Land matters and rural development: 2012(1)

1 General

President Zuma's State of the Nation Address referred to the centenary of the 1913 Land Act and highlighted the fact that the land question remains a highly emotive matter that needs to be resolved amicably within the framework of the Constitution and the law.

The President acknowledged that Government's land distribution targets will not be met within the projected time frame and offered a number of interventions to improve implementation. These interventions include: shortening the finalisation period for claims by determining compensation through the 'just and equitable' principle provided for in the Constitution (instead of the principle of willing buyer, willing seller); revisit the proposals to amend the Restitution of Land Rights Act 22 of 1994 to make it possible for people who missed the deadline of 31 December 1998 lodge their restitution claims; and to consider allowing exceptions to the June 1913 cut-off date to accommodate claims by the descendants of the Khoi and San as well as heritage sites and historical landmarks. The importance of the provision of adequate post-settlement support was stressed, as well as the need to provide better incentives for commercial farmers who are willing and able to mentor smallholder farmers. Lastly, the President stated that the preference for money instead of land by some claimants impeded change in land ownership patterns.[1]

In this Note, the most important measures and court decisions pertaining to land restitution, land redistribution, land reform, housing, land use planning, deeds, sectional titles, agriculture and rural development are discussed.[2]

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[1] http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=34250&tid=98676 (accessed 2013-02-14).

[2] In this note the most important literature, legislation and court decisions are discussed for the period 2012-09-01 to 2013-04-30.

2 Land restitution

A Draft Restitution of Land Rights Amendment Bill, 2013 was published for comment (GN 503 in *GG* 36477 of 2013-05-23). The Bill re-opens the submission of claims for restitution and extends the date for the submission of land claims to 31 December 2018. According to the Memorandum to the Bill three categories of possible claimants were excluded from submitting claims in terms of the 1994 Act (cl 1) – namely, those who missed the cut-off date of 31 December 1998, those who were dispossessed before 19 June 1913 and persons who were relocated in terms of betterment planning schemes. Other arguments that are put forward are that, apparently, the research methodology that informed the restitution process was poor, not all possible claimants were informed of the restitution process and the window period for claims was too short. According to the Memorandum, between 3.5 million and 7.5 million people were dislocated while only 80 000 claims were lodged. What is not taken into account is that most claims were not individual claims but were instituted in the name of families or communities (which in some instances totalled several thousand people per claim). Currently, claims are published in the *Government Gazette* – in future, claims must also be published in a national newspaper and one circulating in the province where the land is situated (cl 2). The lodging of fraudulent claims will be an offence (cl 4). Amendments to the appointment of judges to the Land Claims Court are also proposed (cl 5). It is further proposed that section 33 be extended to include that the cost of the land and the ability of the claimants to use the land be considered as factors for restitution of land (cl 9).

A special investigation is conducted into the affairs of the national Department of Rural Development and Land Reform and its agents with regard to the 'payment of advances, subsidies or compensation to claimants in respect of the restitution of a right in land' in terms of the Restitution of Land Rights Act 22 of 1994 (Proc R53 in *GG* 35691 of 2012-09-21).

2.1 Notices

Several land restitution notices were published in Mpumalanga (Bushbuckridge 2; Nkangala, Satara Rest Camp and Orpen Gate and Kruger National Park 1 each), Gauteng and North-West Province (Bojanalo 2; no district mentioned 2; Johannesburg 2; Tshwane 8; DR Segomotsi/Ruth Monpati 1; Brakpan 1; Potchefstroom 1, Nokeng Tsa Taemane 1), Free State (Masilonyane 1), Northern-Cape (Pella 1), Limpopo (Vhembe 7; Mopani 2; Molemole 1), Eastern Cape (King Williams Town 8, Keiskamma 1, Idutywa 3, Whittlesea 1, Cala 5; Grahamstown 30, Komga 1, Sterkspruit 1) and Western Cape (Cape Town (Hout Bay Claim)). Amendment notices were published for KwaZulu-Natal, Mpumalanga, Free State and Limpopo

and withdrawal notices for KwaZulu-Natal, North-West Province, Western Cape and Limpopo.

2.2 Case law

Meintjies v Government of the Republic of South Africa ((305/2011) [2012] ZASCA 172 handed down 2012-11-28)) dealt with an appeal against a decision made by the Land Claims Court (LCC) in terms of which a restitution claim for equitable compensation was dismissed. Briefly, the facts were the following (paras 1-12): The appellant, Mr Meintjies, ventured to purchase three farms, all of them located within 'released areas' under the former Development Trust and Land Act 18 of 1936 in order to develop them for game farming. Being located in a released area meant that the farms could be expropriated under section 13(1) of the Act for purposes of furthering the ideals and goals of the former homeland policy. Mr Meintjies roped in various business partners to participate in the business venture. This entailed drafting a rather complex purchase agreement which entailed, *inter alia*, various provisions dealing with the funding, the amounts involved, but more particularly, with the registration of the property once numerous conditions linked to securities etc, had been complied with. Finally only two farms were involved: Andover and Leamington. In short, the purchase agreement and addendum drafted later, entailed that the farm Andover would be sold to the appellant as trustee for four companies and that the farm would be registered in the names of the four companies, each company having an undivided one-quarter share in the property. The farm Leamington was to be sold on exactly the same basis, with the difference that registration with a one-quarter share would vest in four other companies. However, though the draft addendum had been signed on behalf of Hall and Sons (the registered owners of said farms) on 21 October 1971, a notice of expropriation was served under section 13(1) of the Development Trust and Land Act 18 of 1936 one day later, on 22 October 1971. Accordingly, the expropriation notice affecting the two farms in question intervened, resulting in the purchase agreement never being signed on behalf of the purchasers. Expropriation resulted in the farms being registered in the name of the SA Development Trust which was followed a few months later, in May 1974, by a settlement in terms of which the State paid an amount of R1 000 580 compensation to Hall and Sons (para 11).

When the new political dispensation commenced, the appellant, Mr Meintjies, lodged a restitution claim in relation to the farms Andover and Leamington. The claim, in terms of which equitable compensation and not specific restoration was claimed, was subsequently referred to the LCC where it was dismissed on the basis that no 'right in land' had been dispossessed as a result of a racially discriminatory law or practice (para 16). The claim was lodged on the basis that the Restitution Act made no distinction between registered and unregistered rights (para 13). In this regard the court per Ponnan JA (and Mhlantla, Shongwe JJA and Erasmus AJA concurring) scrutinised the purchase agreement, underlining that clause 14 of the

agreement contained numerous conditions before the contract became binding. Because these conditions had not been complied with, no agreement of sale came into existence. However, a further argument was posed that despite no agreement being in existence, it nevertheless created 'a very real and definite contractual relationship between the parties' which, but for the expropriation, would have ripened into a contract of sale in terms of which the appellant would have acquired a right to the properties (para 18). In this regard the court found the agreement to be straightforward: it provided for a sale directly from Hall and Sons to companies formed or to be formed, with each company to receive a one-quarter share in the property. There was no reference to the appellant personally or to him in his personal capacity. In signing the agreement the appellant did so on behalf of the two categories of potential transferees – the first being companies already in existence and the second, notional entities that were still to be created in due course: '[t]hat description of the purchaser thus left no room for the appellant to nominate himself or any other natural person to benefit under the agreement' (para 22). Therefore, pending the decision by the companies to either accept or reject the contract, there was nothing in the agreement to suggest that the appellant personally acquired any rights or incurred any obligations that had been reserved for the companies mentioned. The Supreme Court of Appeal (SCA) was satisfied that the LCC had made the correct finding that the appellant had no right in land that had been dispossessed. Accordingly, as no right had indeed been dispossessed, no restitution claim could be entertained under section 2 of the Restitution Act. The appeal was thus dismissed.

Farjas (Prop) Ltd v Minister of Agriculture and Land Affairs ((753/11) [2012] ZASCA 173, handed down 2012-11-29)) dealt with an appeal against a judgment handed down by the LCC. The appellants were expropriated of properties by the erstwhile Minister of Housing (House of Delegates) under the Expropriation Act 63 of 1975 during the former political dispensation. Compensation was paid, but a promised *solatium* of R10 000 was never paid. Initially the claim was pursued under the Expropriation Act itself, but was reformulated when the Restitution Act commenced on the basis that just and equitable compensation had not been paid at the time of expropriation. Following a review, the claims for restoration of the properties were abandoned and in its place payment of the promised *solatium,* as well as equitable redress in the form of financial compensation, was pursued.

The appellants sought an order against the respondents for payment of the amounts that would, in terms of section 33(*e*C) make provision for the changes over time in the value of money (para 9). They contended for a range of alternatives and in that regard relied on the evidence of three actuaries. All of the witnesses focused on the returns the appellants would have made had they received the amounts in 1991 and invested them. Each witness was critical of the methods proposed by the others and had different views on the issue (para 10). In light of the conflicting testimony, as well as the testimony of the Commission that previously they had

relied on the Consumer Price Index (CPI) as the best method of assessing the value of money over time, the court *a quo* concluded that the CPI adequately catered for changes over time in the value of money (para 13). The court furthermore underlined that major differences existed between restitution claims and compensation linked to them and commercial transactions and dealings. An amount of compensation was accordingly awarded by the LCC though no mention was made of the *solatium*. It was against the finding that the CPI was the method used to determine the change of value in money as well as the absence of any reference to *solatium*, that the appellants lodged their appeal.

When the LCC decided to employ the CPI, it exercised its discretion. Accordingly, the SCA had to determine whether the discretion so exercised, had been done judicially. It also had to be kept in mind that the LCC was a specialised court and that the SCA could not change its finding merely on the basis that it would have reached a different conclusion to that of the specialised court. It could however, find that the discretion had not been exercised judicially or that it had been influenced by wrong principles or that the court *a quo* had been misdirected on the facts (para 16). The Restitution Act made no mention of *solatium*, nor did the Act provide for interest. The Act furthermore did not prescribe the method to be applied to determine 'changes over time in the value of money'. Instead, that was left to the Department and the courts to ascertain, by considering all options available and then to determine an appropriate method (para 17). The appellants were only interested in compound interest and relied on case law dealing with financial and commercial transactions to support their view. However, both the LCC and the SCA went to long lengths to underline that restitution claims could not be equated to commercial transactions in terms of which interest was an inherent factor. In contrast, restitution claims were aimed at redressing massive social and historical injustice (para 22). The SCA was satisfied that the LCC had reached the correct conclusion as the appellants by no way demonstrated that the CPI was inappropriate or that it would lead to unjust or inequitable results. None of the experts indicated that the employ of the CPI would in fact have the effect that the compensation determined would be unjust and inequitable. Furthermore, in light of the nature of the restitution programme in that the claims were lodged against the state and that fairness had to reflect all of the interests involved, the court per Mhlantla JA (with Lewis, Ponnan and Shongwe JJA and Erasmus AJA concurring) also found that the compensation awarded must be just and equitable – not only to the appellants, but also to the members of society who had an interest in the manner in which public resources were utilised (para 23). The court further emphasised that awarding *solatium* was by no means automatic. Instead, evidence had to be tendered of the hardship caused. As they failed to do so, the claims were correctly rejected by the LCC. The appeal was thus dismissed.

Dhlomo-Dhlomo Community v Minister of Agriculture and Land Affairs ((LCC 175/10) [2012] ZALCC 15, decided on 2012-10-19)) concerned a section 14 referral

from the Commission to the LCC. The issue before the court was (a) whether the first defendant ought to be ordered to purchase property belonging to the fourth defendant (Aloe Falla Golf Estate (Pty Ltd)) and (b) whether it was feasible to restore the property, once it had indeed been purchased, to the claimant community. The fourth defendant purchased the property in 2002-2003 after it had enquired whether any land claims had been lodged in relation to the land. Such enquiry was answered in the negative (para 24). In the meantime, however, a land claim had been lodged and accepted earlier on behalf of the Ndumane Community. That claim was later on consolidated with several other claims by the third defendant, the regional land claims commissioner, after which it became known as the Dhlomo-Dhlomo community claim (paras 2-16). After completion of the usual investigation by the Commission, the land claim was published in 2006, some three years after the property was purchased by the Aloe Falla Golf Estate (Pty) Ltd. After purchasing the land, the fourth defendant had applied for and was granted a rezoning application from agricultural to industrial and leisure. Linked to the envisaged development were numerous applications to various institutions and authorities dealing with environmental, survey, road construction, subdivision and website development matters. In due course the various parties came together and negotiated some kind of joint venture in order for both the applicants and the fourth defendant to benefit from the golf estate possibilities. Part of the negotiations included purchasing the property from the fourth defendant in order to restore it to the applicants. After long negotiations that led to nothing, mainly because the first defendant, the Minister, refused to sanction the amounts mentioned in the papers, the claim was finally referred to the LCC.

Once the fourth defendant had been granted the rezoning application, vast amounts and a lot of time and effort went into laying the groundwork for the golf estate development (para 25). The moment the land claim was published in 2006, almost all of the developments stopped.

Concerning the issue of restoration or redress, the Court per Mpshe AJ underlined that the applicants received no compensation at the time the dispossession occurred (para 30). Only the fourth defendant and the applicant were in favour of specific restoration of the property while the Minister, the Commission and the Regional Land Claims Commissioner were all opposed to specific restoration. The main reason for opposing specific restoration was financial, finding that the purchase price of more than R50 million was excessive and that equitable redress was more appropriate. Furthermore, since some land had already been restored, just and equitable compensation would exclude further specific restoration (para 32). Accordingly, both the Department's (limited) resources and the transfer of developmental and other skills had to be considered (paras 34-35). In this regard the Court found that 'the issue of budget and/or financial resources of the state were never intended to be a reason in itself for opposing physical restoration' (para 38). The other contention was that the

restoration of a golf estate would amount to overcompensation as land in extent of 22 790 ha had already been restored (para 39). The land already restored and the land now claimed had originally all belonged to the claimants. If the Department had already spent large amounts on the previously restored properties it could not in itself be used as a bar against the claimants (para 41). The overwhelming evidence favoured physical restoration. The community as a whole supported the return of the land that was lost. The lack of departmental guidance and assistance in the whole process as well as the lack of benefits and services to the community and the general atmosphere of unrest and dissatisfaction were furthermore referred to (para 46). For the community consisting of 2000 members a total of just below R5 million was proposed as compensation (para 47. The Department was ordered to acquire the property and thereafter transfer it to the claimant community (para 49):

> I am awake to the reason(s) put forward by claimants for physical restoration. The benefits, including poverty alleviation that the restored property will bring to the claimant community *[sic]*. I cannot find support for the proposition that the financial compensation is an equitable redress. A simple calculation indicates that each household will be entitled to a once-off payment of R2 482.50. Whilst with restored land the benefits would be greater on a long term basis.

Regional Land Claims commissioner v Jazz Spirit 12 (Pty) Ltd ((LCC 26/10) [2012] ZALCC 17, decided 2012-12-07)) concerned, *inter alia*, whether a dispossession had occurred for purposes of section 2 of the Restitution Act. The facts were briefly the following (paras 6-17): the land in question (agricultural land) was acquired as early as 1902 by Doet Sadien. After his death and the subsequent death of his widow, the farm was purchased on auction by five of the Sadien brothers in 1956. When one brother died before transfer could take place, the land was transferred into the names of the four surviving brothers and the estate of the deceased, in equal shares. Under Proclamation 34 of 10 February 1961, issued in terms of section 20 of the Groups Areas Act 77 of 1957 the area in which the property was situated was declared a white group area. In 1962 the brothers attempted to sell the property by way of public auction. An offer was submitted by one Badenhorst which was initially rejected. Following negotiations a settlement agreement was finally entered into with Badenhorst purchasing the property for R13 550 on 21 March 1962.

The question the court had to decide was whether this sale constituted a dispossession as a result of racially discriminatory laws and practices, as required under section 2 of the Restitution Act. This phrase forms part of the substantive requirements. Such a provision would ensure that not every kind of dispossession would qualify as a dispossession for purposes of the restitution programme. The present application was opposed on the basis that the sale was a voluntary agreement that had been entered into by the relevant parties in terms of which a purchase price had been paid – consequently no dispossession had occurred

resulting from racially discriminatory laws or practices. This question had been dealt with before by the LCC, the SCA and the CC, most notably in *Department of Land affairs, Popela Community v Goedgelegen Tropical Fruits (Pty) Ltd* (2007 6 SA 199 (CC)). It was also dealt with more recently in detail in *Jacobs v Departement Grondsake* (2011 6 SA 279 (LCC)). In most of the cases where the phrase came under scrutiny, the dispossession had occurred or had been made possible because of government or official state policy, conduct or legislative measures. The *Popela*-case was different in that it was the first case where a private business decision resulted in the cancellation of existing labour tenancy rights which were replaced by farm worker agreements. In that process rights of land linked to residence, cropping and grazing were effectively dispossessed without any compensation being paid. Because the Restitution Act contained no definition of 'racially discriminatory laws or practices', it was left to the courts to interpret and apply the phrase. In the present instance a private commercial transaction had taken place. The respondents went a long way in trying to convince the court that the sale had been forced on the Sadien brothers because of financial constraints (paras 64-68). But was that really relevant? The fact remained that the Sadien family was disqualified from being the owners and would eventually be forced to sell their property in any event, irrespective of their personal of financial circumstances. Not only would they eventually be forced to sell their property, but the market was anything but 'open': (a) only persons belonging to the White group would be able to purchase the property at (b) much less than market value – as research has shown that the mere proclamation of land as a group area immediately led to a drop in market value (paras 78, 92). Therefore, the persons to whom the property could be sold as well as the price that could be asked, were restricted. Accordingly, even though no official measure or practice underscored the public auction and the later settlement agreement between the Sadien family and Mr Badenhorst, the overarching grid of measures consisting of the Group Areas Act and the Proclamation issued under it, enabled and assisted the Badenhorst family to purchase property valued at R22 000 for the amount of R13 000. To that end the court was satisfied that a dispossession had indeed occurred for purposes of section 2 of the Restitution Act (para 86).

Having found in favour of the claimants, the court then turned to the specific restoration order (paras 87). Up to the hearing, no claim had been lodged for specific restoration. Instead, the possibility of suitable alternative state land had always been on the table. In light of the facts, including that three suitable parcels of state land were available and could be restored to the claimants, the court ordered the restoration of one parcel of land that was similar in size to that of the land dispossessed (see para 99). Though the family initially consisted of five brothers, only one descendent of the remaining four brothers lodged a claim. That claim had now been successful, but should the one descendant be the only beneficiary? The Restitution Act was silent on situations like the present where

descendants refrained from lodging claims (paras 90-100). In this regard the court followed a purposive approach to interpretation and also considered the manner in which the initial Sadien family occupied and utilised the land. The land was used communally and the family as a whole benefited from the land. The court found that the fact that certain descendants did not lodge claims should not be interpreted as meaning that their forbears did not suffer injustice at the time of the dispossession. Accordingly, the facts justified restoration of rights in land even to those who did not lodge claims. The state land was thus to be restored and to be shared or enjoyed by all, including those descendants who did not lodge claims.

Kwalindile Community v King Sabata Dalinyebo Municipality (case number: CCT 52/12 [2013] ZACC 6, decided on 2013-03-28) is the final instalment of a legal saga that commenced in 2008 in the LCC and proceeded to the SCA in 2012 (*King Sabata Dalindyebo Municipality v Kwalindile Community* [2010] ZALCC 33). The matter concerned a section 34-application, which, if granted entailed that the land in question would not be restored to the claimants if and when their claim was successful. While the land in question is removed from the restitution process, other forms of restitution may still be available to the claimants. Such an order may only be granted if it is clearly in the public interest. An order in favour of non-restoration was handed down in the LCC and was confirmed in the SCA. It is against such a confirmation that the present appeal was lodged in the Constitutional Court (CC).

When the new political dispensation commenced all land belonging to the former Transkei, including the relevant Erf 912, vested in the Republic of South Africa by virtue of section 239 of the interim Constitution. In 1997 the Minister of Land Affairs delegated his powers to dispose of state property to the relevant MEC. The delegation required that if such land was to be developed, the MEC had to take care that the development would not result in the dispossession of any person or people's rights (formal or informal) in the land. Following the delegation the MEC donated certain erven to the Mthatha Municipality in 1997 and transfer of said properties occurred in 1999. The donations were subject to the condition alluded to above though the conditions were not reflected in the title deeds. Under the restitution programme, in 1998, a number of land claims were lodged by three communities, the KwaLindile, Zimbane and Bathembu communities. Whilst still in the process of investigation, two of the claims were published in accordance with section 11 of the Restitution Act. This led to a response by the municipality that, according to their history and information, none of the three respondents had previously been dispossessed of land which fell within the boundaries of the town of Mthatha. The land that was donated to the municipality by the Eastern Cape Province formed part of the land claimed by the communities. During 2002-2006 the municipality entered into various development agreements, *inter alia* with the second and third respondents, which impacted directly on the land in question. That occurred, despite the Regional Land Claims Commissioner alerting the municipality to the claims so lodged. Such conduct was in violation of the Act (s 11 required one

month notice to the Commissioner prior to development, etc) and the conditions linked to the donation and transfer of the land, as explained above. Consequently an interdict was sought in and was granted by the LCC against developments in progress pending consultative negotiations. When an impasse was reached, the municipality was granted leave to launch a section 34-application, which was opposed by the communities on reliance of the Referral Report submitted by the Regional Land Claims Commissioner. That Report was opposed to the section 34-application and favoured actual restoration of the undeveloped portions of land. The application for non-restoration was granted by the LCC, but linked to various conditions (paras 21-28). While the municipality welcomed the decision that the land would not be restored, the conditions linked to future developments were appealed against, leading to the SCA-decision (see paras 29-31). In the SCA the section 34-order was again confirmed, but the conditions were set aside.

In the CC the applicant community sought leave to appeal against the order of the SCA. The municipality urged a refusal on the ground that the issue was purely factual and that no constitutional issues as such, were raised. In this regard Judge Moseneke stated that a claim for restoration of dispossessed rights in land was a pre-eminent constitutional issue and that that right was a vital part of the constitutional quest to heal divisions of the past (para 33). Furthermore, the issue for the CC to decide was not a factual one, but whether the LCC (and the SCA) were correct when it held that the requirements of section 34 had been complied with.

As leave to appeal was granted, the CC turned to the issues at hand, namely whether the LCC properly exercised the power conferred on it by statute (para 38 ff). The underlying motivation for section 34 was that sometimes, depending on the facts and the circumstances, it was better if particular parcels of land were not restored to claimants. Usually it related to major social disruption which would substantially prejudice the public. Being quite a drastic measure, section 34(6) prevented a court from granting it unless the twin threshold requirements of public interest and substantial prejudice have been satisfied (para 42). In this regard the Court had to make a value judgment regarding what was in the public interest and what was substantially prejudicial. This entailed that the public body seeking non-restoration would have to adduce the facts necessary to enable the court to make such a value judgment. Where feasible, actual restoration must enjoy primacy: 'A non-restoration order is invasive of restitution rights, and for that reason, the statute requires that it may be done only when the threshold requirements have been met' (para 43).

The CC turned to the LCC judgment and how the matter was dealt with there. The CC agreed with the statement of the LCC that the municipality did not provide sufficient information concerning the relevant boundaries of the City of Mthata (para 49). Though the LCC and the SCA decried the paucity of information, both courts went ahead to grant an order that 'immunised the restoration of any and all land

within the area of jurisdiction of the Municipality' (para 51). That was deemed to be a material irregularity that vitiated the non-restoration order granted earlier. Furthermore, on the papers before all of the courts the claimants were very clear that they only wanted restoration of the undeveloped and un-serviced areas (para 53). That much was also confirmed in the Referral Report. Accordingly, in light of the considerations mentioned above, the LCC misdirected itself on the value judgment it had made (para 57). Moseneke J also found that the SCA was incorrect in upholding the non-restoration order (para 58): 'Nothing on the facts justifies the conclusion that it is in the public interest for rights on vacant and undeveloped land not to be restored'. Both the orders granted by the LCC and the SCA were furthermore 'overbroad' as it related to 'any land in the town of Mthatha' (para 60). It was quite possible to grant a section 34-application with regard to land, part of the land or rights in the land. The LCC and SCA could have been more scrupulous in defining and refining the particular portions of land so affected, if the necessary information was before the courts.

The further question turned to in the CC was the relevance of the conditions subject to which the donations were made. No development could occur if it would result in the dispossession of 'formal or informal rights' in land. While the LCC found that these conditions had been breached, the SCA found that 'formal and informal' rights in land did not include mere claims in land, as they were not rights (para 63). Despite stating that it was not necessary to adjudicate on which was meant with formal or informal rights, Moseneke J went ahead to (para 64):

> dispel the suggestion that a right to claim restoration of rights in land under the Restitution Act is not an existing right. The Municipality was clearly wrong in taking the position that it may ignore the reservation in the Delegation that development should 'not result in dispossession if people's existing rights (formal or informal)'. One such right would certainly be the right warranted by the Constitution to lodge a claim for the restoration of the land in question.

In this regard it is crucial that a distinction be drawn between the right to lodge a claim and a right in land, resulting from a successful claim. While nothing can prevent persons or communities from lodging claims, having lodged the claim is by no means an indication that the claim would be successful. A constitutionally warranted right to lodge a claim does not automatically result in a 'right in land'. Instead, the right to lodge a claim would still only result in a claim with the possibility that a right in land may be the end result. Once such a claim had been lodged, a process unfolds. The acceptance of a claim by the Commission is still not tantamount to a successful claim. Acceptance of a claim and a consequential publication of a section 11 notice are indications that the claim is not frivolous and certainly has merits, but is not an equivalent of a successful claim. If that had been the case, the publication of a section 11-notice would not announce the lodging of a claim, but would announce the finalisation of a claim. Section 11 is aimed at protecting the integrity of the claim and the land so claimed. To that end

section 11 is more like a 'holding measure' in terms of which the *status quo* of the land is 'frozen' for the duration of the process. While the publication of the claim has certain implications, it is not equal to a right in land in the property law sense. It seems as if a constitutionally-based right to lodge a claim and therefore become part of a process, has been confused with actual vesting of rights in land in a property law sense.

The final end result is that leave to appeal had been granted, resulting in the appeal being upheld. The order of the SCA had therefore been set aside and replaced with a new order. The section 34-application had been dismissed, though the land in terms of which the third respondent had a registered long lease, will not be restored to the claimant or any other prospective claimant.

This judgment is valuable on many levels. Firstly, it underlines that clear and concise communication between all role players is crucial. Though it was clear from the Referral Report and the documents emanating from the claimants that only the undeveloped or un-serviced land parcels were claimed for actual restoration, that scope somehow slipped through the cracks resulting in the courts evaluating and considering the relevant land as a whole, as one unit. To that end a clear distinction could have been made between the undeveloped and developed, urbanised land. Secondly, identification of the land in question has to be concise; and thirdly, all relevant information – supported by way of survey maps and planning diagrams etc, has to be placed before the court in order for it to make the value judgment required. Had that been in place, right from the outset, unnecessary confusion, resulting in drawn out, protracted litigation could have been avoided. Finally, the role and nature of a section 34-application has to be understood correctly: it is an extraordinary measure that allows for the withdrawal of certain land from actual restoration before the claim had been finalised. It means that the claimants may still proceed with their claim and that they may still be successful with it, though actual restoration would not take place. Instead, other options, like monetary compensation or alternative land, would then be considered. This channel has an important role to play in the restitution process, but it is crucial that it is approached correctly, as this judgment has clearly shown.

3 Land reform

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

After protracted litigation affecting the full spectrum of courts, finality was reached concerning the phrase 'right to family life in accordance with cultural background' in *Hattingh v Juta* (case number: CCT 50/12 [2013] ZACC 5, decided 2013-03-14). The background and facts of the case are the following: Mrs Hattingh, a 67-year old woman of poor health, had been in the employ of the owner of the farm, Mr Juta, for

some time. She remained in occupation of the dwelling assigned to her and her husband after her husband's death and the termination of her employment. At some stage the applicants in the appeal (Mrs Hattingh's adult children and daughter-in-law) moved into the house that Mrs Hattingh had been occupying. The question the court, per Zondo J (with Mogoeng CJ, Moseneke DCJ, Cameron J, Froneman J, Jafta J, Nkabine J, Skweyiya J, van der Westhuizen J and Yacoob J concurring) had to decide was whether the presence of Mrs Hattingh's adult children and some minor grand children was in accordance with Mrs Hattingh's right to family life to which she was entitled to under ESTA. While the land owner had no problem with Mrs Hattingh's continued occupation, the presence of her adult children was cause for concern, for two reasons in particular: (a) from the outset their presence was to be temporary only; and (b) the accommodation was required to house the newly appointed manager who travelled far distances to and from work on a daily basis (paras 10-11). While the land owner relied on his ownership entitlements and the temporary occupational basis for the applicants' eviction, Mrs Hattingh relied on her 'right to family life' which would enable and allow her (grown-up) children to remain in occupation with her (paras 11-13).

In the Magistrate's Court the application for eviction of Mrs Hattingh's children was turned down on the basis that the mother's right to family life entailed that the children could reside with her. In the LCC the decision was overturned on the basis that, if a wider interpretation of 'right to family life' was called for, such a wider approach would have to be supported by evidence (paras 14-18). As no such evidence was provided, the LCC upheld the appeal and set aside the order of the lower court. The matter was thereafter heard in the SCA (paras 19-23). In this regard the SCA formulated the question to be decided as 'whether the extended Hattingh family reside together in accordance with its culture' (para 11 of SCA judgment). In this context 'family' was first considered and thereafter 'culture'. With regard to the former, the SCA found that 'family' was incapable of having a precise legal connotation or definition. Having found that, the Court still went further and underlined that family life was inherent to the fundamental human right of dignity, which is enshrined in the Constitution. It furthermore found that 'culture' resisted any precise definition and that culture was an inherently associative practice and that cultural practices were influenced by religious practices (paras 18-1 of SCA judgment). Being part of a community was also emphasised in this context. The applicants contended that culture was non-associative and fell to be determined solely by the manner in which Mrs Hattingh and her extended family lived their lives. However, the SCA found that culture was associative and accordingly dismissed the appeal.

The CC approached the issue by first confirming that the matter before it was clearly a constitutional matter (para 24). The matter raised the interpretation of section 6(2)(d) of ESTA, which relates to an important right that affects vulnerable and a significant portion of the South African society who live on land belonging

to other persons (para 25). Based on agreement between the parties, the only issue before the Court was whether Mrs Hattingh's right to family life in section 6(2)(d) entailed that she could live with applicants in her cottage. In order to answer that question, section 6(2)(d) needed to be properly constructed. Section 6(2)(d) succeeded section 5 in which a list of rights was set out for land owners, persons in charge and occupiers and section 6 that governed the rights and duties of occupiers in particular. In this regard Zondo J underlined that, though section 6(2)(d) specifically provided for a right to family life in accordance with that family's cultural background, section 6(2) provided that such a right be 'balanced with the rights of the owner or person in charge' (para 32). This approach would determine the stance taken throughout the judgment. Accordingly, the striking of a balance between the rights of the land owner on the one hand and the occupier on the other was called for. Inevitably, a just and equitable balance had to be struck. The Court also identified a few other sections in ESTA that required the infusion of justice and equity or fairness, including section 8(1) that contained a list of factors that had to be considered with fairness playing an integral role (para 32). Judge Zondo proceeded further by illustrating how justice had been infused in other legal relationships as well, in particular in labour practices; the regulation of unlawful occupation of land where PIE had been integral in that infusion process and in relation to landlord and tenant relationships (para 33).

The focus was then placed on the term 'family life' in section 6(2)(d). While the applicants called for the inclusion of an extended family, the land owner argued for a restriction to be placed on the term. In the LCC it was found that 'family' embodied the spouse, partner and dependent children – the nuclear family (para 15). In this regard the CC underlined that families came in different shapes and sizes and that there was 'no need to attempt to define the term 'family' with any precision other than to say it cannot be limited to a nuclear family (para 34). Merely attaining the age of majority or being independent of parents did not, *per se*, remove that person from the ambit of 'family'. The Court further investigated the purpose of section 6(2)(d) and found that the purpose of the conferment of this particular right on occupiers was to ensure that, despite living on property belonging to other persons or entities, persons falling within this vulnerable section of our society would be able to live a life that was as close as possible to the kind of life they would have lived if they resided on their own land: 'This means as normal a family life as possible, having regard to the landowner's rights' (para 35). This provision was thus inherently linked to the aim of providing human dignity to a portion of the society that was denied such dignity under apartheid. However, the extent of that right to family life would depend upon striking a fair balance between enabling the occupier to enjoy the right to family life, while enabling the owner to enjoy his or her rights as land owner. This meant that each case would have to be approached individually and the striking of a balance had to be meticulous and pertinent to the facts of each case. If the end result of the

balancing act was that the right to family life in the particular circumstances did not amount to injustice or unfairness of inequity, then the occupier would be entitled to continue living in accordance with his or her family life. This approach entailed that a family was not restricted to an occupier living with his or her spouse or children only (para 40). Nor was it dependent on the age of majority or whether the children are self-reliant (para 40). Instead, '[w]hat matters is what is just and equitable when the rights of the occupier are balanced with those of the landowner' (para 40).

In light of the above, Zondo J found that a discussion of the phrase 'in accordance with cultural background' would be unnecessary (para 41). In this balancing process the Court considered all the relevant factors, including that Mrs Hattingh would not be evicted and could continue to reside in the cottage; that her one son would be allowed to remain with her in the house and assist her, that Mr Juta would be enabled to use the dwelling for his manager if the applicants were evicted; and that the applicants were adults and independent from their mother (para 41). All the factors in favour of the land owner were thereafter considered in light of the factors in favour of the applicants. Having taken all of the factors into consideration, the CC was satisfied that it would be just and equitable that Mrs Hattingh did not continue living with the applicants. The exclusion or eviction of Mrs Hattingh's children from the house would not infringe her right to family life because, even though her right was limited, the limitation was just and equitable. To that end the applicants were evicted (para 43).

The approach of the CC is interesting: by focussing on the balancing act and not the elements (or components) of which 'family life' or 'culture' are supposedly made up, the content of family life for purposes of the ESTA had effectively been 'broadened'. It has been broadened as the Court has concluded that the right to family life in accordance with culture is much more than the sum total of its components. Former approaches attempted to delineate what the concept 'right to family life' and 'culture' entailed, by attempting to identify or list the relevant components thereof. That meant that elements or components would have to be listed, defined and thereafter calculated. Such an approach would inevitably be reduced to a technical 'checklist-kind-of-approach'. However, by focusing on the balancing act of the various opposing rights involved, the technical *pro forma*-approach has been avoided. This means that the age of children, whether they are self-sufficient, whether they need support, whether there are partners or spouses involved, whether grandchildren also come into the picture are irrelevant for purposes of defining and constituting the concept of family life. To some extent, 'family life' is thus open-ended. However, the factors alluded to above remain relevant, but not in construing the concept of family life. Instead, they are crucial in considering the balancing of rights and interests. Accordingly, the age of children and whether they are self-sufficient, are still valuable factors – but within the contexts of *fairness and equity*.

Voges v Molusi LCC 85/2010, (decided on 2013-01-18, Randburg) concerned an eviction order under ESTA. The 12 respondents were not farm workers, did not provide services to the land owner, but occupied the property in terms of lease agreements, of which an equal distribution of written and oral lease agreements existed. The occupiers had all been in occupation for estimated periods of between 7 and 10 years. Previous litigation between the parties entailed a prohibitory order being granted in favour of the present respondents, in terms of which the present applicants were prevented from removing corrugated iron roofs from rooms to constructively evict the occupiers (para 4). Different matters were raised in the eviction proceedings. Firstly, the respondents contended that the manner of service had not been in accordance with the Act (para 9). As the respondents all appeared in court on the correct date, they had somehow managed to receive the correct information, despite the technicalities of service not being complied with. To that end Judge Sidlova confirmed that an overly technical approach would not be followed concerning service, resulting in this issue not being pursued further (para 9). Secondly, and of more importance for this discussion, the question raised was whether the termination of the lease agreements was just and equitable (para 12).In this regard the land owners (the applicants) contended that the agreements were terminated in order to develop the property more effectively. Previous case law had already confirmed that it was reasonable for lease agreements to be terminated if they are irreconcilable with land development goals in the long-term (para 13). With regard to the eviction application as such, the Court emphasised that, in considering the application, it is necessary to consider whether (a) the right of occupation had been terminated in accordance with the Act; and (b) whether the procedural requirements had been met (para 19). These questions were both answered in the affirmative (para 21). The rights and interests of both parties were furthermore considered. In this regard the Court underlined that the respondents had been in occupation for more than two years, rent free. The failure of the state to provide housing in these instances could not be levelled at the land owner. Providing housing in these conditions is not the duty of the land owner (para 22). The eviction order was consequently granted and a just and equitable date for eviction was set. While the majority of ESTA cases confirm the link between residence and labour (employment) as many cases deal with farm workers, this case illustrates the relevance of ESTA with regard to lease arrangements in terms of which consent (explicit – either by way of a written or an oral agreement) was granted for occupation after which the basis for occupation is then terminated. However, all instances, not only with regard to employment-related matters, call for justice and equity before eviction can occur.

3.2 Land Titles Adjustment Act 111 of 1993

Notices were published in terms of the Land Titles Adjustment Act (North-West - GN 163 in *GG* 36183 of 2013-03-01; GN 25 in *GG* 36066 of 2013-01-18; GN 851-852 in *GG* 35790 of 2012-10-19; Sekhukhune, Limpopo – GN 29 in *GG* 36082 of 2013-01-26).

3.3 Communal land

Positive changes regarding the gender dimension in customary law land rights, especially within the context of communal land, include more single mothers being allocated land for residential sites and more daughters being chosen to inherit responsibility for natal homes. On the other hand, certain portions of the Traditional Courts Bill 15 of 2008 seem to impact quite negatively on women living in accordance with customary law in general. For example, clause 10(2)(1) provides that a Traditional Court may make an order depriving the accused person or defendant of any benefits that accrue in terms of customary law and custom. In this regard communal land benefits (including access to water) accrue in terms of customary law and custom. Accordingly, community members may be deprived of such benefits. This is particularly prejudicial to women given the gendered link between women and issues around land ownership. This is even more problematic in light of the fact that the Bill enables traditional leaders to enforce controversial versions of customary law which may promote their own interests and not those of the subjects. Land rights, access to it and use thereof may be construed in a limited fashion, impacting negatively on the positive, equality-based developments within the customary law paradigm that have already occurred, alluded to above. Though the Bill was supposed to have passed through Parliament in the course of 2013, it has recently been announced that, being so controversial, it is to be withdrawn and is likely to be revised (Kgosana 'Traditional Courts Bill to be withdrawn' *Sunday Times* (2013-03-17) 6).

3.4 Black Administration Act

The Repeal of the Black Administration and Amendment of Certain Laws Amendment Act 20 of 2012 came into operation on 28 December 2012 or on a date when a national Act will regulate the matters addressed in sections 12(1)-(4), (6), 20(1)-(6) and (9) and the third schedule to the Act (*GG* 36021 of 2012-12-19). Although the repeal of the Act should be welcomed, the problem of the land tenure regulations issued in terms of this Act and the void that was created by the repeal of the Act has still not yet been addressed.

4 Unlawful occupation

During the period under discussion various judgments were handed down dealing with a variety of issues linked to the granting of eviction orders, *inter alia* what is considered under 'just and equitable' and the implications of structural interdicts and court orders dealing with meaningful engagement. *City of Johannesburg v Changing Tides 74 (Pty) Ltd* ((735/2011) [2012] ZASCA 116 (delivered on 2012-09-14) concerned an appeal dealt with by Wallis JA (with Mthiyane DP, Lewis, Tshiqi and Petse JJA concurring). While the building (Tikwelo House) was still the property of the predecessor in title of the first respondent – Changing Tides – the building had been taken over by occupiers in desperate need of shelter. In the process the building was also 'hijacked' by third parties who regulated access to it. This was done by subdividing the erstwhile warehouse into smaller sections and charging and collecting rent from its occupiers (paras 2-5).Though the building was not equipped for residential use it in fact housed about 100 people. These conditions led to the City of Johannesburg giving Changing Tides (who had in the meantime received ownership of the property as a means to settle a debt) notice to comply with the public health and emergency service by-laws. After a failed eviction application in 2008 the owners were successful in the course of 2011. The order required that the sheriff gain access to the building in order to compile a matrix to gather information regarding the general profile of the unlawful occupants. The City was ordered to provide emergency accommodation to the persons so listed. The present appeal application was lodged against some sections of that eviction order, especially those sections linked to the provision of emergency accommodation, as well as the costs order against the City.

In scrutinising the order some paragraphs thereof were found to be legally ineffective and that the judge *a quo* was unable to find that the order he was granting was indeed just and equitable as well as the timing thereof. In order to determine whether the granting of an eviction order was indeed just and equitable, the SCA distinguished between two phases or two kinds of enquiry. Under section 4(7) of PIE the court had to determine whether it was just and equitable to order an eviction order after considering all the relevant circumstances (para 12). Under section 4(8) the court was obliged to grant an eviction order if the requirements of section 4 had been complied with and if no valid defence was raised. Compliance with the requirements of section 4 referred to both the service formalities and the conclusion under section 4(7) that the eviction order was indeed just and equitable. It had to be just and equitable for all parties concerned. Then only did the second enquiry begin. That enquiry dealt with the conditions that could be attached to the eviction order as well as the date upon which the eviction order would take effect. Again, the consideration of 'just and equitable' came into play. In both these phases of enquiry two factors have loomed large in case law, namely (a) the risk of homelessness, and (b) the availability of suitable alternative accommodation (para

13). In this regard the court provided an overview of important case law developments linked to instances where public land was involved or where eviction orders were applied for at the instance of public bodies. In all of these developments and proceedings, the duties of government, especially in relation to those who were in desperate need of housing, were underlined (para 13 generally). In this context the SCA emphasised that disparate situations in each case meant that what was said in former judgments could not merely be transplanted on all situations and that solutions in one case might not be appropriate in another case. Therefore, conditions and circumstances of each case were different. However, (para 14) '(w)hat is clear and relevant for present purposes is that the State, at all levels of government, owes constitutional obligations to those in need of housing and in particular to those whose needs are of an emergency character, such as those faced with homelessness in consequence of eviction'.

In instances where eviction applications were lodged by organs of State, section 6(3) PIE also became relevant. Though consideration of the availability of suitable accommodation formed part of this enquiry, due to the enormous need for housing in the country, the Court underlined that 'there cannot be an absolute right to be given accommodation' (para 15). While the issue of suitable alternative accommodation was already complex, it became even more complex when eviction applications were lodged by private individuals, as another constitutionally protected right, the right to property, also came into play (para 16). When an eviction order was not granted in relation to private property, it would not result in expropriation, but would only suspend the owner's right to exercise his ownership to its full capacity, for a limited time only. However, where an eviction application was lodged by an organ of state, that particular organ was invariably also the body responsible for the provision of alternative accommodation or was closely linked to the provision of accommodation. However, because private individuals could not be obliged to provide suitable alternative accommodation, it made it difficult to see on what basis the availability of suitable alternative accommodation had a bearing on the question whether an eviction order should be granted, as opposed to the date of eviction and the conditions attaching to such an order. The date of eviction could be closer in instances where suitable accommodation was available, whereas a date further off could be more just and equitable when no alternative accommodation was available. However, the court found it difficult to see on what basis it affected the question whether it would be just and equitable to grant an eviction order – in relation to private land owners (para 18).

Thus, though the availability of suitable alternative accommodation had to be considered, its weight in deciding whether to grant an eviction order or not, should not be too great. Furthermore, when a private land owner lodged an eviction application and demonstrated a need to be in possession of the property and there was no valid defence against the claim, it would usually be just and

equitable to grant such an eviction order (para 19). The consideration of suitable alternative accommodation would thus not have such great weight in the first part of the enquiry, but would certainly have more weight in the second part of the enquiry that related to the date on which eviction would occur. If suitable accommodation was available, then the date would be set earlier, and *vice versa*. In this regard the court underlined that the finding that the granting of an eviction order would be just and equitable was not the end of the enquiry, as the eviction order had to operate from a fixed date. In this regard the courts had to focus on not only the justice and equity of an eviction order, but also on the justice and equity of its timing (para 24).

Regarding the question as to who had to place all necessary information before the court, it was found that, in the first instance, it was for the applicant to secure that the information placed before the court was sufficient, if unchallenged, to satisfy it that it would be just and equitable to grant an eviction order (para 30). Keeping in mind that all sources of information had to be explored, it may still result in insufficient information, especially regarding homelessness. Joinder was usually called for whenever a party had a direct and substantial interest in the outcome of litigation. Because there was a certain possibility that at least some of the occupiers would be rendered homeless, the issue of alternative accommodation and the constitutional obligations of the local authority also came into play. Accordingly, the local authority had to be joined of necessity. In other instances the joinder of the local authority would still be a precautionary measure (para 38.)

The court then set out the obligations of local authorities in this regard (para 39). Firstly, the usual approach of local authorities to file a general report was found to be inadequate. Case specific reports were required, (para 40) dealing with (a) the particular building (eg whether it was a 'bad building'); (b) information regarding the unlawful occupiers (eg, how many, their circumstances, etc); (c) whether in cases of eviction, unlawful occupiers were likely to become homeless; (d) if so, which steps the local authority would follow or put in place to address such homelessness; (e) the implications for owners of a delay in eviction; (f) details regarding any dealings with the unlawful occupiers regarding their continued occupation or removal from said property; and (g) whether the local authority believed there was scope for a mediated process, whether under section 7 of PIE or otherwise, to secure the departure and relocation of the unlawful occupiers. The more complete and detailed the report, the less likely the chances of lengthy and costly litigation.

The court then turned to the case at hand (paras 42-58). The court had already found that the granting of the eviction order was just and equitable and focused on the issue of date only. In order to grant the necessary order, the court underscored that it needed information about the needs of the occupiers in relation to temporary emergency accommodation (para 46). Firstly, the persons who needed assistance from the City had to be identified and secondly, the nature of the needs had to be determined. In the present circumstances the simplest and most expedient way to

get the necessary information was for the Legal Resources Centre to compile a list with the necessary information (para 48). Next, the City's obligations were determined. Because all parties presented different methods and approaches, the court underlined that the various approaches, as proposed, would continuously open up fronts for further conflicts while the unlawful occupiers were resident in a 'death trap' (para 52). Therefore, a much more practical and expedient approach was required. In instances where an eviction had to take place urgently, on the basis of risks to life and health, the review process should defer to the need for eviction and take place after the City has provided the evictees with temporary emergency accommodation. That could result in some persons gaining temporary access to emergency accommodation until their disqualification was discovered (para 53). That result would still be better than having all the people continuing to occupy an extremely risky building. Therefore, infusing grace and compassion into the eviction process would sometimes require that an eviction take place quickly and not be dragged out or postponed as long as possible (para 54).

The court found it appropriate that, after receiving the list so compiled by the Legal Resources Centre, the City had to report to the court within one month, setting out the accommodation and when it would be available (para 56). Once the City had delivered its report, the occupiers had one month to consider its contents and set out their views and comments in a set period of time. After all the set time periods had elapsed, the application for eviction had to be set down again for hearing on the opposed roll (para 58). At the hearing the court would have to consider the proposals by the City and the responses of the occupiers and then determine the date for the eviction. The appeal was upheld and the eviction application was remitted to the High Court to determine the date of eviction and the terms on which emergency accommodation (and conditions linked to it) would be provided.

The judgment handed down is detailed and all-encompassing and deals with all matters linked to eviction procedures. Though the court explains the differences between evictions relating to public land and evictions by private land owners respectively, the underlying message is that (a) sufficient information is required irrespective of whom the applicant is; and (b) that government and its different bodies and levels have particular obligations in relation to persons who stand to be homeless. Private individuals cannot be obliged to provide housing – be it permanent or emergency. However, even if the rights of private land owners have to be considered and weighed, the usual common law rules of protection of ownership are not relevant any more – at least not in its exact common law-format. Instead, land owners cannot rely only on their land ownership to secure an eviction order. As applicants, the onus remains on them to furnish the court with sufficient information to enable the court to consider all relevant circumstances so as to find that the granting of an eviction order was indeed just and equitable in the circumstances. However, having made that finding, the investigation is not closed

as the second enquiry – dealing with the timing of the eviction order – has to be completed as well.

Two further judgments were handed down also dealing with the phrase 'just and equitable'. The first decision, *Mahogany Ridge 2 Property Owners Association v Unlawful Occupiers of Lot 13113 Pinetown* ((2673/2011) [2012] ZAKZDHC 66, handed down on 2012-11-07)) dealt with an eviction application under section 4 of PIE. The applicant is a section 21 association (Companies Act 61 of 1973). During the 1990s land was transferred to the applicant for R300 on the basis that it would act as a conservancy and 'green lung' within the township and would not be developed (para 4). To that end certain limitations were imposed impacting on the kind of structures that could be erected. The land could not be commercially exploited as long as the title conditions remained in place (para 7). Between 16 December 2011 to 10 January 2012 the land was unlawfully invaded and structures and shelters were erected on it by the respondents. This forced the applicant at immense expense to fence off the property and to provide for an access point, as well as to install guards to prevent further invasion.

It was clear that the respondents were unlawful occupiers and that the procedural requirements had been met. The only issue before the court, per Sishi J, was the merits. The basis of the respondents' opposition was threefold: (a) the land in issue was a 'green lung' and was not being used by the applicant for commercial gain; (b) no specific reason was given for the eviction application; and (c) no case was made out that the unlawful occupiers in any way interfered with the 'legitimate affairs' of the applicant – para 12. The relevant housing department of the local authority compiled a report that offered various solutions, including relocation to adjacent land (Emaus informal settlement), coupled with concrete platforms and building materials (para 13). The respondents neither accepted nor rejected the resettlement offer but provided a further option that the land be purchased by the municipality for R300 developed as an informal settlement (para 15).

The eviction application was lodged under section 4(6), within 6 months after invasion. However, the court considered section 6(3) of PIE regarding the issue of suitable alternative accommodation which usually relates to instances where an eviction order was applied for by an organ of State. Strictly speaking therefore, section 6(3) would not be applicable here. The authority listed in support relates to local authorities or other organs of State being the driving force behind evictions (see paras 22-23). Nevertheless, after citing section 6(3) and its relevance to the present application, the court did, however, also refer to section 26 (housing), section 25 (property) and section 28 (children) of the Constitution and underlined that PIE was promulgated 'to give effect to these provisions in the Constitution' (para 29).Special emphasis was placed on the prohibition of arbitrary deprivation of property in particular, though '[t]he owner's right to land is not virtually unlimited' (para 31). In any event, irrespective of whether the duration of unlawful occupation

of land was more than or less than six months, all relevant circumstances had to be considered before an eviction order could be granted.

In considering all relevant circumstances, the court referred to the report submitted by the housing department and the lack of response from the unlawful occupiers. There was furthermore no explanation why the respondents had not yet replied or delivered any kind of response (para 36).Only one answering affidavit had been filed. The court was satisfied that there had been meaningful engagement between the occupiers and the local authority and accepted the housing report so submitted (para 40). The Court also considered the offer made by the applicant to contribute financially to the relocation of the occupiers as well as the applicant's expense to protect its property, that it suffered prejudice in that it was deprived of its property, that the occupiers had occupied the land unlawfully and had erected structures on it unlawfully and that the occupiers had no lawful defence against the eviction application (para 49). The court was satisfied with the very detailed housing report and the affidavit submitted (para 51). Because of the alternative accommodation an eviction order would not result in homelessness (para 54). In light of all of the above facts and considerations the court was satisfied that the applicant had shown that the granting of an eviction order would be just and equitable in these circumstances (para 60). Though the judgment is detailed and the final end result is balanced and fair, the final result may possibly be attributed more to the specific facts of this case (eg the complete housing report, the willingness of the applicant to contribute financially to the relocation and the actual availability of suitable land for relocation) than the legal and constitutional arguments listed.

In *Johannesburg Housing Corporation (Pty) Ltd v The Unlawful Occupiers of the Newtown Urban Village* ((2011/30368) [2012] ZAGPJHC 230, delivered on 2012-11-15)) the eviction application likewise related to 'just and equitable' under section 4(7) and (8) of PIE. The property, generally known as Newtown Urban Village, has been the property of the applicant, a section 21 housing corporation, since 2011 with the main purpose of providing affordable housing to the City of Johannesburg. The respondents, who stood to be evicted, were not the tenants of the applicant as they had no legal basis for their occupation. Instead, the respondents reported to a one Mr Matsela who was in charge of the property and who collected 'rents'. The respondents' occupation was terminated with effect from July 2011 and the eviction notice was given on 30 June 2011 and the application for eviction was launched on 26 August 2011 and 29 August 2011 to the two groups of respondents respectively.

Judge Willis starts his judgment stating that 'What would have been a legally straightforward matter before the coming into operation of PIE on 5 June 1998 has now become fraught with complexity' (para 5). This is followed by an exposition of some of the leading SCA and CC judgments that had set the general framework for the application and interpretation of PIE since its commencement (paras 15-20). Finally, 'A conundrum arises from what is meant by "just and equitable"' (para 11).

Turning to the facts and application before the court, Willis J underlined that there had been ample time for the parties to consider and explore all the alternatives (para 26).

While the phase 'just and equitable' glides from the tongue with facility, the 'precise meaning eludes easy description' (para 33). Of importance is that two considerations are relevant: the question whether the granting of the eviction application would be just and equitable and thereafter, what a just and equitable date for eviction would be. In both instances the relevant circumstances would have to be taken into account. With reference to case law, the court concluded that a 'broad discretion' was called for here. If applied correctly, it would mean that (a) the court would have to reach some conclusion that the granting of the eviction order would indeed be just and equitable (or not); and (b) if indeed just and equitable, it would then at the same time have to pinpoint an actual date in the future from which the eviction would take effect. In light of the current confusion reigning in eviction applications generally, (para 37) Willis J opined that 'it would create an intolerable situation, rendering the functioning of courts in regard to eviction matters unworkable. It would be grossly unfair to judges' (para 36).

In its attempt to construe the phrase 'just and equitable' the court looked at the Companies Act (including its predecessors from 1894) (para 40). Though highlighting that the liquidation of companies and eviction proceedings under PIE were rather different, the court emphasised that words and phrases generally had inherent, inner coherence. A discussion of various cases, judgments and jurisdictions followed, (paras 41-49) leading to the conclusion in paragraph 50 that, finally a court should reach a decision 'the result of which could not unreasonably have been made by the court properly directing itself to all the relevant facts and principles. Once a court starts to talk about 'reasonableness', this is, ordinarily, a pointer to the fact that it is referring to an objective test.' Because the power a judge wielded was institutional and not personal, senior members of the judiciary were usually appointed only after they had acquired years of scholarship and experience (para 51). Therefore, in theory, the test to determine whether the granting of an eviction order was indeed just and equitable would be an objective one. However, as reasonable men and women may reach different conclusions, the Court suggested that it would be 'much easier' if there were a range of decisions which could correctly be made, given a particular set of facts (para 52). Therefore, more certainty was required and if 'templates' for different scenarios could be developed, more certainty would be achieved and it would be easier for courts and judges to deal with these matters.

The respondents had proffered numerous reasons why the eviction order ought not to be granted, including that the respondents were willing to pay rentals to the applicant, that many had been residing in Newton Urban Village since its inception 12 years before, that the residents were well-established in the community and that an eviction would be extremely detrimental to the families,

especially impacting on their employment and the schooling of their children (para 66). Furthermore, of the 85 families that constituted the Matsela group, 43 households were headed by women of which 17 were unemployed and 6 were elderly. A total of 180 children lived in the Village and 19 residents were older than 50 years of age. At least 11 of the residents were sickly persons. Most of the residents would be rendered homeless if the order was granted and most have requested alternative accommodation as well. While the circumstances of the 125 families that constituted the Khumalo group were very similar to the Matsela group set out above (para 66.11-66.12), the personal circumstances of at least 50 other families had not been placed before the court. The court also considered the interests of the applicant, as owner of the property. Here the court considered that ownership was a constitutionally protected right (para 73) and that an owner could not be expected to provide free housing for an indefinite period (para 75). Keeping in mind that neither the CC nor the SCA had defined 'homeless' and that there was no definition of what it entailed in PIE, the court was satisfied that some degree of permanence had to be described to the concept of a home (para 81). The court then considered to what degree of permanence a person, who was occupying property against the will of its owner, was entitled to (para 82). The Court reached the conclusion that 'homelessness' meant (para 85):

> Without any reasonable prospect, between the date of the court order which it is proposed be made that the occupier is to vacate the property to the date upon which the eviction order is to be effected (in the event that the occupier does not vacate the property), of the occupier being able to find alternative accommodation that is (a) of a comparable or better standard to and (b) at a similar rent to and (c) within reasonable proximity to that of the property from which the eviction is sought.

In light of the above considerations the court reached the conclusion that the only correct decision the court could make was to grant the eviction order. A just and equitable date was furthermore set on which evacuation would occur if the residents had not vacated the premises voluntarily. The eviction order made no mention of alternative accommodation.

It is a lengthy judgment that contains a lot of personal ideas and conceptions of the judge handing down the decision. It is clear that the judge finds eviction applications complex and difficult to deal with. The judgment is permeated by frustration on the one hand and a genuine attempt to find a workable, practical solution – not only in relation to this particular case, but to eviction applications generally. Unfortunately eviction applications cannot be approached similar to the drafting of templates that could (theoretically) cover the broad spectrum of eviction scenarios. Yes, predictability and certainty are necessary in law. But facts, circumstances and cases differ, not only regarding the owners of properties or the authorities involved, but especially with regard to the various personal and other circumstances of the respondents. Of course embarking on the endeavour to determine whether the granting of an eviction order would be just and equitable,

followed by the determination of a just and equitable date for eviction, was complex and difficult and may even be 'unfair to judges'. But should not fairness to the parties – the applicants and respondents – be paramount?

Sohco Property Investments (s 21-company) v 232 Respondents (Case no: 14264/10, decided on 2013-01-15 in KwaZulu-Natal High Court, Durban) related to eviction proceedings impacting on all units within a social housing complex in the jurisdiction of the Ethekwini City Council. The applicant was a social housing provider relating to a complex that comprised 330 two bedroomed units. The idea was to develop quality housing for low-income households with funds acquired by Government and private financial loan institutions respectively. Rents operated on a sliding scale, depending on the income of the relevant tenant and functions on a cross-subsidisation principle, entailing that persons with bigger incomes cross-subsidised those tenants with less income (para 3). Hence the careful screening of applicants so that the matrix of rents could be upheld to ensure that the scheme remained economically viable. Occupation was regulated in terms of a written lease agreement (para 6).

The eviction applications were all based on the ground that lease agreements had been lawfully terminated due to the non-payment of respective rentals. The defence raised was that the respondents never agreed to pay the rentals as the space in the contract indicating the rent was blank. Consequently, they were under the impression that the subsidies from government would be sufficient to cover said rentals (para 13). In light of this the respondents denied that they breached the agreements. The court per Mnguni J considered the denials but found that they had no merits and that, subsequent to the termination of the rental agreements, the respondents had become unlawful occupiers for purposes of PIE (para 16). Notwithstanding the letters of cancellation, the respondents had continued their occupation of the units. Because PIE provides for a period of unlawful occupation less than six months and a period in excess of six months, with different implications, the exact period had to be determined. In the latter instance the issue of suitable alternative accommodation also comes into play (para 17). In this regard the Court confirmed that unlawful occupation started when the lease agreements were cancelled.

On closer scrutiny the Court became aware that, in all three of the complexes owned by the applicant, a 'rent boycott' had been in progress for some time. That resulted in non-payment levels of approximately 75% (para 21). Despite the fact that the Rental Tribunal had already attended to the matters (paras 22-24), the respondents ignored the directives so issued. Yet, the respondents requested further mediation under PIE. In light of the Tribunal experience and the stance that was taken there by the respondents, that they would decide when, how and the amount of rental they would pay, the Court was satisfied that additional mediation would not be justified in these circumstances (para 24).

With regard to the respondents' averment that eviction orders would render them homeless, implying that the City had to take the necessary steps to realise their right to access to housing, the Court confirmed that the period of unlawful occupation, alluded to above, was indeed less than 6 months. It was thus not expressly required to consider the availability of alternative accommodation (para 26). The Court thereafter attended to the just and equitable enquiry and underlined that it called for the assessment of the competing interests and to balance out and reconcile them in a just manner as possible (para 27). Here the Court focused in particular on the group of respondents who were unemployed and whether 'the unemployed respondents' factors, as contained in their PIE affidavits, should be considered and measured differently from those of the other respondents' (para 28). In this regard the Court considered all of the factors equally in relation to the overarching aims of social housing, the fact that the applicant was forced to maintain the complexes despite not having received rental for almost three years and the consideration that the non-payment of rental was an orchestrated, organised effort that was not linked to financial or economic hardship (para 2).

In light of the facts and considerations confirming that the respondents have failed to disclose sufficient facts to persuade the Court that the interests of the applicant should yield to those of theirs, a just and equitable date for the eviction was set. This final result of this case is that persons, who had already been placed in a position to enjoy their constitutional right to access to housing, effectively forfeited it. The case underlines that, though constitutional imperatives are crucial, for a scheme like this to operate effectively, all relevant parties have to contribute responsibly. To that end the system has been developed so that those with more income pay more rental, thereby subsidising the tenants who have less income. Despite this approach, a rent boycott was embarked on with no apparent economic or financial reasons (para 31).

Hlope v City of Johannesburg (case number 48102/2012 of 2013-05-03, South Gauteng High Court, Johannesburg) calls attention to the possible inefficacy of structural interdicts and orders of meaningful engagement. The circumstances and conditions are reminiscent of *Joe Slovo Community, Western Cape v Thubelisa Homes* (case number: 22/08 [2011] ZACC 8, decided on 2011-03-31, CC) that was handed down in the course of 2011. In June 2012 an eviction order affecting about 200 persons was handed down in the CC (*City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC)). The order was structured in such a manner that it allowed sufficient time for the City of Johannesburg to furnish an accounting of its arrangements for housing the occupiers and to provide temporary shelter to secure the eviction. There was also ample provision to report back on its progress. In February 2013 the City requested and was granted further time to effect the content of the court order (see paras 5-10 for the chronology of events and concomitant orders). When the present judgment

was handed down in May 2013 the City failed to comply with all parts of the June 2012 and February 2013 orders. In this regard the Court pointed out that every time the deadlines were postponed urgent and crucial matters arose regarding the right to possession of owners (the owner of the building was prevented from possessing his building and to utilise it accordingly); the uncertainty of the occupiers' own positions and the role the City had to play. This poses some difficulties concerning the actual efficacy of these kinds of orders.

In short, the various orders required the City to compile reports regarding the nature and location of temporary shelter and the list of names of persons involved. Broadly, the response of the City regarding the June 2012 and February 2013 orders underlined the incapacity of the City to comply with these orders due to a lack of financial resources and suitable available buildings (para s 11-16). In Chambers Judge Satchwell raised various concerns and extended an invitation to both the Executive Mayor and the Director of Housing to attend the hearing and to hear the concerns personally. The concerns raised were the following:

- That all the reports submitted by the City were drafted by a lawyer only (with no apparent input from city planners, health and sanitation and environment and building experts);
- neither reports provided any information regarding the nature and location of accommodation to be provided, despite specifically ordered to contain that information;
- both reports were essentially *pleas in misericordiam*, only lamenting the position of local government and the lack of capacity and resources;
- no information was provided concerning a task team formed, meetings held, research conducted, finances secured, deeds offices perused, town plans scrutinized etc. In fact, no information specifically requested by the Court, had been provided; and
- it seemed as if the City was uncertain as to whether eviction had been ordered. In this regard the Court emphasized that it had indeed been ordered.

The Court got the impression that local authorities lamented the possibility that they would be required to house the whole of Africa, that no distinction was made between South African citizens and other persons and that the contribution to the tax base of the City was minimal (para 24). In this regard Judge Satchwell said that (para 25):

> there is no room for any tier of government or any organ of state or any court in the land to be inimical to the reasoning or the decisions of the Constitution Court. The City of Johannesburg is bound thereby. This court is bound thereby. We must all do our best and exert ourselves to implement the decisions of the Constitutional Court in pursuit of the Constitutional promise.

In light of all that had transpired, the Court was convinced that a further report was still necessary. Here the Court followed an interactive approach by inviting all parties to take a week and to consider the questions that needed to be asked and to formulate further or different issues that they believed the City had to address (para 28). This invitation in fact led to various suggestions being placed on the table by both the City (para 29) and the respondents (para 30). These related to, *inter alia*, the date when accommodation would be made available, the location and details of vacant property, measures that had already been adopted, health and safety concerns, and discussions with the present owner to find ways in which to lessen the burden placed on the owner and his property. In the Report the City had to reply to each of the questions posed. The whole purpose of the exercise was 'with one outcome only in mind: provision of temporary accommodation for these applicants sooner rather than later. They are premised upon the view that management towards an outcome must be planned, focused and directed towards that outcome' (para 33).

The judgment is a crucial piece in the puzzle that local authorities are confronted with on a daily basis. Orders handed down that require reports to be submitted and results being conveyed are not effective if it is not part of an overall planned and structured process. Authorities cannot only lament and provide reasons why they had not complied with court orders: they have to be more pro-active and have to work in a planned and coordinated manner. Though the challenges are great, progress will only result if all parties play their particular role responsibly.

City of Cape Town v Hoosain NO ((10334/2011) [2012] ZAWCHC 180, decided on 2012-10-24)) provided the reasons for a decision handed down previously in relation to apartment buildings in Gugulethu. The relevant buildings initially functioned as hostel accommodation until it was taken over in 1993 by the Western Cape Housing and Development Trust with the aim to transform said building into sectionalised housing apartments for persons in need of housing. Since then, most of the 40 apartments had been compartmentalised informally to accommodate more than one family per unit (paras 1-4). In due course the Trust had lost control of the buildings, which resulted in structural defects and they finally fell into such disrepair that they were no longer safe for human occupation. The local authority gave notice to the Trust to address the problem, or demolish the buildings which led to a notice to vacate said buildings. When the occupants refused to comply with the vacation notice, the City entered negotiations concerning the necessity to move and the availability of suitable alternative accommodation. When this also failed, eviction proceedings were initiated under section 12(4) of the National Building Regulations and Building Standards Act 103 of 1977 (Building Act) and, alternatively, under section 6 of PIE. While the eviction application was initially opposed, all parties finally settled with only one matter

outstanding, namely the counter application that section 12(4) and (5) of the Building Act was unconstitutional.

The challenge to the constitutionality of section 12(4) and (5) of the Building Act concerned its alleged incompatibility with section 26 of the Constitution. The complaint was that sections 12(4) and (5) were characterised by a marked absence of any reference to the need for affected parties to be granted hearings and for notices to be served by the relevant authorities to obtain court authorisation for their actions (para 13). It was further contended that these sections supported self-help of local authorities in respect of erection, demolition and alteration of buildings. In this regard Binns-Ward J underlined that section 12 consisted of two subsets and that it had to be read with section 12(6) (para 15). The first subset, consisting of sections 12(1)-(3), provided local authorities with powers to address issues that could arise from dilapidated or unsafe buildings and unsafe earthworks and building activities. It also imposed duties on owners of such dangerous buildings or earthworks to notify the local authority. The second subset, which contained the impugned provisions, was directed at providing local authorities with the power to address that habitation or use by persons of buildings that were in unsafe conditions and matters related thereto. The second subset was complementary to the first and could be used by the local authority when it was necessary for the safety of any actual or potential occupant or user of a building at whom an order made in terms of section 12(4) might be directed that they be prohibited from occupying or using the building for as long as the condition threatening their safety endured.

Because the current application contesting the constitutional validity of the provisions was not the first one to be entertained, the court provided a brief overview of earlier applications, which overview will not be repeated here, suffice it to say that the CC had found *mero motu* in *Occupiers of 51 Olivia Road, Berea Township* (2008 3 SA 208 (CC), 2008 5 BCLR 475) that section 12(6) of the Building Act – in the form in which it had been promulgated – was indeed unconstitutional (paras 18-19). The CC therefore read-in the proviso to the subsection in order to save it, namely 'This section applies only to people who, after service upon them of an order of court for their eviction, continue to occupy the property concerned' (para 19). Its effect was to underline the fact that the provisions of section 12(4) did not permit a local authority to resort to self-help and expel persons who failed to comply with notices issued in terms of the subsection. Instead, a court order was necessary in all cases where an eviction was required to enforce compliance (para 19).

The court contrasted other similar judgments previously handed down, all linked to the vacation and/or eviction of persons from dangerous situations and buildings, with the present application and facts before the Court. Case law that was considered was the well-known case of *Pheko v Ekurhuleni Municipality* (2012 2 SA 598 (CC)) which dealt with an evacuation under the Disaster Management Act

(DMA) and *Occupiers of 51 Olivia Road, Berea Township* (2008 3 SA 208 (CC), 2008 5 BCLR 475 – see paras 34-37). As mentioned, the court in the *Olivia Road* case emphasised that section 12(4)(b) of the Building Act did not imply that the local authority was relieved of its duty to consider and appropriately address the consequences of homelessness that might foreseeably result upon the implementation of its order (para 34). It further stressed that any court considering any application for the eviction of a person from their home was required in terms of section 26(3) in any event, to consider all relevant circumstances. From these judgments it became clear that section 26 of the Constitution mandated an enquiry by any local authority contemplating acting in terms of section 12(4) broader than one merely into whether the jurisdictional prerequisite for the exercise of the section 12(4) power had been satisfied. Instead, it also enjoined an enquiry into the manner and consequences of the implementation of a section 12(4) order affecting a person's home (para 34). In light of the case law developments, the court concluded that section 12(5) could be availed of for enforcement purposes only where it was reasonable to do so and never in a manner that effectively trumped section 26 of the Constitution (para 36). Since the matter had been before the court in November 2011, it had also become quite clear in jurisprudence that the immediate removal of persons from their homes in terms of section 12 of the Building Act or comparable provisions in the DMA could not, by itself, lawfully deprive them permanently of their rights to those houses. That could only be achieved lawfully by means of a court order obtained in the circumstances contemplated by section 26(3) of the Constitution – as supported and confirmed in the *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* ((CCT 23/12) [2012] ZACC 26, decided on 2012-10-09)). Furthermore, any local authority applying section 12(4) of the Building Act in circumstances which occasioned the persons affected by such a notice to be despoiled of their homes, also had to act in accordance with the framework and corresponding responsibilities set out in the well-known *Grootboom* case (*Government of the RSA v Grootboom* 2001 1 SA 46 (CC), 2000 11 BCLR 1169). Therefore, in light of the case law developments that had occurred since the matter was dealt with, as well as the fact that there was no evidence before the court that the application of section 12(4) was currently occasioning or likely to occasion an infringement of persons' fundamental rights, it was found not to be in the interests of justice to entertain the constitutional challenge (para 42).

Contrasting section 12(4) of the Building Act with section 16 of the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act 6 of 2007 (para 45), which had indeed been found to be unconstitutional, the court underlined that the kind of powers and the extent of each, in sections 12(4) and 16 respectively, were vastly different. The latter section 16 afforded the MEC an unrestrained policy-directed power, the use of which could override safeguards built into the other applicable legislation (including PIE) of the character contemplated by section 26(2) of the Constitution. By contrast, section 12(4) of the Building Act

afforded an expressly circumscribed administrative power to local authorities, which, on a proper reading of the provision, could be enforced when its effect was to evict people from their homes, only through a court order of the nature contemplated in section 26(3) of the Constitution.

The importance of a 'feature in the armoury of municipalities' such as that incorporated in section 12(4), was underlined, especially in relation to decaying city centres (para 50). But like any other weapon, it could be misused and exploited. To that end, particular guidelines were required. Though the court did not find obvious merit in the challenge against constitutionality, the court managed to leave the way open for the question to be considered, if required, in a factual context. The court was not satisfied that such a degree of uncertainty attended the application of the provisions that it was in the interest of justice that a determinative decision was required in the context of the current case concerning constitutionality.

6 Housing

Rules and procedures for the nomination of council members, committees and sub-committees in terms of the Projects and Construction Management Act 48 of 2000 were published (BN 22 in *GG* 36183 of 2013-03-01) as well as a Continuing Professional Development Policy (BN 75 in *GG* 35294 of 2012-04-26). A draft Standard for Developing Skills through Construction Work Contracts was also published for public comment (BN 118 in *GG* 35507 of 2012-07-13). The Minister of Human Settlements appointed board members in terms of the Community Schemes Ombud Service Act 9 of 2011 and the Estate Agency Affairs Act 112 of 1976 (BN 152-153 in *GG* 36183 of 2013-03-01). Since May 2012 the Minister of Human Settlements also administers the Estate Agency Affairs Act (Proc 32 in *GG* 35358 of 2012-05-17).

7 Land use planning

The Spatial Planning and Land Use Management Bill B14B-2012 was unanimously adopted by the Portfolio Committee on Rural Development and Land Reform on 12 February 2013.[3] The Report on the Bill states that, after the Bill was referred to the Portfolio Committee, public hearings were held and 22 organisations made submissions. The Bill is intended to address the incoherent and diverse land use management systems and is intended to allow the provinces to plan, taking into account their particularities. An independent opinion was obtained from an advocate, where after the Portfolio Committee decided to adopt the Bill with the

[3] http://www.pmg.org.za/report/20130212-spatial-planning-land-use-management-bill-adoption-public-service-com.

proposed amendments. The Bill is currently before the Select Committee on Land and Environmental Affairs of the National Council of Provinces (NCOP), with the verification of the final version of the Bill scheduled for 4 June 2013.[4]

The Rules and Draft Code of Conduct for Registered Persons in terms of the Planning Profession Act 36 of 2002 was published for comment (GN 445 in *GG* 36429 of 2013-05-03).

8 Deeds

The Minister of Rural Development and Land Reform approved amendment regulations (amending GN R474 of 1963-03-29) of the Deeds Registries Regulations Board (GN R195 in *GG* 36240 of 2013-03-14). Regulation 20 is substituted and it now regulated that 'in the description of immovable property in a deed or bond the extent thereof should be expressed in word and figures'. Regulation 39 is also substituted and prescribes the format of certificates to be signed by conveyancers. Regulations 44A(d)(ii)(aa) and (bb) are substituted dealing with the authority that needs to be obtained by representatives that sign on behalf of a company, close corporation, church, association, trust, etc. Regulation 61(2) dealing with the cancellation of *fidei commissa* is also substituted. Regulation 68(11B) is inserted dealing with lost and destroyed bonds. Form K and Form III also deal with these issues. Form SS provides for a certificate of registered title. GN R196 (*GG* 36241 of 2013-03-14) amends GN R664 (of 1988-04-08). These regulations deal with amendments to the regulations pertaining to sectional titles.

On 27 February 2013, the Surveyor-General and Director-General of the DRDLR briefed the Portfolio Committee on Rural Development and Land Reform on the surveying of State land and the progress on the compilation of a comprehensive land register.[5] According to the DRDLR, the compilation of said register would facilitate and improve the updating of asset registers of organs of state, and would serve as the basis for land planning and administration, as well as property portfolio management and service delivery. A two-phase approach to the compilation of the comprehensive land register was adopted. The first phase aligned property details between the Deeds Office and the Surveyor General's Office, with special reference to township names, sectional title names and farm names. In this regard, the physical verification of State land has been substantially completed, and a total of 5.934 million ha of unsurveyed State land had been surveyed and submitted to the Deeds Office for registration since 2004. The separation of private and State land has also been completed, but some 111 000 land parcels of State land still needed to be re-verified. This phase was expected

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[4]http://www.pmg.org.za/files/doc/2013/billsprogress.pdf.

[5]http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/1gl_gwB7m7KnFOnXYfkqWw9tC5Y2D3UytfTnjML5MiE/mtime:1362130996/files/docs/130227survey.pdf.

to be completed by March 2013. The second phase involves the collection and verification of detailed property data, including establishing the exact location, extent, what improvements had been made and how the land was utilised by all the State entities. No target date was provided for the completion of the second phase. During the meeting[6] it became evident that large tracts of unregistered vacant land, communal settlement areas and non-vested immovable State assets existed, particularly in the Eastern Cape, Limpopo and Mpumalanga. In this regard the Auditor-General had issued adverse audit findings to State entities that had been unable to ascertain the extent of the immovable property under their control.

The DRDLR stated that the 2.7 million ha of land owned by the Ingonyama Trust Board (IBT) in KwaZulu-Natal was included in the data for State land, as well as all registered State Domestic Facilities (SDF's) on land owned by IBT. State-owned land that was in the process of being transferred to private ownership was also classified as State land. State-owned land and land acquired by the State under the land reform programmes that had been transferred to beneficiaries was included in the data on privately-owned land. Land owned by traditional authorities in the Eastern Cape and registered by the Deeds Office was also included in the data for privately-owned land. The same applied to land owned by the Royal Bafokeng and other tribes. However, there were a substantial number of surveyed but unregistered land parcels in the Eastern Cape.

The Deeds Office had not recorded the racial classification of the owners of land since 1994, and had requested the assistance of the Department of Home Affairs (DHA) in this regard. The Statistician-General would also be approached but it was not clear if Statistics South Africa (StatsSA) had such information. The Registrar of Companies might also be able to provide information on the racial composition of the owners of companies that owned land, and the DRDLR was working with the Masters of the High Court to obtain information on the more than 100 000 trusts that owned parcels of land. One of the challenges was that the data on trusts was paper-based and the exercise to extract information is very time-consuming. The DRDLR was unable to provide data on how much land was available for land reform. Although vacant, unused land had been identified, such land was not necessarily suitable for transfer. The DRDLR acknowledged the possibility that there were areas that had not been identified, as the data provided had been sourced from the Deeds Office in 2012 and needed to be brought up-to-date. There was currently no electronic interface between the DRDLR and the Deeds Office. The information provided in the briefing referred only to land that had been registered at the Deeds Office, and as such certain parcels of land had not yet

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[6] http://www.pmg.org.za/report/20130327-drdlr-report-survey-registration-all-state-land-well-creation-compreh.

been registered and were excluded from the data provided. The information would be made available to the various State entities once the register was completed.

In *Adlem v Arlow* ((782/11) [2012] ZASCA 164 (2012-11-19)) the Supreme Court of Appeal held that a 'portion' mentioned in section 3(d) of the Subdivision of Agricultural Land Act 70 of 1970 'must be interpreted as meaning a part of property (as opposed to the whole property) registered in the Deeds Registry, and not as having the meaning used in the Deeds Registry to describe the whole property ... section 3(*d*) of the Act does not on the appellants' case apply to the lease in question as the whole of the property owned by the respondent was leased to the appellants.'

9 Sectional titles

A Sectional Titles Amendment Bill, 2012 was published for comment (GN 808 in *GG* 35766 of 2012-10-05). Several definitions are clarified, namely that of 'architect, 'developer' and 'land surveyor'. Section 7(2A) exempts the Surveyor-General from the 'responsibility to investigate the correctness or accuracy of documentation relating to the subdivision, consolidation and extension of sections and the extension of sectional title schemes' (Memorandum – see also the proposed amendments to s 25). This has led to problems and therefore the Surveyor-General will in future be responsible to investigate the correctness and accuracy of any documents submitted to him or her (cl 3 amending s 7(2A)). Section 14(8) is to be amended to ensure that the registrar endorse records in the prescribed manner (cl 4). Section 15B(7)-(10) is to be inserted (cl 5) to provide that an owner who wants to register a fraction of an undivided share of a section may obtain a certificate of registered sectional title upon written application. The application must be accompanied by the sectional title deed of the unit, any mortgage bonds registered against the unit and the certificate of registered sectional title deed. Section 17 is to be amended to provide that owners of sections and holders registered rights over sections must give written consent before a part of the common property is transferred (ss 17(4A)(bA) and 17(4C) – cl 6). Section 19 is to be amended to make provision for the cancellation of registration of part of a section (of the common property or rights therein) pursuant to an expropriation (cl 8). Section 25(1) includes bondholders in the decision-making of the body corporate when a scheme is extended on unanimous resolution of that body corporate (cl 10).

A notice of intention to file lost or destroyed documents in terms of regulation 25A was published in relation to the City of Tshwane Metropolitan Municipality (GN 607 in *GG* 35552 of 2012-08-03).

10 Surveying

Intention was given to introduce a Geomatics Profession Bill, 2012 in Parliament (GN 850 in *GG* 35801 of 2012-10-22). The Bill is introduced to transform the

surveying profession to serve the interest of the profession, public and for the benefit of present and future generations.

11 Expropriation

Another Draft Expropriation Bill is published for public comment (GN 234 in *GG* 36269 of 2013-03-20). According to the Memorandum, the 'Draft Bill seeks to align the Expropriation Act with the Constitution and to provide a common framework to guide the processes and procedures for expropriation of property by organs of state'. The Minister may expropriate property for a public purpose or in the public interest, subject to the obligation to pay compensation (cl 3). 'Property' is 'not limited to land and includes a right in or to such property' and the 'public interest' carries a corresponding meaning to the definition of 'public interest' in section 25 of the Constitution. A 'public purpose' 'includes any purposes connected with the administration of the provisions of any law by an organ of state' (cl 1). The Minister may expropriate property on behalf of juristic persons for a public purpose or in the public interest if the juristic person has failed to reach an agreement with the owner of the property to purchase the property on the open market (cl 4). The procedures for expropriation are described in clause 4. The expropriation is subject to the payment of compensation (chapter 5). Chapter 3 makes provision for investigation and valuation of the property. The expropriating authority may take the factors into account that are also listed in section 25 of the Constitution, for example, direct state investment and subsidies in the property as well as other relevant factors, which are not described (cl 6). If land is to be expropriated the municipality must be informed (cl 7). Extensive procedures need to be followed before expropriation may take place (cl 8-9, 25). The expropriated property remains subject to all registered rights in favour of third parties (except mortgages – cl 10(1)(d)). Clause 10 also describes the vesting of the expropriated property. It is not only the ownership of the property that would vest in the expropriating authority but also all unregistered rights in such property. If a right of use is taken – then the owner's right to use as well as unregistered rights are temporarily suspended, but not his or her registered rights in the property (cl 10(1)(c)). A procedure is established to determine unregistered rights in expropriated property (cl 11). All parties will have a right of access to the courts (cl 22). The Bill also provides for urgent expropriation and taking a right to use in the case of, for example, disasters (cl 23). The Minister may also withdraw expropriations (cl 24). The Director-General must open and maintain a register of all expropriations (whether intended, effected or withdrawn) (cl 26). All existing legislation regulation expropriation will have to comply with the provisions of this 'Act' (cl 29). Members of the public were invited to comment on the Bill until 13 May 2013 (GN 449 in *GG* 36437 of 2013-05-06).

12 Minerals

In *Minister of Mineral Resources of the RSA v Sishen Iron Ore* ((394/12) [2013] ZASCA 50 (2013-03-28)) it was decided that the '(e)ffect of failure of one co-holder of an "old order mining right" to convert that right in accordance with Item 7 of Schedule II to the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) is that on the expiry of the prescribed five year period that co-holder's undivided share in the "old order mining right" ceases to exist as provided by Item 7 (8) of Schedule II and the co-holder whose undivided share in the right has been converted becomes the sole holder of the mining right in terms of the MPRDA. The Minister therefore cannot allocate the share of the "old order mining right" that was not converted or any share of the mining right in terms of the MPRDA.'

13 Agriculture and rural development

13.1 Agriculture

According to its Organisational Performance Report for Quarter 3,[7] the Department of Agriculture, Forestry and Fisheries (DAFF) directly contributes to Outcome 4 (decent employment through inclusive economic growth), Outcome 7 (vibrant, equitable and sustainable rural communities contributing towards food security for all) and Outcome 10 (protect and enhance our environmental assets and natural resources) (4). The strategic priorities for the financial year are creating employment by increasing the number of participants in the agricultural, forestry and fisheries sectors through support for smallholders and processors; improving the food security initiative by coordinating production systems to increase the profitable production, handling and processing of food, fibre and timber products by all categories of producers; improving the income and conditions of farm workers, foresters and fishers; enhancing exports by facilitating market access for agricultural, forestry and fisheries products; and ensuring the sustainable use of natural resources (5).

At the end of Quarter 3, some 3 473 smallholder producers have been assisted with loans, against the full year target 5 000 (12). A cumulative 63 088 beneficiaries were supported through CASP, more than the target of 15 000.With regards to Ilima Letsema, a cumulative total of 59 641 beneficiaries were supported, in excess of the target of 30 000 (13). A draft Intergovernmental Strategy was developed, a finalised Stakeholder Engagement Strategy is awaiting departmental approval, and a Communication Strategy is being implemented (16). Of the 28 Acts set to be reviewed, 1 Bill has been finalised by Parliament, while 7 were being finalised.

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[7] http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/8ozIZU6rv-va0G99P4s-uPIGF0WNJi1dKXFkLZe2Q9Q/mtime:1363270028/files/docs/130312daff.ppt.

Through Programme 2: Agricultural Production, Health and Food Safety, 865 producers participated in animal production schemes, 113 pig farmers benefitted from the pig commodity strategy (20), and 350 vegetable farmers were supported (23). The Veterinary and Para-Veterinary Professions Amendment Bill was signed by the President, which was the first step in implementing the compulsory community service framework (21).

Programme 3: Food Security and Agrarian Reform finalised a Draft Food Security Policy, which is expected to be tabled in Parliament (28). The principles of the Zero Hunger Campaign are being implemented through the Public Private Partnership (PPP) for Food Security, Nutrition and Health (29). A mechanisation policy for household food production support was developed and distributed for comments within DAFF, and some 504 tractors were delivered through the Tractor Scheme. One of the shortcomings in this respect was that production is not linked to mechanisation statistics (31). The discussion in the Portfolio Committee on 12 March 2013[8] also revealed that many a number of tractors were delivered to municipalities, but never distributed to beneficiaries. An Extension Recovery Plan and Draft National Extension Policy were developed and undergoing departmental approval (32; 34). A cumulative total of 15 899 smallholder producers were trained (35). Seven colleges of agriculture received accreditation from the Council of Higher Education to offer 3-year diploma programmes (36). Through Programme 4: Economic Development, Trade and Marketing, 96 cooperatives involving 853 farmers have been established during the financial year (40).

The challenges and future focus areas of DAFF include strengthening interdepartmental cooperation and collaboration for the development of production infrastructure and other supporting policies and programmes; facilitating implementation of food security production interventions targeting an additional one million hectares for production; improving cooperation with provinces and local government to enhance governance; and accelerating collaboration with stakeholders through existing forums (76).

On 15 April 2013, an official from the Auditor-General of South Africa (AGSA) briefed the Portfolio Committee of Agriculture, Forestry and Fisheries on the progress DAFF has made compared to the previous audit cycle.[9] According to the previous year's audit outcomes, DAFF was financially unqualified, with findings.[10] During the 2011/2012 financial year, DAFF did not achieve 51 per cent of its planned targets as indicated in its Strategic Plan, despite spending 99 per cent of its allocated budget

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[8] http://www.pmg.org.za/report/20130312-department-agriculture-forestry-and-fisheries-third-quarterly-expendi.

[9] http://www.pmg.org.za/report/20130416-auditor-general-briefing-key-issues-in-department-and-entities-strategic-plans-and-budgets.

[10] http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/S0lFmbfF-tgF77-aRYNmN58CBSCiTVsQY7yd93FRW-0/mtime:1366378995/files/130416agsa_0.ppt.

(25). In addition, there was an urgent need for DAFF to align its strategic objectives to the National Development Plan's objectives to 'realise a food trade surplus, with one third produced by small-scale farmers or households' (26) and 'ensure household food and nutrition security' (27). AGSA identified four issues, mainly related to monitoring and control of the plans of the Department, which needed to be addressed to achieve a clean audit outcome by 2014. These are the lack of monitoring of compliance with laws and regulations, the lack of discipline of credible comprehensive monthly reporting, the ineffective internal audit function, and the lack of skills and policies to achieve pre-determined objectives (11). Although DAFF has drafted an audit matrix action plan and have enhanced monitoring on a quarterly basis, repeat audit findings were still occurring (13). This could be attributed to a number of factors, including non-review of compliance with laws and regulations, incomplete reported disclosure notes, insufficiently implemented actions plans, lack of understanding of the principles of the Framework for Managing Programme Performance Information (FMPPI), and lack of oversight responsibility regarding compliance and reporting (14).

13.2 Rural development and land affairs

The DRDLR's Annual Performance Plan 2013/2014 (APP)[11] indicates that the DRDLR's strategy is agrarian transformation, to be achieved through the Comprehensive Rural Development Programme (CRDP). In this regard the priorities articulated in the 2011-2014 Strategic Plan remain unchanged for the 2013/2014 financial year, with the DRDLR continuing to lead the coordination of Outcome 7(3), and contributing to Outcomes 4, 6, 9 and 10. However, the DRDLR reviewed, modified and/or amended a number of its strategic objectives in February 2013 in order to adopt a results (outcomes) based approach and to align to the revised Outcome 7. In this regard, a new strategic objective, 'tenure security for people living on commercial farms and communal areas provided', was introduced in the 2013/14 APP to highlight the importance of protecting tenure rights of people living in communal areas (4).

The DRDLR spent 98.3 per cent of its allocated budget of R 8 974 085 000 during the 2011/2012 financial year (15), and the budget for the 2013/2014 financial year amounts to R 9 459 740 000 (8). A total of 6 971 293 ha of land have been acquired between 1994 and 2012 (34), of which 1 038 062 ha was acquired for redistribution purposes (vi). 1 052 land claims have been settled, and 725 farms have received support from the Recapitalisation and Development Programme (RADP). Some 428 farmers were provided with training in agriculture and business management. By October 2011, the CRDP was being implemented at 65 sites across the country. Priority infrastructure needs have been identified in the 23

[11] http://www.ruraldevelopment.gov.za/publications/annual-performance-plans/file/1825.

poorest District Municipalities, with plans being finalised for approval to leverage necessary resources as part of the CRDP rollout (vi). The 2014 CRDP target is 160 sites (iii).

The DRDLR has started a process of reviewing its current policies in order to accelerate the pace of land reform. In this regard, the willing buyer willing seller approach has been rejected. Policy frameworks under discussion include the establishment of the Office of the Valuer-General, the Land Rights Management Board and the Land Management Commission (iii). Work is also being undertaken on a Restitution Policy Framework, Rural Development Policy Framework, Rural Development Agency Policy, Rural Cooperative Financing Facility and a Policy Framework on Communal Land Tenure (7). Finally, an Intergovernmental Relations Framework/Policy will be developed and implemented (4). As part of the Green Paper development process, the DRDLR, together with a National Reference Group, are also evaluating a number of additional policy proposals relating to land tenure security and evictions, common property institutions, land ownership by non-South Africans and communal area land reform. A number of legislative initiatives are planned for 2013/2014, including a Land Valuation Bill, Land Protection Bill, Land Management Commission Bill, Communal Property Associations Amendment Bill, and an (Amendment) Extension of Security of Tenure Act (16). With regard to the Restitution Programme, the DRDLR aims to settle 230 claims and have 208 backlogged claims finalised in the 2013/2014 financial year (28).

The Land Reform Programme's goals include the confirmation of 533 land parcels vested as part of its integrated planning, spatial information and administrative system, and the acquisition and allocation of 311 917 ha of strategically located land. Some 628 farmers will be trained and 344 additional farms will be recapitalised under RADP. As part of the new strategic objective, 'tenure security for people living on commercial farms and communal areas provided', the DRDLR aims to settle 76 labour tenant applications, resolve 100 per cent of reported eviction cases as well as 100 per cent of land rights cases referred to the Land Rights Management Facility (31). District Land Reform Committees will also be established to fast track delivery of sustainable land reform during the 2013/2014 financial year (vi).

The APP states that the NARYSEC youth will play a crucial role in informing the public on the centenary of the 1913 Land Act through, amongst others, conducting door-to-door campaigns informing communities about their rights and collecting and recording oral history (vii-viii).

Juanita Pienaar (US)
Willemien du Plessis (NWU Potchefstroom)
Nic Olivier (UP)