on neighbouring farms. Tenbosch, the government's showcase land restitution project is starting to fall apart. Umlimi has disbursed approximately R3,5 million to Mjejane Trust on behalf of the Luggedlane community during the past three years, but none of this income was passed on to the community. The concerned group was trying to establish what happened to the Trust's income. Attorney Richard Spoor (acting for a group of concerned members of the Tenbosch beneficiary community) said he was bringing an application to the Court to re-establish accountability, transparency and the democratic election of trustees (Blom 'Armed mob grabs land reform farm' *Business Day* (2009-04-15) 1).

Land reform

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

The interpretation of 'occupier' has been contentious since the commencement of the Act in 1997, especially in relation to female occupiers and the approach followed by courts whereby a distinction is made between occupiers in the narrow and occupiers in the broad sense. Case law has

also provided guidelines in relation to other aspects of the definition, for example the exclusion of persons on the basis of their income or the location of their premises. Despite the guidelines available, there is still confusion regarding the dividing line between occupiers for purposes of ESTA and unlawful occupiers for purposes of PIE. *Lebowa Platinum Mines Ltd v Viljoen* ((case number 733/07) SCA, delivered 2008-12-17) is a case in point. The appellant is a registered mining company carrying on business in the platinum mining industry. Part and parcel of an employee's package, is a house located on the land from which the minerals are extracted. In return the employee pays a nominal monthly rent and contributes to the utilities. The wage, however, is R11 438 per month. The respondent was employed, but was dismissed after a disciplinary hearing. The dispute was referred to the CCMA. When that application was unsuccessful, a review was launched in the labour court against the CCMA decision. Eviction proceedings were instituted against the respondent under PIE. The respondent opposed the proceedings on the basis that he was an occupier for purposes of ESTA, because he was unemployed and because the premises were situated on a farm. It was also proffered that the eviction application was premature since his right to occupy could only be terminated under section 8(2) and (3) of ESTA only upon final determination of the labour dispute (paras 4-5). On agreement the matter was transferred to the LCC. There it was found that when the application was lodged, the respondent was unemployed and accordingly not earning an income. The disqualification of R5 000 per month would thus not apply. It was concluded that the appellant ought to have instituted proceedings under ESTA, either in the magistrate's court or the LCC and dismissed the application with costs. An appeal was lodged thereafter. The present issue before the SCA is thus the applicability of ESTA to be determined with reference to whether the respondent is indeed an occupier for purposes of that statute.

The court per Maya JJA first set out the background to ESTA with reference to section 25(6) of the Constitution and the Preamble to the Act. Emphasis was placed on the regulation of the eviction process of vulnerable occupiers of land and that the Act generally sought to protect a designated class of poor tenants occupying rural and peri-urban land with the express or tacit consent of the owner (para 9). With reference to *Mkangeli v Joubert* (2002 4 SA 36 (SCA)) the court underlined that, although ESTA generally applies to a particular class of impecunious tenant, it applies, regardless of who may be the holder of the right and whatever the course of such right may be. Accordingly, although the respondent is not a member of a vulnerable class, the courts are never-

theless enjoined to consider ‘... the colour-blind provisions of section 26(3) of the Constitution when interpreting ESTA. From the wide wording of such provisions, it hardly seems inconceivable that in that exercise a person falling outside the designated category, but nonetheless possessed of a land owner’s consent or some other legal right, may fall within its purview’ (para 13).

The question, however, is when the circumstances of the person sought to be evicted ought to be considered to ascertain whether he or she is an occupier. LCC case law, for example, *Hallé v Downs* (2001 4 SA 913 (LCC)) found that the status of an occupier is determined when the legal proceedings for the eviction of that person commence. In the present instance the respondent did not qualify as an occupier for the whole tenure of this employment as the Act specifically excludes persons who earn more than R5 000 per month. The fact that he remained in occupation of the house with the appellant’s consent after the termination of his employment cannot, however, be ignored. His occupation assumed a wholly different character as he had no earnings. On this basis the court found that he fell squarely within the ambit of the definition of ‘occupier’ as he met all the requirements (para 18). Concerning the *Hallé* decision referred to above, the SCA found that that judgment is incorrect in so far as it extends the time relevant to consider a tenant’s circumstances beyond the date on which consent terminates. The appeal was thus dismissed. The result of this decision is that it confirms that the point in time to consider when a person qualifies as an occupier for purposes of ESTA, is indeed when the eviction proceedings commence. Although the employment contract was terminated, the consent to reside on the land was still intact. Accordingly, the individual still had consent to occupy, but at that stage had no earnings, thereby excluding the disqualification clause of R5 000. Similar cases will merely be avoided by not granting additional consent to remain on the land after the expiration of the employment contract. While the consent is still intact and the individual has an income exceeding R5 000 per month, that person is not an occupier for purposes of ESTA.

A mandamus was applied for in *Hadeco (Pty) Ltd v Shabangu and 25 other Respondents* (LCC 55/08, decided on 2008-11-28). The various respondents were all employed by the applicant (although no employment contract was before the court) and fell within the ambit of ESTA. Apart from 6 respondents who did not own any livestock, the application was in relation to the other remaining respondents to remove all livestock from the property within a set period of time after which the sheriff will be authorised to impound said cattle and other livestock, and

in relation to all 26 respondents to harvest their maize and sugar cane and to remove all stover from the land. Lastly it was also prayed that no new crops will be planted and no new livestock be brought onto the land. The applicant owns various farms in four of the provinces, all producing flower bulbs for the local and international market. From the outset it was apparent that the particular conditions relating to the keeping of livestock and planting of crops were unclear. The respondents all argued that they had permission to keep livestock and plant crops, which was denied by the applicants. Apparently the practice was that senior employees, like managers, were allowed to keep cattle and in some instances plant crops, but the respondents, all labourers, were not entitled to livestock or crops. Animals in the area and other crops may pose a threat to producing bulbs since national and international guidelines relating to agricultural practices apply. In the present instance the applicant had been trying since 2003 to persuade the respondents to get rid of their livestock and crops (para 7). The process gained momentum when the Department of Agriculture issued a quarantine notice on the applicants in 2005 when eel worm was discovered on the land during an inspection. Under the notice issued it became imperative to 'follow good agricultural practice ... to decrease the level of infection' (para 4). It is not contested that eel worm is spread by animal hooves, either by way of transplanting contaminated soil or by way of portions of contaminated vegetation that is lodged to the hooves. The issue was whether it was indeed caused by the animals belonging to the respondents.

The court found that the rules relating to the keeping of livestock and cropping on the farms were relaxed, that there was no clarification for the discrimination between senior levels of employment and the lower levels and that the respondents did not prove that they indeed had permission to keep said cattle and grow crops since there was no evidence relating to who gave the consent, when it was given, what it entailed and in which circumstances it could be revoked (para 9; para 12). On the facts, however, it became clear that the respondents were not the only individuals who had cattle on the land since there were also other, unidentified unlawful occupiers (para 13). Furthermore, the eel worm infection may have been caused by the cattle belonging to the managers of the neighbours or even other animals, like runaway horses found on the premises on a previous occasion (para 14). Although the economic and cultural importance of keeping animals was emphasised by the respondents (see quotation in para 17), this case was distinguished from other case law where livestock was the only source of income. In this case all of the respondents were employed and therefore had other

income as well. Insufficient evidence was placed before the court concerning to what extent the income derived from cattle was supplementing their general income. In balancing the rights of the land owners and those of the occupiers the court focussed on the question of prejudice to each party (para 18). Closure of the farming operations as a result of the spreading of the eel worm infection will prejudice both the applicant and the respondents since the applicant will receive no income and the respondents will lose their employment. Despite many questions still unanswered, (eg, whether it was indeed the respondents' cattle that infected the land and were continuing to spread the infection), the application was granted in full. It is clear that in this particular instance, the specific kind of farming enterprise and the possibility of risking the whole farming enterprise, with dire consequences for all parties, was the deciding factor.

Hallé and Hallé v Downs (LCC 78R/2007, decided on 2008-11-20) concerns an appeal against an eviction order granted in the Vryheid magistrate's court in the course of 2007. The basis for the appeal lies in the averment that the occupiers are long-term, section 8(4) occupiers and therefore qualify for additional protection against eviction and that the court *a quo* erred in not finding them to be such long-term occupiers (para 2). In order to qualify as long-term occupiers a person would have to be 60 years or older and had to have resided on the land in question for 10 years or longer.

The respondent contended that the appellants were neither occupiers nor long-term occupiers under ESTA but that they were instead, unlawful occupiers who had to be dealt with in terms of PIE. The appellants were married (out of community of property), were both over 60 and have been living on the farm since 1966. Mrs Hallé became owner of the farm in 1983 and remained owner until 1994 when the farm was sold and transferred to the respondent, Mrs Downs. Mrs Downs did not take occupation of the farm. Instead, the parties agreed the Hallé s could remain on the land during which time they would be entitled to re-purchase the farm within 5 years (para 5). This agreement was followed by a formal, written lease agreement between the parties in relation to a portion of the farm that was currently occupied by the Hallés. The portion occupied, apart from the main dwelling, also had other dwellings that were leased by the appellants and the bed and breakfast and woodwork manufacturing business conducted on the property continued. The respondent herself later relocated to the farm. In 1998 the appellants offered to re-purchase the farm, which offer was denied. When the appellants fell behind in rental payments, the lease agreement

was cancelled in July 1998 and the appellants were requested to leave the farm at the end of August 1998. When a further rental instalment was paid, however, the appellants were allowed to stay on, but were again asked to leave the property a year later, in 1999. Thereafter eviction proceedings began which culminated in an eviction order. On appeal the order was set aside in the LCC and remitted to the magistrate's court after which the eviction application was withdrawn. Since 1999 the appellants had occupied the land in question, refused to pay rent, refused to negotiate a lease agreement while still deriving an income from the land.

Between 1999 and 2006 the respondent attempted numerous times to negotiate rent or affect vacation of the property, to no avail. In 2006 the appellants were again given notice to vacate the land which again led to eviction proceedings in the magistrate's court under both ESTA and PIE. The court *a quo* found that the appellants were occupiers, but not long-term occupiers, under ESTA and that, in light of the breaches contemplated in section 10(1)(b) of ESTA, had to be evicted (para 17).

For appellants to have qualified as occupiers under ESTA, they would have to have met the requirements set out in the Act when the eviction proceedings started, namely August 2006. At that time an income exceeding the R5 000 set out in the definition was received by the first appellant. Apart from that, first appellant was not an occupier in her own right, as the lease agreement was entered into with her husband - she resided on the land by virtue of her marriage to the second appellant. Mrs Hallé was thus found not to be an occupier under ESTA (para 21). Jointly, both appellants' income exceeded the limit of R5 000 per month. On that basis the court per Meer J disqualified them as occupiers. They were also not long-term occupiers as they did not meet the 10 year requirement. It was not enough to have occupied the land for 10 years or longer, it was imperative that the 10 year occupation was with the status of an occupier (para 24). As they have exceeded the income limit in the 10 years preceding the termination of their residential right, they did not occupy as occupiers during that period of time. Even if they were long-term occupiers they still stood to be evicted as they had committed breaches set out in the Act, eg, refusal to pay rent and refusal to negotiate a lease agreement (para 25). Although the court *a quo* was correct in finding that the appellants did not enjoy the protection of long-term occupiers, it was incorrect to grant the eviction order under ESTA. The appellants were unlawful occupiers

and should have been dealt with under PIE. The respondent instituted eviction proceedings under PIE and ESTA and met all the procedural requirements. The LCC however, does not have jurisdiction over PIE (para 3). In certain circumstances the LCC may exercise jurisdiction in respect of issues which it usually cannot adjudicate by virtue of section 22 of the Restitution Act (para 31). Case law confirmed that where a court of first instance made a correct order, an appeal court can confirm the order, albeit for other reasons (para 32). A court of appeal can, subject to the question of jurisdiction, conclude that the eviction order could have been granted under PIE, and on that basis dismiss the appeal. Allowing the appeal and remitting it to the magistrate's court would prolong litigation and involve unnecessary costs - which would not be in the interest of justice. The LCC accordingly ascribed jurisdiction to it under section 22 of the Restitution Act and dismissed the appeal accordingly.

Provision of Land and Assistance Act 126 of 1993

Land was designated in terms of the Provision of Land and Assistance Act 126 of 1993 in the Ubuhlebezwe Local Municipality area (GN 226 in GG 31957 of 2009-03-06). Only 382 beneficiaries may settle on the land and should the land not be developed within three years the land would revert back to the DLA. The Conservation of Agricultural Resources Act 43 of 1983 and the National Water Act 36 of 1998 are made applicable to the land. This notice is an example of where the Department has specifically applied the 'use it or lose it' principle by way of government notice.

The Provision of Land and Assistance Amendment Act 58 of 2008 commenced on 2009-01-09 (GG 31788 of 2009-09-01). The Act provides the Minister of Land Affairs with wide powers to expedite land reform not only with regard to land but also to acquire other assets relating to land (see in this regard Du Plessis, Pienaar and Olivier 'Land matters: 2008(2)' 2009 SAPR/PL 101).

Interim Protection of Informal Land Rights Act 31 of 1996

The provisions of the Interim Protection of Informal Land Rights Act 31 of 1997 were extended to 2009-12-31 (GN 98 in GG 31843 of 2009-02-06). The previous extension was only until 2008-12-31. It seems that the publication of the notice was belated as the wording is 'where as the application ... will expire on 31 December 2008'. The notice does not provide for retro-active application for the period

2009-01-01 until 2009-02-05 and it would seem that informal rights have not been protected during that period.

Communal Land Rights Act 11 of 2004

Several traditional communities brought an application to the Pretoria High Court to challenge the constitutionality of the Communal Land Rights Act 11 of 2004 (CLRA). It is alleged that the Act amends customary law and erodes the position of traditional leaders and provincial government. It is amongst others argued that the rights of women would be more insecure and that traditional councils should have executive functions pertaining to land (*Legalbrief Today* 2008-10-13).

Upgrading of Land Tenure Rights Act 112 of 1991

It is for the first time in a very long time that a notice in terms of the 1991 Upgrading Act has been published again. In this case, land in Ga-Rankuwa is declared as a formalised township and that no conditions are placed for the township. It is also ordered that the township should be included in the Tshwane Townplanning Scheme (GN 82 in GG 31798 of 2009-01-23).

Unlawful occupation

Various government departments (the Departments of Minerals and Energy, Land Affairs and Labour) the local municipality as well as Cosatu have indicated that they would assist a group of approximately 90 farm dwellers to contest a court order instructing them to vacate land in the North West Province without any alternative accommodation being offered. They found temporary refuge in a community hall in Marikana. It was decided that the Department of Land Affairs would appoint an attorney to scrutinise the court order. According to the bailiff, the court order was valid, and the farm dwellers had been informed beforehand of the eviction and that they might receive legal advice before their removal. Most of the farm dwellers were unemployed, but some had been born on the farm and others have lived on the farm for more than 40 years (De Beer 'Groep van 90 van plaas in Noordwes afgesit' *Beeld* (2009-05-08) 14).

Balduzzi v Rajah (2008 (4) ALL SA 183 (W)) raised 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 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, he (the plaintiff) consented that Mr Rajah takes occupation of the erf, even though ownership did not 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 on 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 this one entered into by Mr Rajah as one of the factors that have to be considered in the question 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.

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' Court 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 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.

Secrivest Twenty (Pty) Ltd v Mazisi Nyubuse (case number: EL214/07 (ECD) decided on 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 with an eviction date of one month from the date of the order.

The following two judgments are especially interesting in that eviction orders were granted under the common law, despite the provision in section 4(1) of PIE excluding common law and the well-known case of *Ndlovu v Ngcobo*, *Bekker v Jika* (2002 4 A ll SA 384 (SCA); 2003 (1) SA 113 (SCA)) that confirmed that PIE is applicable in all cases where persons are being evicted from a 'home'. In *Minister of Land Affairs v Mphuthi* (case number: 3028/06, delivered on 2009-02-26, Orange Free State Provincial Division) the land in question was state-owned land, namely Portion 77 of farm 1903 in the area of Harrismith. The respondents have been occupying the land illegally

since 1998. They came to occupy the farm land on the mistaken belief that it formed part of Unit 3.21, forming an integral part of Portion 76, which they had leased from the state and later purchased from it. Thus, when they moved on to the land and into the home-stead, they thought the land was within the boundaries of the portion they leased. On that basis they effected improvements to the house and also added two additional rooms. In fact, that portion of the farm was separate from the portion they actually leased and later purchased and was in reality leased to another, who testified to that fact. An eviction application was lodged in July 2006 after which protracted negotiations were embarked on in an effort to settle the matter. The respondents were only convinced of their illegal occupation when they saw aerial photographs and a survey report in April 2007. After that date, they still, however, refused to vacate the land. In the answering affidavit filed a year later, they raised the issue that they were occupiers under ESTA.

The main thrust of the judgment is focused on whether the respondents were occupiers for the purposes of ESTA. If that were indeed the case, the High Court would not generally have jurisdiction to adjudicate, except if the parties consent to its jurisdiction. Accordingly, emphasis was placed on the concept of 'occupier' and how one became an occupier as well as the consequences thereof. It was underlined that ESTA was aimed at protecting a particular class of impecunious rural tenant (para 12). As the initial occupation was not on a lawful basis and because it did not coincide with consent, the respondents did not meet the first requirement for becoming occupiers under ESTA (para 15). Presumptions in favour of persons claiming occupier status regarding tacit consent were also not useful, since these presumptions did not bind the state (para 13). On the facts it was furthermore clear that the farm was utilised for commercial farming enterprises, something specifically excluded in the definition of occupier (para 14). Concerning the definition of 'occupier' the court per Molo AJ reached the following conclusion (para 14): 'The respondents can, as a result, not be the persons entitled to the protection of ESTA, simply because they belong to the so-called 'previously disadvantaged' group'. Regarding the eviction application, the court found that (para 15): 'The applicant has met all the requirements of proving entitlement to the relief *sought under common law*. The respondents have not been successful in proving their entitlement to the protection afforded by ESTA and have no defence against the relief sought' (own emphasis).

It is correct that the respondents do not qualify as occupiers under ESTA. However, the judgment is problematic for many reasons. In the first instance it does not state what the status of the respondents is. They are certainly unlawful occupiers resulting in the legal principles relating to unlawful occupiers becoming relevant. Different sets of rules apply for different categories of unlawful occupiers. The court has already disqualified the ESTA set of measures, but did not consider any of the other categories of legislative measures also impacting on unlawful occupiers. The respondents occupy land and a homestead used for residential purposes unlawfully. How is it possible that the court can grant an eviction order under the common law? Apart from the fact that this approach ignores section 4(1) of PIE and the watershed judgment in the *Ndlovu* case referred to above, it is also in conflict with section 26(3) of the Constitution. Section 26(3) of the Constitution states that eviction orders may only be granted by way of a court order and only after all of the circumstances have been considered. Although the order was granted by a high court, the common law was applied, thereby only drawing on two requirements, namely, (a) that the applicant is the owner of the property, and (b) that the respondent is in occupation thereof. This approach does not allow for the consideration of *all relevant circumstances*, nor does it require that the procedural and other substantive requirements incorporated into PIE, are met. There is furthermore no reflection in this case on the matter whether the granting of the order is 'just and equitable'. The common law in the form of the *rei vindicatio*, may be relevant if the property is used for commercial, industrial or trade purposes. However, the judgment itself does not reflect that these purposes have indeed been considered in relation to the utilisation of the farm and buildings. That would explain why the common law, as opposed to PIE, may be applicable. If that had indeed been the case, the application of the common law ought to have been placed into perspective.

Machele and 67 Other respondents v Mailula, Trust for Urban Housing Finance, Bhana & Associates, Registrar of Deeds and City of Johannesburg (case number CCT 99/08) 2009 ZACC 7, decided on 2008-12-03, reasons given on 2009-03-26) raised various interesting issues, *inter alia* the consideration of eviction orders in the absence of PIE and the execution thereof, as well as certain procedural and technical matters. On the basis that Mailula, the first respondent, was the owner of Angus Mansions, the relevant property, an eviction order was granted in the South Gauteng High Court - Johannesburg on 2008-11-05, but with leave to appeal. On 2008-11-13 an application to execute the eviction order was granted by the same court. Execution

was to take place on 2008-12-15, despite the appeal having been lodged (para 3). In direct access to the CC the following order was made by Skweyiya J, namely, that the order granting leave to execute eviction be suspended, pending final determination of the appeal by the SCA. Reasons for this order were given in the present judgment, dated 2009-03-26.

It transpired that the eviction order granted in the High Court was based purely on the validity of the relevant purchase agreement of the building which was occupied by the 68 applicants. When the High Court was satisfied that the purchase agreement was valid, it granted the eviction order. There was no consideration of either section 26 of the Constitution or the provisions of PIE. In this regard, Skweyiya J stated that ‘...the application of PIE is not discretionary’ (para 15) and ‘that the high court authorised the eviction without having regard to the provisions of PIE is inexcusable’ (para 16).

The legal issues before the CC were the following: (a) in what circumstances an interim execution order was appealable in the CC; (b) whether this case raised a constitutional matter; and (c) whether the applicants had shown that they would suffer irreparable harm. It was argued that interim orders were generally not appealable, except that they may be appealed to the CC where a constitutional issue was raised. With reference to *Minister of Health v Treatment Action Campaign* (2002 ZACC 16, 2002 (5) SA 703 (CC)) it was found that it was generally not in the interest of justice for a litigant to be granted leave to appeal against an interim order of execution (para 22). However, for an applicant to indeed succeed it would have to show irreparable harm if the interim appeal were not granted. The court would then have regard to the possibility of irreparable harm and the balance of convenience.

Concerning the issue whether constitutional matters have been raised here, the Court stated the following: ‘In my view, an eviction from one’s home will always raise a constitutional matter’ (para 26). The positions of the applicants on the one hand and Mailula on the other, had to be considered in order to determine whether irreparable harm would be suffered. The harm to the applicants lay in the fact that they would lose their homes and that alternative accommodation was not readily available (para 29). The harm Mailula would suffer was mostly financial loss as he risked losing the building as he was unable to pay the debt owing on utilities to the City and faced possible foreclosure. There was also an increase in costs for his planned renovation (para 31). The Court found, however, that the harm to Mailula was minimal and not

irreparable (para 32). In the present circumstances and in light of the appeal already lodged in the SCA regarding the merits of the eviction order, the appropriate relief was to suspend the execution order, pending the finalisation of the appeal.

In *Abahlali Basemjondolo Movement SA v Premier, KwaZulu-Natal* (2009 3 SA 245 (D)), the applicants submitted an application for a declaratory order that the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 (hereafter KZN Slums Act), was unconstitutional. In respect of the first argument that the functional domains of eviction, land tenure and access to land (dealt with in the KZN Slums Act) are in the exclusive legislative competence of the national sphere of government, the Court indicated that the main aim of the Act was housing (which is in the concurrent (Schedule 4 (Part A)) domain of the national and provincial spheres of government (para 32). The second contention that the KZN Slums Act was inconsistent with section 26(2) of the Constitution ('the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right' (that is the right to have access to adequate housing)). The Court found 'that the (KZN) Slums Act constitutes a reasonable legislative response to deal with the plight of the vulnerable in our society', consequently found that the contention had to fail paragraph 36. The third argument (that the KZN Slums Act conflicted with national legislation, and specifically with the National Housing Act 107 of 1997 and the PIE, was also rejected on the basis that the KZN Slums Act incorporated the PIE (including a number of prescribed administrative and judicial steps), and that other binding policy and legislative prescripts (eg the National Housing Code) would ensure that widespread evictions would not take place (para 38). The applicants subsequently petitioned the CC for an order invalidating the KZN Slums Act; on 14 May 2009 the Court reserved judgment (SABC 'Judgment reserved in KZN informal dwellers case' <http://www.sabcnews.com/portal/site/SABCNews/menuitem.5c4f8fe7ee929f602ea12ea1674daeb9/?vgnnextoid=11c2dcb271041210VgnVCM10000077d4ea9bRCRD>).

Housing

Despite advances in the delivery of housing, the existing backlog is still a major priority for government. Various challenges remain and still need to be addressed, for example, rising building costs and capacity

limitations. It is envisaged that these and other challenges will hopefully be met, at least to some extent, by developments that occurred at the end of 2008. These include *inter alia*, the establishment of the planned housing development agency as set out in the Housing Development Agency Act 23 of 2008 that commenced on 2008-10-31 (GN 54 in GG 31604 of 2008-09-30). Apart from this development, emphasis was also placed on social housing resulting in the Social Housing Act 16 of 2008 (GN 1199 in GG 31577 of 2008-11-05) and the Housing Development Agency Act 23 of 2008 respectively.

The aim of the Social Housing Act 16 of 2008 (GG 31577 of 2008-11-05) is to provide for social housing and everything linked to it. Essentially, the Act provides for a rental or co-operative housing option for low to medium income households that encounter difficulties in accessing rental housing in the open market. The point of departure of the Act is that social housing in this context has to be regulated as it relates to housing at a particular level of scale and built form which is provided by social housing institutions or other delivery agents in proposed projects in designated restructuring zones with the benefit of public funding. The general principles in relation to social housing are set out in section 2 of the Act. These include *inter alia* that housing programmes have to be responsive to local housing demands and that social priority should be given to the vulnerable in society, for example, female-headed households and women and children in general. The Act proceeds to set out the various roles and responsibilities of the different spheres of government relating to housing, namely that of national government (s 3); provincial government (s 4) and local government (s 5). The roles and responsibilities of other role players are provided for in section 6. The governing or management body dealing with social housing as such is set out in detail in chapter 3 of the Act and provides for the institution of the Social Housing Regulatory Authority (s 7), its composition (s 8) and its functions (s 9). This Authority consists of a Council (see s 9), a Chief Executive Officer and a Corporate Services Manager. The Authority seems to act as a link between the provinces and the Department of Housing and supports provincial government by approval of applications from social housing institutions while also advising the Department and the Minister on policy and related matters (s 11). On an annual basis the Authority has to submit plans and financial statements in relation to its functions. It also has powers to intervene if there are reasonable grounds to believe that there has been maladministration by any of the social housing institutions (s 12). Apart from the more supervisory role of the Regulating Authority the various social institutions carry the bulk of the

work in being primarily responsible to provide social housing. Chapter 4 of the Act deals with these institutions. A social housing institution is an institution accredited or provisionally accredited in order to provide rental or co-operative housing options for low to medium income households on an affordable basis and manages its housing stock over the long-term. All institutions that have undertaken housing developments with the benefit of the national housing subsidy are provisionally accredited social housing institutions. When the provisional accreditation lapses, the institution that wishes to continue providing these services, has to apply to the Minister on the prescribed form (s 13). Local authorities that wish to participate in social housing need to establish an institution that has to be accredited. Subject to conditions, social housing institutions generally have to be companies registered under the Companies Act 61 of 1973. Details of all social institutions are thereafter kept in a register by the Regulating Authority for accessing information and monitoring purposes. All the functions of these institutions are set out in section 14 of the Act, although the main focus will be on the acquisition, development and management of approved projects, primarily for low to medium income residents, with the joint support of local authorities. In order to function optimally social housing institutions need to draft a corporate governance policy that has to be accepted by the Regulating Authority, and to appoint a competent manager. The Policy has to provide for risk management, as well as for internal and external audits. When and how the social housing institutions have to report to the Regulating Authority will be set out by way of regulations still to be issued (s 16). Funding for social housing projects is to be made available from money earmarked for that purpose from the Department's annual budget as well as from money allocated to provinces for that purpose. Criteria for the earmarking of money for this purpose still need to be drafted by the Minister. The issue of regulations in terms of this Act is specifically provided for in section 19. The Act will commence on a date still to be determined.

The Housing Development Agency Act 23 of 2008 (GG 31472 of 2008-09-30) is intricately linked with the Social Housing Act in that it is also aimed at adequate housing delivery to low-income earners. The main purpose of the Act is set out in section 2, namely, to (a) establish the Housing Development Agency which will facilitate the acquisition of land in a way that aligns with the capacities of Government across all spheres; (b) to provide for the objects, roles, powers and duties of the Agency; and (c) to fast-track the acquisition of land and housing development services. The Housing Development Agency, a juristic person, operates

as a national public entity (s 3) and has *inter alia* the following objectives: to identify, acquire, hold and sell land (privately owned, state-owned as well as communal land) for achieving the aims of the Act; to engage in projects aimed at housing development, to ensure that there is adequate planning and budgeting and to monitor projects and the provision of infrastructure (s 4). The Agency has many roles to play, amongst others to consult in relation to the various projects it is involved in, to ensure that funding is available and secure and that the spending is monitored, liaise with the various spheres of government, act as an advisory agent to organs of State and direct organs of state to engage where necessary (s 5). A list of functions is provided for in section 7, related to both the objectives and the roles of the Agency already set out above. In essence the Agency consists of a governing board of which the composition and functions are also set out in the Act (ss 9-12) and committees, appointed as and when necessary by the governing board (s 15). Concerning the staff of the agency provision is made for the appointment of a chief executive officer and a chief executive financial officer (ss 17-18) and other staff members (s 24). The appointment and removal of all of these officials is also regulated in detail in the Act (see, eg, ss 21-24). Funds for achieving the objectives of the Act are to be appropriated by Parliament, coming from donations, interest on investments, loans raised by the Agency, proceeds from the sale of land; fees for services rendered and subsidies and grants received from the State (s 25). Concerning supervision of the funds and spending of the budget, the Agency falls within the ambit of the Public Finance Management Act 1 of 1999 (s 26) and is obliged to table an annual report in Parliament (s 27). Provision is also made for additional functions to be performed by the Agency, as ordered and authorised to do so by the Minister (s 29) as well as intervention by the Minister in particular circumstances (s 31). It would seem that, despite having a governing body and officials as listed, the Minister may have a major influence in the running of the Agency. The issue of regulations by said Minister is also provided for in section 32.

In *Picardo Hotels Ltd v Thekwini Properties (Pty) Ltd* (2009 1 SA 493 (SCA)) the question before the Court was whether a landlord who had ceded (by means of a cession *in securitatem debiti* judgment all his rights in respect of a mortgaged property to a financial institution, could in his own name institute action against a lessee of the property concerned for outstanding rent. The court *a quo* found that the landlord could claim for the arrears. On appeal the SCA found that

The matter is essentially one of interpretation. It is incumbent upon the court to ascertain the intention of the parties which, in the first instance, must be gathered from the language of the clause itself. The words of the cession must be given their plain, ordinary, popular and grammatical meaning, unless it clearly appears from the context that the parties intended them to have a different meaning. Absent ambiguity, the meaning conveyed by the words themselves must be given effect to unless this would give rise to absurdity, repugnancy or inconsistency with the rest of the bond. In order to ascertain what the parties intended by the language used the court is required to consider the bond as a whole, rather than isolated expressions, and is to have regard to its object. The relevant provision must also be construed in accordance with sound commercial principles and good business sense so that it receives a fair and sensible application (para 5).

The SCA consequently decided that the appeal succeeded on account of the fact ‘that an effective and unconditional transfer of rights occurred when the cession *in securitatem debiti* was executed. The consequence is that the respondent was divested of the power to sue the appellant in respect of the unpaid rentals. In order to sue for the recovery of the ceded debts, the respondent should have taken recession of them from the bank’ (para 14).

Land use planning

A split judgment was handed down in the Constitutional Court in *Walele v City of Cape Town* (2008 6 SA 129 (CC)). The applicant sought leave to appeal against a decision made by the High Court in which his application to review the approval of a set of building plans was rejected. Various important issues were raised in this case, amongst other basic rights and responsibilities of land owners, procedures and considerations related to building applications, the role and function of zoning plans and the responsibilities of officials involved in the zoning, planning and building departments of local authorities. In this sense various administrative law issues were also raised.

The applicant owns property adjacent to the relevant property being owned by joint owners - the respondents. The respondents submitted building plans for a block of flats constituting four floors which application was approved. The applicant, as neighbouring property owner, had no knowledge of the building plans or their approval. He only became aware thereof once activity on the adjacent plot started during which a wall on his property was damaged. He immediately lodged an application to review the

approval of the building plans as it would impact negatively on the value of his property and generally mar the character of the surrounding neighbourhood. The grounds for review were (a) the decision to approve the plans was procedurally unfair, arbitrary and capricious in light of section 3 of the PAJA; and (b) the City failed to comply with mandatory procedural requirements prescribed by the National Building Regulations and Building Standards Act 103 of 1977. The majority judgment was handed down by Japhta AJ (4 other judges concurred) and the minority judgment handed down by O'Regan ADCJ (3 other judges concurred). The majority granted leave to appeal and upheld the appeal. Concerning the first ground for appeal, the Court confirmed that the mere granting of an approval could not in itself affect the applicant's rights (para 31) and that he could not challenge the approval on the basis that he was not granted a pre-decision hearing. Although the approval as such did not affect the neighbouring owner's rights, the subsequent execution thereof could result in the erection of a building that may affect the rights of neighbouring owners (para 52). Concerning the statutory requirements, the decision-maker has to be satisfied before granting an application that the legal requirements had been met and that none of the disqualifying factors in section 7(1)(b)(ii) of the Building Act would be triggered by the erection of the building. In order for the decision-making to reach that decision, the documents before him or her, have to be detailed and complete so that the decision could be reached after consideration of all relevant factors. The 'recommendation' as part of the process of approving the building plans was therefore crucial. In the present case the endorsement and signature of the building officer did not constitute such a recommendation, as required (paras 68-71). It was thus found that the approval was invalid and the appeal was accordingly upheld. The minority judgment agreed that leave to appeal had to be granted, but dismissed the appeal. Basically the point of departure in this case was that all forms of land ownership are limited in principle and that zoning schemes is one way of limiting land rights on the one hand, but at the same time also conferring rights on owners because owners are entitled to require that neighbouring owners comply with the zoning scheme (paras 129-130). In this regard the court stated that

Our use and enjoyment of property are affected by many things. To hold that, whenever the use and enjoyment of our property are affected by an administrative decision, that it will constitute the 'material and adverse' effect on our rights as contemplated by s 3(1)

of PAJA may well cause great disruption to the administration of urban spaces. It would be inconsistent with both the overall purpose of PAJA and with s 33 of the Constitution (para 132).

Concerning this application, the minority found in contrast to the majority judgment, that there was indeed a 'recommendation' as required, since the endorsement only occurred once all the other phases in the approval process had been complied with and that the word 'recommendation' did not entail also supplying a report explaining the approval. The minority granted the application for leave to appeal, but dismissed the appeal.

In *PS Booksellers (Pty) Ltd v Harrison* (2008 3 SA 633 (CPD)) the basic requirements dealing with interim interdicts in relation to planning and building law considerations were confirmed. In the present instance the applicants applied for an interim interdict preventing the further construction of building works on the erf concerned and the transfer of said erf pending an application for (a) the final determination of the applicant's appeal against the approval of building plans, and (b) an application for the demolition of buildings on said property. The application for a review of the building plans relates to the averred contravention of a title deed provision and the contravention of the applicable zoning scheme. These matters relate to the construction of building works too close to the boundaries of the property on the one hand and the height of the building, on the other. From the moment the plans were inspected by the applicants, being neighbouring land owners, after being submitted by the first respondent to the local authority concerns were raised in relation to the title deed condition and the zoning scheme regulations. Ongoing correspondence between the parties throughout dealt with these matters in that the applicant continued to draw the first respondent's attention to these contraventions whereas the first respondent continued to state that (a) there had been no such contraventions, and (b) if there had been, the offending building works would be demolished (see the background in paras 23-61). This correspondence finally led to the approval of a revised building plan by the second respondent, the local authority. On closer inspection, however, the applicants established that the plans still contravened the title deed condition and the zoning scheme, leading to an appeal against the approval of the revised building plan and an application for a demolition order. In the mean time this application for an interim interdict was lodged. During the process of considering the first requirement of the interim interdict, namely, that the applicants must have a clear right, the court per Meer J confirmed, after having done an

inspection *in loco*, that offending building works in the form of retaining walls and slabs of concrete were in fact present on the erf. She furthermore found that the title deed condition (paras 62-77) and the zoning scheme regulations had been contravened (paras 78-97) in that the first respondent had manipulated the ground level by landfills so substantially that the height restrictions had indeed been contravened. In light of the finding that the applicants did have a clear right, the court did not decide the question whether the second respondent's approval of the second plan (the so-called rider plan) was *ultra vires* (para 100).

With regard to the consideration of the balance of convenience, the court considered the possible financial implications the granting of the interim interdict may have on the first respondent. However, the court emphasised that the title deed condition and the zoning scheme regulations were imposed for the public benefit of town planning development in general as well as in the interests of the property owners and residents of Camps Bay (para 105). Furthermore, the first respondent was continually warned about the possible contraventions and the possible consequences thereof. Despite these warnings she still took the risk of continuing construction works. The court also found in favour of the applicants concerning the requirement of irreparable harm (para 109). Consequently the interim interdict was granted. The emphasis placed on the role title deed conditions and zoning scheme regulations play in relation to planning and development is in line with the perspectives of the minority judgment in the *Walela* case discussed above. In that judgment O'Regan CJ also emphasised that, although these conditions and regulations restrict land owners' rights in the public interest, it also vests rights for said owners since they are thus entitled to ensure that these conditions and regulations are complied with and enforced. The *Booksellers* case is an illustration of how neighbouring land owners enforce these rights.

Proposed draft rules were published in terms of the Planning Profession Act 36 of 2002 dealing inter alia with inspections, registration and cancellation of registrations (GN 1355 in GG 31550 of 2008-10-31).

Deeds

The regulations pertaining to tariffs in terms of the Deeds Registration Act 47 of 1937 were amended (GN R1031 in GG 31458 of 2008-09-26; GN R198 in GG 31926 of 2009-02-27).

Minerals

The Minerals and Petroleum Resources Royalty Act 28 of 2008 was published in the *Government Gazette* (GG 31635 of 2008-11-24) to provide for the payment of royalties on the transfer of mineral resources listed in Schedule 1 and 2 of the Act to the National Revenue Fund (s 2 read with 1; minerals such as refined mineral resources such as cobalt, copper, gold, lithium, silver, zinc, oil and gas and unrefined mineral resources for example coal, graphite, lead, mica, ilmenite and nickel). The Act further provides for the determination and calculation of the royalty (ss 3-6) as well as matters related thereto. The Act came into operation on 2009-05-01 and applies to minerals transferred on or after this date. Subsequently the Mineral and Petroleum Resources Royalty (Administration) Act 29 of 2008 was also published (GG 31642 of 2008-11-2008).

On 20 October 2008 Proc 42 (in GG 31525 of 2008-10-20 - replacing Proc 41 in GG 31512 of 2008-10-13) was published to determine 2008-11-01 as the date when the Diamond Export Levy Act 15 of 2007 came into operation. On 2008-10-31 rules were promulgated in terms of the Act (GN R1169 in GG 31560 of 2008-10-31).

The Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (GG 32151 of 2009-04-21) was published, amending the provisions relating to environmental management. All environmental related matters will in future (3 years from the date of commencement) be dealt with by the Department of Environmental Affairs and Tourism (in future Department of Water and Environmental Affairs - see also the National Environmental Management Amendment Act 62 of 2008).

In *Agri South Africa v Minister, Minerals and Energy; Van Rooyen v Minister, Minerals & Energy* (2009 JOL 23248 (GNP)) the Court had to rule on whether exceptions to the particulars of claim were to succeed. The plaintiffs respectively were the holders of coal and clay rights over fixed properties. On 2004-04-30 the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) came into operation. The MPRDA provides for the vesting of all mineral rights in the South African government as the custodian of these rights for the benefit of the South African nation and the allocation of new order rights (para 10). This allocation is in the discretion of the Minister of Minerals and Energy. The plaintiffs' application for compensation for the expropriation (as contemplated in s 12 of schedule II of the Act) was turned down by the Director-General (para 2) as they 'did not have valid claims' (para 4). No appeals were lodged by the two plaintiffs to the Minister (as provided for in s 96 MPRDA). The Court found that

schedule II (which provides for the payment of compensation) has implications as regards the constitutionality of MPRDA ('but for schedule II, the Act stood to be declared unconstitutional' para 12). Reference was made to the fact that an application for the issuing for the granting of the necessary permission to exploit a right affected by the legislation would require financial resources (para 17). The Court continued by saying that for those holders who do 'not have the financial resources the opportunity afforded by the schedule is more apparent than real' (para 17). The Court found as follows: 'In short, it is my interpretation of the Act that it admits that holders will be deprived of their rights and that such deprivation coupled with the State's assumption of custody and administration of those rights constitute expropriation thereof' (para 17).

As a result the first exception (that the particulars of claim were vague and embarrassing) was turned down (para 19). The second exception (that the internal remedies provided for in MPRDA had not been utilised) was also unsuccessful on the basis that the MPRDA appeal provision (to the Minister) was administrative in nature, whilst item 12 of the schedule 'allows a claimant ... to assert that he has been expropriated and to prove it in a court of law. Those issues are not administrative issues' (para 22). In a recent newspaper report it was said that the court case represented the beginning of 'a long legal tussle'. Claimants have until 2011-04-30 to lodge their claims for compensation pursuant to the regulations to the Act (Cronin 'Vanishing rights challenged' *Business Day Business Law and Tax Review Supplement* (2009-04-17) 1).

Property tax

The DLA, SARS and the Department of Treasury discussed the possibility of introducing a tax for unutilised land. Farmers objected as they felt it would increase the cost of farming and contribute to food inflation. The Treasury indicated that it could lead to double taxation if the taxation is not aligned with property tax.

Agriculture and rural development

The importance of rural development and agriculture was emphasised by the restructuring of government departments after the 2009 national elections. It is also apparent from the numerous new strategies and policies that were put in place in the last few months.

It was decided to extend the overview on land matters to also include matters pertaining to rural development, including agriculture.

Agriculture

In the foreword to the Department of Agriculture's Strategic Plan 2008/09 - 2010/11 the Minister for Agriculture and Land Affairs indicated the following six strategic performance areas for the (national) Department of Agriculture (hereafter nDoA), the provincial Departments of Agriculture (hereafter PDAs) and its social partners (4):

- (i) Join the DLA to speedily and vigorously implement all the critical five pillars of the LARP (Land and Agricultural Reform Programme) especially the settlement of new farmers, provision of services and promotion of increased production and productivity.
- (ii) Improve and strengthen its capacity and organisation to be permanently vigilant and to decisively deal with all bio-security threats posed by natural disasters, diseases and pests to our plant life, livestock and people.
- (iii) Further strengthen intergovernmental relations protocol issues that will enable the department and PDAs to act as a united force in implementing LARP and the Agriculture Programme of Action (APoA).
- (iv) Continue to issue the critical reports from the FIVIMS (Food Insecurity and Vulnerability Information Mapping System) to strengthen the implementation, monitoring and evaluation capacity of the Integrated Food Security and Nutrition Programme (IFSNP).
- (v) Continue to integrate all engagements of South Africa in the field of agriculture into the AADP (African Agricultural Development Programme) of the International Agricultural Strategy of the DoA.
- (vi) Convene an agricultural summit and launch the revision of the Agricultural Sector Plan.

In the strategic plan the Director-General also indicated that there would be close corporation with DLA in order to expedite the implementation of the Presidential Priority Apex Project 7 which deals with land and agrarian reform. He also indicated that the key deliverables of all DoA programmes have been aligned to LARP in order to bring about positive outcomes in both the short - and medium - terms (Department of Agriculture Strategic Plan 2008/9 - 2010/11 <http://www.nda.agric.za/doaDev/topMenu/StratPlan08/Stratplan08.htm>).

The 2007/08 Annual Report of the Department of Agriculture focuses on service delivery in respect of the priority areas as identified in the Department of Agriculture's Strategic Plan 2007 (<http://www.nda.agric>).

za/doaDev/topMenu/AnnualReports/2007_8/2007_8.htm). Some of the key points are the implementation of the African Agricultural Programme (AADP) by means of involvement in the other African countries. Assistance was given to neighbouring countries such as Swaziland and Lesotho by means of the training of officials.

As regards the Agricultural Broad-Based Black Economic Empowerment (AGRIBEE), the Director-General announced that the AGRIBEE Charter Council would soon be established in order to monitor and report to the BEE Advisory Council on the performance of BEE in the agricultural sector. Access to agricultural information by means of Knowledge and Information Management Systems (KIMS) was also a high priority. An agricultural drought management plan was developed, which focused, amongst others, on the causes of drought, the reduction of the exposure and vulnerability of farming communities and economic assets 'in order to minimise losses, as well as to concentrate on the management of drought after its occurrence' (4).

Significant emphasis was placed on the Comprehensive Agricultural Support Programme (CASP). Under this rubric LARP was discussed, and was referred to as a two year project 'to accelerate service delivery in the areas and restitution, redistribution, agriculture, security of tenure, AGRIBEE and family farming.' The undertaking was given that 'one stop shops' would be established. LARP was once again indicated as a joint project of the Departments of Agriculture and Land Affairs. Through its implementation, the two Departments: '... intend to increase the number of black entrepreneurs in the sector, provide access to agricultural support services, increase agricultural production for emerging farmers and boost agricultural trade by 10 to 15 % for the target groups' (3). It mentioned that in excess of 45 000 emerging black farmers and 1 100 projects were supported through CASP in the 2006/2007 financial year. This has been brought about by an increase in the funds allocated for CASP (R200 million in 2004/05 to R405 million in 2007/08). Within the context of CASP, Mafisa, which focuses on the enhancement of 'the degree and quality of the support available to new and emerging farmers and to improve the prospects of profitability and sustainability of their agricultural enterprises' (3). The Social Cluster of the SA national cabinet accepted the Integrated Food Security and Nutrition Programme (IFSNP) as a central programme. Within this context, the Department of Land Affairs provided agricultural production inputs as part of the Special Programme for Food Security (SPFS) (Department of Agriculture Annual Report 2007/8 http://www.nda.agric.za/doaDev/topMenu/AnnualReports/2007_8/2007_8.htm).

According to a recent StatsSA report (Census of Commercial Agriculture in South Africa), the government regards land reform as a central pillar of its rural development strategies. This policy is based on the expectation that agricultural businesses will absorb the rural poor in order to meet development targets. It also hopes to achieve this by evading market forces. The Census, however, suggests that this approach will not work. Key trends in the Census are as follows: (a) the number of agricultural enterprises in South Africa fell by 13% between 2002 and 2007; (b) the number of people employed by these enterprises fell by 16%; (c) total (nominal) income, however, increased by 49%; (d) total (nominal) wages paid increased by 39%; and (e) current and capital (nominal) expenditure each increased by 20%. This data suggests that market forces are causing farms to operate on bigger economies of scale to remain viable. Farms are becoming more efficient by producing more income with fewer employees. This runs against government's plan that farms should become smaller and employ more people. The risks associated with pressing ahead with government's current policy that flows against the natural economic tide are great. South Africa is currently a net food importer, as a result of a growing population and the fact that the improvements in agricultural efficiency discussed above have not kept pace with demand. In addition, agricultural land under claim and land already redistributed contribute to this, as data on failed land reform projects indicate (*SAIRR Today* 'Agriculture reforms itself even as government plans its reform' (2009-03-06) www.sairr.org.za/sairr-today/news_item.2009-03-04.3571365893).

Agri SA is of the opinion that a more purposeful infrastructure programme is needed for the development and competitiveness of rural economies, and specifically agriculture. The land reform process and access to other natural resources needs to be transparent within the context of the recognition of property rights, equitable compensation, and the sustainability of production potential. The contribution of agriculture to food security and the provision of employment should be highly regarded in the transformation process. Local inclusive fora should be used for the identification of land for redistribution, the identification of beneficiaries, and the mobilisation of development support (Ferreira 'Só moet regering en landbou hande vat' *Sake-Beeld* (2009-04-16) 8).

According to a report by the Organisation for Economic Cooperation and Development (OECD), support to South African farmers has fallen considerably over the last ten years. South Africa

ranked last in the survey of seven developing countries. Farmer support in Chile and South Africa declined since 1997, remained constant in Brazil, and increased in China and Russia. In the Ukraine support changed dramatically on a year to year basis. Even though South Africa became a net importer of food in 2008, it is still much better off than China and Russia. To curb high food prices, South Africa increased spending on its food programme and cancelled tariffs on maize when world maize prices were above US\$110/ton for more than two weeks. South Africa and the Ukraine are the only two countries that did not lower tariffs on certain foodstuff (Bottomley 'Staatsteun vir SA landbou ver onder wêreldgemiddelde' *Sake24* (2009-03-18) 2). However, at a press conference before his budget speech, Minister Manuel said that it was unnecessary to fix something that is doing well - referring to the commercial agricultural sector. Agricultural support to emerging farmers and rural infrastructure received an additional award of R1,8 milliard. This includes funding for agricultural starter packs and government's extensive support project for agriculture. Government's land and agricultural reform programme received an additional R650 million for the production of fruit and vegetables. Manuel said that agriculture was an outstanding sector in South Africa's economy. The primary sector contributes 3% to South Africa's economy, and its exports amounts to R30 milliard per year. The nDoA's medium term award is approximately R9,3 milliard, of which R2,79 milliard are earmarked for the 2009/2010 financial year. Expenditure on the medium term will increase at a rate of 7% and will reach R3,6 milliard in 2011/2012 (De Waal 'Uitblinker landbou met reën gestu' *Sake24* (2009-02-12) 8). Many farmers are considering the invitation to farm in the DRC and Ghana which could be the beginning of a 'brain drain' of farmers to other African countries (Duvenhage 'Groot boeretrek na Kongo kom' *Sake24* (2009-04-20) 1; Pelser 'Ghana werf boere met gratis plase' *Rapport* (2009-03-22) 7).

Land Bank

According to the Preliminary Corporate Plan 2008/9 of the Land and Agricultural Development Bank of South Africa, there was a need for competitiveness to improve after the deregulation of the agricultural sector in 1996. As a result employment levels in the agricultural sector decreased from 1,2 million in 1993 to 886 000 in 2006. The Government set a target of redistributing 30% of white-owned agricultural land by

2014, but by the end of 2007 just over 4% had been redistributed. Support to emerging farmers by the Land Bank has been minimal - only R821 million of the R4.2 billion (representing about 20%) in the Land Bank's retail book could be classified as development loans.

The Bank announced a number of significant changes, amongst others, the following four new emphases: the implementation of a new operating business model; the development of a turnaround plan that 'seeks to ensure the bank's financial performance is improved to ensure long-term sustainability, improved operations and find sustainable funding model, especially for financing development'; the forming of partnerships with other entities (including commercial banks, international development finance institutions, existing and new cooperatives, the nDoA and the DLA, PDAs and other agricultural entities); and the stratification of its loan portfolio into the emerging farmers fund and the commercial farmers fund. In the case of emerging farmers, the bank 'will provide loans to emerging farmers matched with government grants the future of the farmers to be viable' (4-6) (see also Land Bank Budget 2009-11 (2009/05/06) www.pmg.org.za/report/20080506-minister-agriculture-land-affairs-address-land-bank-budget-strategic-).

Rural Development

Provinces receive R47,8 milliard from the medium-term budget. Spending priorities are education, health, social services, housing, roads and rural development. During the last financial year a new allocation was made to help poor farmers to increase production and to modernise farming techniques (Essop 'Provinsies kry R47 mjd op langer termyn' *Sake24* (2009-02-12) 5).

According to a recent announcement ('Achievements and challenges: Rural development'), the ANC is committed to a 'comprehensive and clear rural development strategy linked to land and agrarian reform'. In this regard the post April 2009 government will intensify the land reform programme; review the appropriateness of the existing land redistribution programme; expand the agrarian reform programme; ensure a much stronger link between land and agrarian reform programmes; ensure that all schools and health facilities have access to basic infrastructure; introduce proper sanitation systems in rural areas; strengthen partnerships between government and traditional leadership; work with the farming community to improve farm dwellers' living conditions; and provide support for organised labour to organise and unionise farm

workers (My ANC 'Achievements and challenges: Rural development'
(2009-04-19) www.myanc.org).

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