Commentary

Land Matters and Rural Development: 2017(1)

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General

Land remains a controversial political issue and it seems that the numerous policies, legislation and proposed new legislation and amendments to legislation will not pacify those who live with broken promises.[1] It is not only access to rural land that remains an issue, but many people living in urban areas do not have title deeds to their homes.[2] It is, however, not only a matter of granting land: in order for land reform to be effective, the Minister of Rural Development and Land Reform indicated that the Department of Rural Development and Land Reform (DRDLR) will monitor the use of land that was redistributed and restituted. If the land is not properly used, it will have to be returned for the purposes of reallocation.[3] The minister further indicated that 'comprehensive land audits' need to be undertaken to determine to whom the land belongs in South

1 See in this regard Marianne Merten, 'Analysis: On Land Issues, ANC Lacks Clarity and Determination' *Daily Maverick* (17 April 2017) <https://www.dailymaverick.co.za/article/2017-04-17-analysis-on-land-issues-anc-lacks-clarity-and-determination/#.WcEZw7IjHIU> accessed 18 April 2017. New Bills include, for example, the Extension of Security of Tenure Amendment Bill, 2015 and the Regulation of Agricultural Land Holdings Bill, 2017.

2 Noah Schermbrucker, Victoria Mdzanga and Christine Botha, 'Hundreds of Thousands of Homeowners Do not Have Title Deeds' *GroundUp* (6 June 2017) <http://www.groundup.org.za/article/hundreds-thousands-homeowners-do-not-have-title-deeds/> accessed 7 June 2017.

3 Anonymous, 'Policy: Use It or Lose It Land Reform "Project" Kicks In?' *Legalbrief Today* (8 May 2017).

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Africa.[4] In this note on land, the most important measures and court decisions pertaining to restitution, land reform, unlawful occupation, housing, land-use planning, deeds, surveying, rural development and agriculture are discussed.[5]

Keywords: land reform; restitution; redistribution; tenure reform; eviction; housing; survey; rural development

Land Restitution

While some land claims have been settled, other communities are still disputing how they should be compensated. For instance, in the Peddie region some members of three communities agreed to receive one hectare per household. The claim involves '80 farms spanning 43 000 ha in the Fish River and surrounding regions'[6] and the District Six claimants stated that they are tired of waiting twenty years either for a home or for compensation.[7]

During the window period, before the amendments to the Restitution of Land Rights Act 22 of 1994 (Restitution Act) were declared unconstitutional, 14 000 new land claims were instituted in the eThekwini Metropolitan area. In the period July 2014 to July 2016 claimants lodged approximately 39 730 new claims in KwaZulu-Natal, and in South Africa as a whole approximately 163 000 claims were lodged.[8]

Restitution of Land Rights Act 22 of 1994

In terms of the Restitution Act, election rules pertaining to the investigation of certain claims were published.[9] The notice follows a court directive of Bertelsman J, where one Frantz instituted a land claim on behalf of the Community of Saron and the 'Saron Sendingstasie'.[10] As a result of a dispute as to whether he had the right to represent the community, the Court directed that the 'lawful individual members of the claimant communities and their lawful representative(s)' must be determined before the land

4 Bekezela Phakathi, 'Minister Admits to Significant Gap in Land Audits' *BusinessLive* (22 May 2017) <https://www.businesslive.co.za/bd/national/2017-05-22-minister-admits-to-significant-gap-in-land-audits/> accessed 28 August 2017.

5 This note focuses in essence on the most important literature, legislation and court decisions published during the period 30 November 2016 to 31 March 2017. Some information may be of a later date.

6 Anonymous, 'Land Claims: Community Agrees to One Hectare per Household' *Legalbrief Today* (9 May 2017).

7 Anonymous, 'Land Claims: District Six Claimants Demand Homes' *Legalbrief Today* (9 May 2017).

8 Anonymous, 'General: Land Claims Held Up by Parliament' *Legalbrief Today* (31 May 2017).

9 Claim reference no F284 [KRK 6/2/2/A/1/0/0/1] and F462 [KRK 6/2/3/A/41/241/0/18]—Gen N 866 in GG 40480 (9 December 2016).

10 Land Claims F284 and F462 and the court directive was issued under LCC1222012 and LCC129/2012 on 13 November 2015—see Gen N 866 in GG 40480 (9 December 2016).

claim could be resolved.[11] To enable the process, the Chief Land Claims Commissioner (CLCC), in consultation with the Minister of Rural Development and Land Reform, compiled rules to ensure due process in this regard.[12] In terms of these rules, the CLCC must appoint a genealogical researcher to assist him or her with determining the identity of the claimants[13] and must also appoint a chairperson to convene meetings in terms of the rules. One such meeting is to be held with the applicant and the various church councils or controlling bodies that may be involved in the claim.[14] The election of representative members of the community and the publication of notices are also regulated.[15] It is the first notice of its kind that has been published since 1994 and it is an interesting way of resolving disputes among claimants.

The Office of the Regional Land Commissioner of the Western Cape invited tenders on behalf of the Covie Communal Property Association (CPA) for the development of their restituted land.[16] The development could, over and above the housing component, include 'business opportunities relating to eco-tourism, environmentally oriented commercial activities, community facilities, small-scale agricultural activities and home-based economic activities.' It is also the first notice of its kind to have been published.

Notices

Numerous land claim notices were issued during the period November 2016 to June 2017: the number issued in each district seems to indicate that the various land claims commissioners are trying their level best to finalise the outstanding claims. The table below shows the number of claims instituted.

Table: Number of land claims instituted per province and area, November 2016 to June 2017

11 Rule 2 Gen N 866 in GG 40480 (9 December 2016).
12 The rules were compiled in terms of ss 10(4) and 16 of the Restitution of Land Rights Act 22 of 1994.
13 Rule 3.1 Gen N 223 in GG 40691 (17 March 2017).
14 ibid; Rule 3.5 lists the Verenigde Gereformeerde Kerk Gemeente of Saron; the Apostoliese Kerk; the Nuwe Apostoliese Kerk; the Baptist Church and the Seventh Day Adventist Church.
15 Rule 3.5 (n 14); Rules 4 and 5.
16 Gen N 223 in GG 40691 (17 March 2017). See also Gen N 38 in GG 40577 (27 January 2017) pertaining to an additional tender.

Province	Area	No of claims	No of amendment notices	No of withdrawals
Eastern Cape	Colchester		1	
	Dordrecht		1	
	Flagstaff		1	
	Grahamstown	2		
	Indwe		1	
	Kirkwood		1	
	Lady Frere/Chris Hani	4		
	Matatiele		1	
	Mount Currie		1	
	Port Elizabeth/Cacadu	6		
	Qumbu		1	
	Sterkspruit		1	
	Umthatha	2		
Former KwaNdebele	Ekangala		1	1
	Metsweding		1	
	Sedibeng		1	
KwaZulu-Natal	Alfred District Municipality	1	3	7
	Babanango	1		
	Camperdown	2		
	Dannhauser	3		
	Eden District Municipality	1		
	eThekwini	45		
	Impendle	1		
	Inanda	2		
	Klip River	7		
	Ladysmith	7		
	Lions River	5		
	Lower Tugela	1		
	Lower Umfolozi	2		
	Maphumulo	1		
	Melmoth	1		
	Mhlabathini	2		
	Mooi River	1		
	Newcastle	1		

	New Hanover	1		
	Port Shepstone	2		
	Richmond	1		
	Stanger	2		
	Umgungundlovu	14		
	Umzinto	3		
	Utrecht	3		
Limpopo	Lephalale	2	7	
	Mogale	1		
	Polokwane	2		
	Sekhukhune	3		
	Vhembe	5		
	Waterberg	1		
Mpumalanga	Albert Luthuli	1	2	
	Bethal	2		
	Burgersfort	1		
	Bushbuckridge	2		
	Dipaliseng	1		
	Ehlanzeni	2		
	Emalahleni	4		
	Emakhazeni	6		
	Govan Mbeki	2		
	Greater Tzaneen	1		
	Kungwini	2		
	Nkangala	6		
	Nkumazi	1		
	Peddie/Amatole	2		
	Steve Tshwete	7		
	Thaba Chweu	6		
	Umjindi	1		
	Victor Khanye	2		
Northern Cape and Free State	Gasegonyana	1		
	Kenhardt	1		
	Kimberley	2		
	Thabo Mofutsanyane	1		
North West and Gauteng	Bojanala	2		
	Dr Ruth Segomotsi Mompati	3		
	Ekurhuleni	3		
	Johannesburg	3		

	Ngaka Modiri Molema	2		
	Tshwane	4		
Western Cape	Arniston	1	2	
	Bonnievale	1		
	Camps Bay	1		
	Cape Town	54		
	Cederberg	1		
	Darling	1		
	De Rust	1		
	Doornbaai	1		
	George	1		
	Grabouw	1		
	Michell's Plain	1		
	Montagu	1		
	Oudtshoorn	2		
	Paarl	2		
	Pelikan Park	1		
	Piketberg	1		
	Porterville	1		
	Riversdale	1		
	Simon's Town	1		
	Stellenbosch	1		
	Strand	2		
	Tulbagh	2		
	Uniondale	2		

Case Law

South African Riding for the Disabled Association v Regional Land Claims Commission[17] deals with an application for leave to appeal against an order of the Land Claims Court (LCC), in terms of which a request to intervene in proceedings that were served before the LCC was dismissed with costs. The LCC refused leave and a subsequent petition to the Supreme Court of Appeal (SCA) was also unsuccessful. The application relates to the interpretation and application of especially section 39(5) of the Restitution Act. The facts were briefly the following:[18] the applicants, the Association, had been in occupation (under a lease) of a parcel of land belonging to the State (Erf 142, Constantia) for 34 years. Following a successful land claim lodged by the Sadien family, the Court ordered the transfer of Erf 1783, Constantia, to the claimants. After

17 Case CCT 172/16, 23 February 2017, Constitutional Court.

18 ibid paras 3–8, generally.

the order was granted, it transpired that the land awarded was substantially smaller than the land lost by the family. Accordingly, the land was substituted by way of a variation order, resulting in Erf 142, occupied by the applicants, being awarded. This variation occurred without the knowledge of the applicants and without their having the opportunity to claim for compensation for improvements effected on the land, as provided for in section 35(9) of the Act. The Association forthwith applied for leave to intervene and also applied for the rescission of the variation order, under section 35(11) of the Act. On the basis of a finding by the LCC that the applicants had no direct and substantial interest in the remedy sought by the Sadien family, the application for leave to intervene was rejected, by both the LCC and the SCA.

In this context the Court, *per* Jafta J, first dealt with intervention. It was trite that a legal interest in the subject-matter of the case was called for before leave to intervene may be granted.[19] This required the existence of a right that would be adversely affected or would be likely to be affected adversely by the order sought. If there is indeed a right that will be affected by the order sought, then permission to intervene must be granted.[20] In this process it is important to note the distinction between having no interest in the subject-matter as such (eg the restitution claim and whether it should be successful) and the impact of the variation order granted without offering the Association the opportunity to have its compensation determined. Section 35(9) provides specifically that, where land is State land, the lawful occupier of it 'shall be entitled to just and equitable compensation determined, either by agreement or by the Court.'[21] The underlying motivation for the provision is to enable restitution in respect of land that is State-owned, even when it is occupied by third parties.[22] However, as the lawful occupiers will be losing their occupation and may have effected various improvements to the land, they must be compensated, which compensation must be just and equitable.

Approached from this perspective, section 35(9) confers an entitlement to lawful occupiers of State land, caught in the cross-fire, where restitution occurs. It is the determination of just and equitable compensation that gave rise to the direct and substantial interest of the applicants.[23] In these circumstances the award of land was therefore conditional on the determination of just and equitable compensation for the lawful occupiers.[24] Accordingly, the Association was entitled to intervene and enforce its right to compensation. This interest did not extend to the question whether Erf 142 should be restored or not. The issue at hand was therefore not the merits of the case. In

19 ibid para 9.
20 ibid paras 10–11.
21 ibid para 13.
22 ibid para 13.
23 ibid para 15.
24 ibid para 16.

this regard the LCC was correct in its finding that the Association did not have a direct interest in the restitution as such and could therefore not seek the rescission of the restitution order:[25]

> But the Court was in error when it overlooked the statutory right to compensation conferred on a lawful occupier like the Association and that the transfer of the property was subject to the determination of just and equitable compensation.

The respondents conceded the Association's right to compensation. The Commission on the Restitution of Land Rights (Commission), however, continued to advance the incorrect argument that the applicants had a 'mere financial interest' which did not entitle them to intervene. To that end the appeal was successful, the matter was remitted to the LCC for determination of the compensation payable and the Regional Land Claims Commissioner was ordered to pay costs.[26]

This case successfully draws distinctions between the subject-matter generally, namely, the restitution claim as such (the merits), and matters integrally linked to the claim but not necessarily tied to the merits. These guidelines will help greatly to avoid future uncertainties.

Minister of Rural Development and Land Reform v Ivor Leroy Philips[27] deals with an appeal against an order handed down in the LCC that the respondent be paid R14 785 000 pursuant to having been dispossessed of certain farming properties in the Eastern Cape under a past racial law for which just and equitable compensation had not been paid.

The case has a very long history.[28] The respondent owned two farms in the Eastern Cape on which a thriving farming enterprise was conducted. In 1977 the respondent was forced to sell the farms under duress to the South African Development Trust for R475 000, under the Development Trust and Land Act 18 of 1936, in the pursuit of grand apartheid and linked to forming the Ciskei homeland. On the basis that the area in which the farms were located was declared a 'released area', the land was to be incorporated into Ciskei. When the Restitution Act commenced, the respondent lodged a claim under section 2 of that Act. It took a period of six years for the second applicant, the Regional Land Claims Commissioner, to accept the claim as a valid claim and a further six years to have the claim referred to the LCC under section 14 of the Act. In the process of referral, the Commission disputed that it was a valid claim, averring that just and equitable compensation had already been paid. At that stage, on referral, the

25 ibid para 19.
26 ibid para 22.
27 Case no: 52/2016, 22 February 2017, Supreme Court of Appeal.
28 ibid paras 4–8 for background.

Commission argued that one of the threshold requirements had not been met, thereby disqualifying the claim.

When the trial commenced—which was supposed to deal with just and equitable compensation only—the Commission withdrew its admission that a dispossession had occurred. That latter matter was to be decided separately and was finally concluded in the affirmative.[29]

Refusing the outcome, the applicants lodged an appeal to the SCA contending, inter alia, that as a white person, the respondent did not fall in the category of persons who qualify as claimants. This remained their stance, despite a strong body of case law to the contrary.[30] Leave to appeal was refused in the SCA as well as in the Constitutional Court (CC), the courts finally concluding that dispossession had indeed occurred, leaving only the matter of compensation to be addressed.

Following the methodology and guidelines provided in *Florence v Government of the Republic of South Africa*,[31] the SCA proceeded to assess the financial loss.[32] The exceptional agricultural qualities of the land in question were highlighted in paragraph 14 of the judgment, emphasising that, altogether, they provided ideal conditions for a very successful farming enterprise. When dispossession took place in 1977 the respondent received compensation totalling R475 700.[33] Despite discrepancies and shortcomings in the methodology and approaches, the applicants and valuers acting on their behalf insisted that compensation paid was adequate. However, in the course of argument, the applicants contended that compensation to the amount of R3 209 000 would be adequate, without any explanation as to how they had reached that conclusion. Instead, seemingly 'random and unmotivated figures unsupported by evidence only at the stage of argument'[34] were forwarded.

During the appeal the applicants again changed stance and contended that sufficient compensation had indeed been awarded previously and that no additional compensation had to be paid.[35] On the basis that insufficient compensation was paid, the respondent relied on professional valuers and their methodology, set out in detail in paragraph 19 of the judgment. Interestingly, with the homeland project in mind, a specific committee was established to determine an acceptable set of norms for acquisitions to follow. Their conduct and records would be instrumental in these kinds of case. The methodology

29 ibid para 10.
30 ibid para 11.
31 2014 (6) SA 456 (CC).
32 ibid para 13 and further.
33 ibid para 16.
34 ibid para 17.
35 ibid para 18.

followed by the applicants, essentially entailing a desk-top analysis with no inspections of properties at all, was heavily criticised by the Court.[36] The LCC thereafter re-evaluated the properties in its capacity as 'super valuator', reached an estimation and adjusted it downward in the light of the guidelines laid down in the *Florence* judgment.[37] Factors that guided the downward adjustment included the concerns of the national *fiscus* in a strained economy and the interests of society where numerous claims still had to be adjudicated on.[38] Ultimately, the amount of R14 785 000 was calculated and awarded.

It was the above finding—namely, the value of the properties—that was the ground for appeal.[39] However, at the outset of the hearing in the SCA, the applicants accepted that the criticism against their valuation was sound and therefore conceded. But this did not conclude the matter. Instead, the applicants argued that the result was not 'redress' as understood in section 25(7).[40] The point of departure was that the LCC had misdirected itself in the sense that it was bound to compensate the respondent, which was not the same as redress. Instead, it was argued that the respondent could have refused the sale and would then have to be expropriated, during which time he could have contested the compensation. Furthermore, because he was able to purchase land with the award, he would then be in as good a position as if the dispossession had not taken place.[41]

In this context, Leach JA relied heavily on Judge Moseneke's judgment in *Florence*,[42] where it was emphasised that restitution in South Africa is a unique process and that the structure of the Act as a whole had to be kept in mind.[43] Dispossession, as tragic as it may be, could not be overlooked and ignored in order to determine what could have been the result had the dispossession not occurred. It is useless to speculate. What has to be done, in the light of the unique needs and demands of the restitution programme, is to determine the compensation at the time of loss and to calculate whether that had been just and equitable. What the person did with the money received as compensation furthermore had little to do with the question of whether the compensation was just and equitable.[44] The argument that the respondent could have waited for expropriation loses sight of the fact that the threat of expropriation was indeed part of the duress to sell the

36 ibid para 21.
37 ibid paras 22–23.
38 ibid para 24.
39 ibid para 25.
40 ibid para 28.
41 ibid para 29.
42 ibid paras 30–32.
43 See, for an analysis of the judgment, Juanita M Pienaar, 'Land Reform and Restitution in South Africa: An Embodiment of Justice?' in J de Ville (ed), *Memory and Meaning* (LexisNexis 2015) 141–160.
44 ibid para 30.

land.[45] In essence, these arguments again intended to resuscitate the issue that the respondent was not dispossessed—a matter that had already been finalised.[46]

The SCA further underlined that, because the LCC was a specialist court, interference by the SCA in the Court's exercising their discretion was not without limit.[47] Such interference was possible only when the discretion was not exercised judicially or it was influenced by incorrect principles. This had not been the case.[48] Accordingly, the applications for condonation of the late filing of the record of proceedings and for appeal were dismissed. In the light of the conduct of the Commission, a costs order was awarded against the Commission in the LCC, which was confirmed by the SCA.

The Commission's continued insistence that no dispossession had occurred is problematic. The Restitution Act is specifically drafted in a neutral form in that any person who was dispossessed, irrespective of their racial background, can lodge a land claim, providing the requirements had been met. While 'dispossession' is a crucial element in the overall requirements for lodging a claim, no definition is found in the Act itself. Accordingly, the courts are tasked with interpreting and delineating the concept. Given that the approach to interpretation is purposive and generous rather than limited and legalistic *per se*, a strict property-law approach to 'dispossession' would not be followed here. Instead, a broad approach is acceptable. In *Randall v Minister of Land Affairs, Knott v Minister of Land Affairs*,[49] too, it was found that the forced sale of land under the homeland consolidation provisions constituted dispossession under section 2. As in the case at hand, this approach also had an impact on white landowners. Not only was the manner in which the properties were acquired problematic, but so too were the structures of the purchase prices offered. For example, a portion of the purchase price was paid by way of registered stock, whereas the rest was paid in cash. Landowners therefore had no choice regarding the manner in which the purchase price was to be paid and when government stock was eventually redeemed, it was often much less than its face value. A similar approach was also followed in *Regional Land Claims Commissioner v Jazz Spirit 12 (Pty) Ltd*,[50] where the Court found that a sale on auction to private individuals constituted a dispossession for the purposes of the Act.[51]

45 ibid para 32.
46 ibid.
47 ibid para 33.
48 ibid.
49 2006 (3) SA 216 (LCC).
50 Unreported, referred to as LCC 26/10, [2012] ZALCC 17, 7 December 2012.
51 However, in *Department of Land Affairs v Witz, In re Various Portions of Grassy Park* 2006 (1) SA 86 (LCC), a sale of properties under the Group Areas Act 36 of 1966 was not found to be a dispossession for the purposes of the Act because the owner, Witz, was a 'disqualified person' when he purchased the properties in the first pace and thereafter managed to hold on to the properties for many years after the area was proclaimed. This judgment emphasises that not all sales under the Group

Irrespective of the specific financial position of the landowners, they had been forced to sell property when the area was proclaimed a white group area. The market in which they had had to operate was furthermore not an 'open market' as it is usually understood. Ample support for a broad interpretation of 'dispossession' was therefore available.

In *Ralph Daniel Jacobs v The Department of Land Affairs*[52] the Court dealt with determining compensation as the final conclusion of a restitution claim. Two claims were initially lodged: one dealing with the loss of residential property, Erf 38, in Upington, and the other with the loss of a farm, Uap. With regard to both claims the merits were dealt with first, which resulted in the reported judgment of *Jacobs NO v Departement van Grondsake*.[53] This was an interesting judgment as it further expanded and elaborated on the phrase 'as a result of racially discriminatory law or practice'.

Having dispensed with the merits of the land claims, the next step was to award just and equitable compensation, because specific restoration was not sought, but financial redress instead. In the course of 2016 the LCC awarded compensation in the amount of R10 million for the loss of the farm, 'Uap', the judgment being reported as *Jacobs v Department of Land Affairs*.[54] Now before the Court was the matter of awarding just and equitable compensation to the claimants in respect of the loss of Erf 38. The important facts that are relevant to the issue before the Court are briefly the following:[55] because quitrent had remained unpaid for at least five years in relation to Erf 38 as a result of the maladministration of various officials and the negligence of the magistrate, subsequent to the death of Catharina Beukes in 1918, the erf was abandoned, deserted and left derelict. Because of the dereliction, the quitrent was cancelled in 1925 and the erf was acquired by the State, resulting in its loss by the family of Catharina Beukes. The large September family, however, resident on the farm 'Uap', was evicted in 1921, resulting in the dispersal of the family and concomitant hardship. When the quitrent in relation to Erf 38 was cancelled, it was unoccupied and no compensation was paid.

The LCC was now tasked with determining compensation for the Jacobs family, descendants and claimants in relation to Erf 38 only. Before focusing on the specifics of the case, Murphy J (assisted by Mr Nongalaza as assessor) provided ample background regarding the approach to compensation in the context of restitution.[56]

Areas Act would *automatically* qualify for the purposes of s 2. Instead, each case would have to be approached on its own merits.

52 Case no LCC120/99, 6 January 2017, Land Claims Court, Cape Town ('*Ralph Daniel Jacobs*').

53 2011 (6) SA 279 (LCC). See the discussion of the judgment by Juanita M Pienaar, 'Die Betekenis van 'n Ontneming weens 'n Rasdiskriminerende Wet of Praktyk vir Doeleindes van die Wet op die Herstel van Grondbesitregte 22 van 1994: 'n Oorsig van Ontwikkelings in Regspraak' (2012) Litnet Akademies Regte 107–140.

54 2016 (5) SA 382 (LCC).

55 *Ralph Daniel Jacobs* (n 51) paras 3–10.

56 ibid para 11 and further.

Much of this background was taken from the *Florence* case alluded to above. Of importance were the following points of departure: the Restitution Act has a unique structure in terms of which compensation is awarded, which is not identical to compensation in the law of delict. As highlighted above, the Act focuses on accepting loss at a certain point in time and thereafter assessing the loss and compensating it at that point in time, after which that monetary value is adjusted to present-day value. With regard to the latter, the Consumer Price Index (CPI) is the tool to use, also taking note of the whole of section 33 of the Act and all the factors listed there. Because of the specific scheme of the Act, what is deemed just and equitable cannot be calculated only from the perspective of the claimant, but it needs also to consider the State as the custodian of the national fiscus plus the broad interests of society.[57] Where evidence shows that a conversion of past loss based on the CPI results in compensation that is not just and equitable, it will be permissible for a court to regard all the factors listed in section 33. It is therefore quite possible that, after going through the whole process, the *quantum* of compensation may need to be adjusted in order to eliminate prejudice.[58]

Having provided the necessary background, the Court proceeded to the particular case at hand. Because no compensation had been paid when Erf 38 was lost, it followed that the plaintiff was at least entitled to the full value of the property at the time of dispossession, adjusted by the CPI to present-day values. However, the plaintiff claimed much more, overall roughly R5 million.[59]

Although the *Florence* case specifically found that the Restitution Act was not aimed at placing persons in the position they would have been had dispossession not occurred, the plaintiffs still argued that the *Chorzow* principle—which embodies the financial position as if dispossession had never taken place—had to be applied.[60] That argument was advanced on the basis that the present matter was distinguishable from the *Florence* case because the *Florence* case dealt with lawful dispossession, whereas the present matter dealt with unlawful dispossession. The LCC was satisfied that the lawfulness or not of the dispossession was irrelevant and that the *Chorzow* principle was discarded because it was inconsistent with South Africa's statutory scheme.[61] However, these

57 ibid para 13.

58 ibid para 14.

59 ibid para 16.

60 ibid paras 18–19. The *Chorzow* principle was set out in the judgment of the Permanent Court of International Justice in *Chorzow Factory* 1928 PCIJ (ser A) no 17. This principle entails the calculation of compensation as if the dispossession had not occurred; in other words: the dispossession itself and the reason for the dispossession are ignored. That is the case because compensation should be the equivalent of restitution in kind, where foreign nationals are dispossessed. This principle is not applicable in South African law.

61 ibid para 19.

inputs were valuable as they did provide some idea of the broad parameters of what restitution in kind would have amounted to.

Of importance is that Erf 38, still vacant, was a residential erf when lost, but was now zoned as a commercial erf in a flourishing business district in a fast-growing town.[62] On the basis of the *Florence* case, it is clear that the family could not claim to be put in the financial position they would have been by ignoring the dispossession. However, the additional evidence regarding the possible use of the erf and its loss could help the Court when considering the various factors listed in section 33 of the Act other than the changes over time of the value of money. These included:

- the desirability of remedying past violations of human rights;
- the requirements of equity and justice;
- the amount of compensation or any other consideration received in respect of the dispossession;
- the history of the dispossession;
- the current use of the property, and
- the history of the acquisition of the land as well as of the use of land.[63]

As mentioned, the plaintiff claimed the full market value of the property as well as the accumulated lost past-use value. The case for increased compensation related to the suffering caused by the dispossession and the immense difference between the adjusted historical compensation and the market value of the current property.[64] The Court dealt with each of these factors. Although the defendant accepted that suffering had occurred and that dispossession had resulted in hardship, it was questioned whether the particular dispersal of the family and their concomitant suffering was due to the loss of Erf 38 specifically. The dispossession of Erf 38 had occurred six years after being abandoned by the family.[65] Instead, it would seem as if the loss of the farm, for which the family was awarded compensation of R10 million, was the actual cause for their dispersal and suffering.

What could not be denied was the sharp contrast between the updated historical value of the property (the historical under-compensation) and the current market value. Three factors contributed to that, namely: (*a*) the lengthy period that had passed since the dispossession of the land; (*b*) the change in the nature of the property; and (*c*) the sharp

62 ibid para 22.
63 ibid para 23.
64 ibid para 25.
65 ibid paras 27–28.

increase in property values in Upington in recent years.[66] The Act was not structured so as to provide compensation at the current value of the land or to provide compensation which makes good the value of the lost use of the land since dispossession. It was further argued that it would not be fair if the plaintiff received the windfall with the public having to bear the burden.[67] The same would apply where the current value of land was low and therefore reduced compensation had to be awarded because the value of the land had decreased since dispossession. At the heart of the issue was that the family had lost a residential plot and that a commercial plot, located in the hub of a bustling town, was now the focus. Of critical importance is that the result had to be fair, overall, having regard to the fact that 'justice and equity are not reducible to financial figures or precise arithmetic calculation.'[68] Finally, the Court decided on a just and equitable amount to be R780 000, having regard to fairness, changes in value over time and the interests of the fiscus and the public. This way the claimant would not benefit from the windfall, while at the same time it would be acknowledged that the historical value of the erf and the current value of residential erven did not adequately compensate for the loss of use and the fact that the property had indeed increased in value because of its commercial nature in a flourishing environment.[69]

In the *Philips* case the Court again emphasised that 'valuation is not an exact science',[70] whereas in the *Jacobs* case the Court underscored that 'justice and equity are not reducible to financial figures or precise arithmetic calculation.'[71] Yet in all cases courts must do their best: accept that dispossession—how tragic and unfair—had indeed occurred and deal with it as fairly as possible. Dispossession cannot be ignored or overlooked. While it is complex and various approaches to and methods of valuation exist, the points highlighted in the *Florence* judgment have provided much-needed guidance in this arena.

Land Reform

Communal Property Associations Act 28 of 1996

A Communal Property Associations Amendment Bill (B12-2017) was introduced in parliament. According to the Memorandum to the Bill, the reasons for the amendment include, among other things, that communal property associations (CPAs) had experienced difficulties disposing of their property if disputes arose between a CPA and its community. There is also 'apparent insufficient protection of the rights and interests

66 ibid para 30.
67 ibid para 31.
68 ibid para 32.
69 ibid para 33.
70 ibid para 25.
71 ibid para 32.

of a community in respect of the movable and immovable property owned by communities.' The DRDLR also experienced challenges in administering the Act. The scope of the Act was also broadened to include labour tenants.

The Bill inserted a few new definitions and amended existing definitions.[72] A 'community' would mean

> a group of persons, including labour tenants contemplated in section 2(6), whose rights to a particular property are determined by shared rules under a written constitution and which wishes or is required to form an association as contemplated in section 2

and a 'labour tenant' has the same meaning as it would have under the Land Reform (Labour Tenants) Act 3 of 1996. A 'committee' will be 'a committee elected by members of an association to assist the association to manage the affairs of that association.'

The Act is to be amended to ensure that it would not be the LCC only that could order that a CPA be formed but also any competent court or the minister in terms of the Restitution Act or any other land-reform legislation (eg labour tenants).[73]

Sections 2A, 2B, 2C and 2D have been inserted in the Act.[74] Section 2A determines that the DRDLR must prepare a general plan of the property that has to be registered. The general plan must indicate which parts of the property will be reserved for

> (*a*) economic, social, environmental and sustainable development and infrastructure investment for the entire community; (*b*) crop fields, grazing land, water ways, wood lands, conservation, recreational and any other purpose for the entire community; (*c*) the provision of economic, social and other services for the entire community; and (*d*) subdivided portions for residential, industrial and commercial purposes.[75]

Section 2B establishes a Communal Property Associations Office in the DRDLR and section 2C provides for the appointment of a Registrar of Communal Property Associations. Section 2D sets out the functions of the Registrar. The main function of the Office and Registrar is to provide assistance to CPAs and their communities. They will also be responsible for registering the associations and for record-keeping.

Sections 8(6), 9(1)(*d*) and 12 of the Act are to be amended to make provision for a CPA to act on behalf of the community, that it is the community who owns the property, and

72 Clause 1 to amend s 1.
73 Clause 2 to amend s 2.
74 Clause 3.
75 Clause 2A(2).

that the majority of members need to approve certain steps with regard to its movable and immovable property.[76] A community may also only adopt a constitution if sixty per cent of its members agree to it.[77] Section 10 of the Act will provide for dispute-resolution mechanisms.[78] The sections dealing with provisional associations have been repealed and the Amendment Act accordingly provides for transitional arrangements in this regard.[79]

Although it may still be argued that CPAs may not be the ideal legal entity to use when land is transferred for land-reform purposes, it is currently the most viable option. If the office operates well and assists communities accordingly, it may resolve many of the challenges that CPAs are currently experiencing.

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

The Extension of Security of Tenure Amendment Bill [B 24B-2015] was introduced in parliament during March 2017. The Bill provides for some new definitions, for example, 'dependent', 'family' and 'reside'.[80]

The Act will no longer refer to subsidies but to 'tenure grants'.[81] Tenure grants may in future be used to 'to enable occupiers and former occupiers to acquire suitable alternative accommodation' or to 'to compensate owners or persons in charge for the provision of accommodation and services to occupiers and their families', among other things.[82] The minister has to consider certain criteria before approving a tenure grant in terms of section 4(2). The Bill proposes that an additional criterion be added, namely, that the decision should be in the mutual interests of both the occupiers and the owners.[83] The rights and duties of the occupier are to be extended in that they could 'take reasonable measures to maintain the dwelling occupied by him or her or members of his or her family' and any other person 'may also erect a tombstone on, mark, place symbols or perform rites on, his or her family graves on land that belongs to another.'[84]

76 Clause 8(*e*).
77 Clause 7 amending s 7.
78 Clause 10.
79 Clause 20 inserts s 18A.
80 Clause 1 amending s 1.
81 Clause 2 amending s 4.
82 Section 4(1)(*d*) and (*e*) to be inserted.
83 Section 4(2)(*g*) to be inserted.
84 Section 6(2)(*d*B) and (4).

Section 9(1) of the Act is to be amended in that an occupier should be represented when a court order for eviction is instituted, except if they waive this right or if the court finds that the interests of justice will not be harmed if they are not represented.[85]

Section 10(1)(*e*) is to be inserted to make provision for a court to consider whether the owner or person in charge of the land had considered mediation or arbitration to settle the matter or whether the matter could not be settled by way of alternative dispute-resolution mechanisms.[86] The court may in future also order under which reasonable weather conditions an eviction order may be carried out.[87]

Chapter IVA establishes a land-rights management board. Section 15C sets out the functions of the board. The board will oversee the land rights management committees.[88] These committees will have, among other duties, to 'identify and recommend acquisition of land for settlement and resettlement of occupiers', including facilitating tenure grants, to 'facilitate the provision of municipal services on the acquired land, in consultation with the municipality concerned', 'identify and monitor land-rights disputes observed through adequate participation of all actors whose relative rights are contested'; 'take steps to resolve a dispute', and 'in the event that a dispute cannot be resolved, refer such dispute to the Board.'[89]

The institution of additional boards and committees will have additional cost implications for the DRDLR and may also have an impact on other land-reform initiatives. The implication is that less money may be available to acquire land for land-restitution and land-redistribution purposes or even land-tenure reform.

Case Law

Daniels v Scribante[90] is a ground-breaking judgment, for various reasons. First, while some earlier decisions hinted at the link between tenure security, security of home and hearth, and human dignity, this judgment highlighted unequivocally the link between redress—as a consequence of historical imbalances, access to housing and tenure security—and human dignity.[91] Secondly, although it is quite common that the Constitutional Court hands down a decision consisting of various individual judgments

85 Clause 4.
86 Clause 6.
87 Section 12(1)(*c*) to be inserted.
88 Clause 15H.
89 See also the proposed s 21(3A), in terms of which the director-general will be able to refer disputes to the board for mediation or arbitration.
90 Case CCT 50/16 2017 ZACC 13, 11 May 2017, Constitutional Court.
91 ibid para 2; Judge Madlanga specifically states that an indispensable pivot to the right to security of tenure is the right to human dignity.

in support of one court order,[92] this decision contains a judgment by one of the judges in both Afrikaans and English. This makes the overall decision generally and that particular individual judgment extraordinarily accessible. This also highlights the potential impact of the decision on all role-players involved: landowners and occupiers alike. The decision handed down effectively consists of five separate judgments. The majority judgment was handed down by Madlanga J (with Cameron J, Froneman J, Khampepe J, Mbha AJ and Musi AJ concurring). Judge Froneman provided a further judgment in both Afrikaans[93] and English,[94] with Cameron J concurring. That judgment was followed by a further separate judgment by Cameron J, a still further judgment by Jafta J (with Nkabinde ACJ concurring) and a final, separate judgment by Zondo J. While some differences emerge regarding the content of the individual judgments, all of them, as explained, support the order handed down. The judgment is further characterised by large portions of the content dealing with contextualisation specifically. To that end the judgment is rather a lengthy one, but exceptionally detailed and an excellent backdrop for the present-day land-related issues the country is still grappling with.

The facts are briefly as follows:[95] The applicant, Ms Daniels, had been in occupation of the land in question for 16 years and complied with the definition of 'occupier' for the purposes of ESTA. The first respondent was the person in charge of the property as he managed the farm for the second respondent, the landowner.

In 2014 the applicant's electricity supply was cut and the door to her home was tampered with. After a successful application in the Stellenbosch magistrate's court, the door was repaired and replaced and her electricity supply was restored. However, her home was not being maintained, resulting in her again approaching the local court for a declaration that she was an occupier under ESTA and the failure to maintain her roof constituted an infringement of her right to human dignity. Again a court order was handed down in her favour. Although the maintenance work was completed by the first respondent, Ms Daniels wanted to effect further improvements to the property. The improvements included levelling the floors, paving part of the outside area and the installation of various items and amenities: an indoor water supply, a wash basin, a second window and a ceiling. The respondents conceded that, as the above were not luxurious improvements, but basic human amenities, the dwelling did not accord with human dignity.[96] In her communication, to which she received no response, she indicated specifically that she would carry the costs of the improvements. Once the work started

92 See, for example, the well-known judgment in *Joe Slovo* that consisted of no fewer than five individual judgments—*Residents of Joe Slovo Community, Western Cape v Thubelisa Homes* 2010 (3) SA 454 (CC).

93 ibid paras 72–108.

94 ibid paras 109–144.

95 ibid paras 4–10.

96 ibid para 7.

on the dwelling, the respondent informed her by letter that she had to stop all activities because (*a*) the respondents had not consented to the improvements; and (*b*) no building plans had been submitted, resulting in the improvements being unlawful. Her reply that she had relied on sections 5, 6 and 13 of ESTA was unsuccessful in local court proceedings on the basis that an occupier did not have the right to effect improvements. A subsequent approach to the LCC was also unsuccessful. Both the LCC and the SCA refused leave to appeal, resulting in the present application in the Constitutional Court.

The main issues to be dealt with in the present matter were: (*a*) whether ESTA afforded an occupier the right to make improvements to his or her dwelling; (*b*) if so, was the consent of the owner required for such improvements; and (*c*) if consent was not necessary, whether an occupier could effect improvements to the total disregard of an owner?[97] The Court first focused on the right to make improvements. The point of departure was that ESTA has been drafted in the light of section 25(6) of the Constitution to provide for legally secure tenure or comparable redress. Such an Act was necessary, given the background of racially based land control and access in South Africa, in particular where vulnerable portions of society are concerned.[98] It was within this context that sections 5 and 6 of ESTA had to be approached and interpreted. The premise was that occupiers enjoyed certain fundamental rights, including the right to human dignity.[99] Under section 6 an occupier had the right to reside on and use the land in issue. Arguably, living in deplorable conditions would not constitute 'reside'. Instead, the right to reside had to be consonant with the fundamental rights contained in section 5, especially the right to human dignity:

> But it is about more than just that. It is about occupation that conduces to human dignity and the other fundamental rights itemised in section 5.[100]

Accordingly, effecting improvements meant bringing the dwelling to a standard suitable for human habitation. In that regard context was critical, including the purpose for which ESTA had been enacted, as well as in the light of section 39(2) of the Constitution. Denial of the right asserted by Ms Daniels could therefore inadvertently result in what would effectively be the eviction of occupiers.[101] Considering the interpretations put on

97 ibid para 11.

98 ibid paras 14–22—for a general historical background; and see also Pienaar (n 52) 133–136, where the links between control of labour, control of natural resources and the exploitation of the franchise and the links with land control are highlighted specifically.

99 ibid para 29.

100 ibid para 31.

101 ibid para 32.

'reside' and 'tenure security', it would therefore mean that the dwelling had to be habitable.[102]

The respondents further averred that, if the Court concluded that an occupier had such a right to effect improvements, it would place a positive duty on the landowner to ensure an occupier's enjoyment of the section 25(6) right.[103] As section 13 provides for the payment of compensation in relation to improvements, the argument was that the landowner would then finance the improvements, which constituted a positive duty on the landowner to ensure that the occupier lived under conditions that afforded him or her human dignity. Being private parties, no such positive duty ought to be placed on landowners, was the gist of the argument. In this regard the court underlined that whether private persons would be bound by positive duties depended on a number of factors, including the nature of the right, the history behind the right, the objective of the particular rights, the best manner in which the objective of the right could be achieved, the potential of invasion of that right by persons other than the State or organs of State and whether letting private parties off the hook would not lead to negating the particular rights in question.[104] However, as a point of departure, it would be unreasonable to require the exact same obligations under the Bill of Rights from private parties as those placed on the State.[105] If such a positive duty were indeed placed on the landowner, it was an important factor to consider, but still only *one* factor.[106] On the other hand, in the light of the *Mazibuko* judgment, it did not mean that under no circumstances would the Bill of Rights impose a positive obligation on private persons:[107] '[i]n sum, this Court has not held that under *no* circumstances may private persons bear positive obligations under the Bill of Rights.'[108]

Accordingly, the real question was therefore: What was the extent of an occupier's constitutional entitlement as expounded in ESTA? Did it go so far as to create an entitlement to improvements with the effect of imposing a positive obligation on landowners? The positive obligation here related to the possibility of an order for compensation upon the eviction of the occupier.[109] Whether an owner will be ordered to pay compensation depended on a variety of considerations, including the need of the occupier to improve their living conditions and lift them to the level that accorded with human dignity.[110] Therefore, compared to the right to dignity, the possibility of payment

102 ibid para 33.
103 ibid para 37.
104 ibid para 39.
105 ibid para 40.
106 ibid para 41.
107 *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC); ibid paras 43, 47.
108 ibid para 48 [own emphasis].
109 ibid para 50.
110 ibid para 51.

of compensation paled in comparison. The *crux* of the matter was the following: just because there was a possibility that the landowner might have to pay compensation could not automatically mean that the occupier ought to be satisfied with the state of her living conditions. Clearly this could not be the case.[111] Furthermore, the payment of compensation for a departing tenant was also possible at common law.[112] The possibility of payment of compensation could therefore not be the deciding factor in circumstances such as these. The conclusion was therefore reached that Ms Daniels was indeed entitled to effect the proposed amendments as this flowed 'naturally' from a proper interpretation of 'what Parliament itself has said'.[113]

The second issue to be dealt with was whether the owner had to consent to the improvements. Here, owners had various options in practice. For example, an owner could accept that a dwelling was not fit for human habitation but could still not be open to effecting improvements. In these instances a simple refusal by the landowner would render the occupier's right to secure tenure (linked to human dignity) nugatory. This right of the occupier was 'primarily sourced from the Constitution itself'.[114] Accordingly, the landowner's consent could not be a prerequisite for effecting improvements that would bring a dwelling in line with a standard that conformed to human dignity.[115]

This led to the further question, namely whether an occupier could effect improvements to the total disregard of the owner? This issue, the third one to be dealt with by the Constitutional Court, highlighted the fact that the landowner also had certain rights.[116] This was also underlined by the rights listed in section 5 of ESTA, which were relevant to both owners and occupiers. Although—as was alluded to above—the consent of the landowner was not a prerequisite, the *meaningful engagement* of an owner or person in charge was indeed still necessary.[117] The Court set out the possible methodology to be followed:[118] It started with the occupier first approaching the landowner and raising the issue of improvements. Various options would then arguably arise: (*a*) the landowner could consent; (*b*) the landowner could withhold consent; (*c*) the extent of the improvements could be contested; (*d*) the improvements could compromise the structure to the detriment of the owner; or (*e*) the parties could agree that, when evicted, compensation would be paid for the improvements. Accordingly, although various forms of engagement could take place with varied results, the point of departure

111 ibid para 52.
112 ibid para 55.
113 ibid para 57.
114 ibid para 59.
115 ibid para 60.
116 ibid para 61.
117 ibid para 62.
118 ibid para 64.

remained that the existence of the occupier's right was not dependent on the owner's consent.[119] However, if the engagement resulted in a stalemate, the Court had to address the matter. At no point could the occupier resort to self-help.[120]

Having regard to the reasoning above and the conclusions reached, the final part of the majority judgment dealt with the appropriate relief. Of critical importance was relief in terms of which the existence of the right of Ms Daniels was indeed recognised. Apart from stating this right, how it was to be dealt with and acknowledged in practice was furthermore critical. To that end the order was handed down that the applicant was entitled to make specific improvements, which were listed as: levelling floors, paving part of the outside area, installing a water supply inside the dwelling, a wash basin, a second window and a ceiling. The parties were furthermore ordered to engage meaningfully in relation to particular issues, namely:

- the times at which the builders would arrive and again depart from the farm;
- the movement of builders on the farm, and
- the need for and approval of building plans in respect of the improvements set out above.

If the parties were unable to reach an agreement within a month, either party could approach the magistrate's court for appropriate relief.

As explained above, the majority judgment was followed by an Afrikaans judgment by Froneman J, immediately followed by the English translation. The Afrikaans version is a poignant, beautifully written judgment that underscores and acknowledges the injustices of the past—in general, but also specifically with regard to farm land, rural areas and the class and racial distinctions that evolved in these arenas. It was in this context that human dignity was crucial. This judgment further highlighted the place and role of the property concept in South Africa and the necessity to rethink and reconceptualise ownership in the light of prevailing needs and demands. In sum, the judgment argued that human dignity had to be restored in much the same format in which the poor white problem had been addressed (and alleviated) by the former apartheid government. In this endeavour the concept of ownership was instrumental.[121] The Froneman judgment was therefore a further embodiment of the need for redress and human dignity and did not adjust the legal findings that were formulated in the majority judgment set out above.

119 ibid para 64.
120 ibid para 65.
121 ibid para 70.

Likewise, the Cameron judgment concurred with the legal findings of the majority judgment, but with some reservation regarding the historical reflection in it and its completeness. That was the case because both of the former two judgments were only partial reflections of what had occurred: 'they are neither impartial nor incomplete.'[122] In this light Cameron J warned against judges' writing history. Yet, despite this reservation, he too concurred with the findings.[123] Ultimately, his warning was that courts, judges and society generally would not be at peace until the claims to justice had been reckoned with sufficiently.

The judgment of Jafta J also concurred with the main thrust of the majority judgment, save for the finding that a positive duty was placed on the landowner, as explained above. Instead, he found that section 8(2) of the Constitution ensured that some of the rights entrenched in the Bill of Rights were enforceable against the State (vertical application) and others against private persons (horizontal application).[124] Whether the right was indeed horizontally or vertically enforced stood to be determined by two factors, namely (*a*) the nature of the right and (*b*) the duty it imposed.[125] However, there was no provision that expressly imposed a positive obligation on a private person in the Bill of Rights.[126] In this regard, Jafta J differed from the main judgment's stance that section 25(6) of the Constitution imposed a positive duty on private parties.[127] He emphasised that persons or communities who did not have secure tenure are entitled to it and that, if that were not possible, then they were entitled to comparable redress. However, there was no duty on private parties as such to ensure that that happened. Apart from the specific wording in section 25(6), he also highlighted that it formed part of the property clause that began by safeguarding property rights.[128] The positive obligation to address injustices in relation to loss of tenure or possession was on the State alone. Enforcing a positive obligation against a private person would also raise a spectrum of practical difficulties, including how the private person was to be identified and what exactly he or she was required to do to fulfil the obligation, as well as what the implications would be if the obligation were not discharged.[129] Accordingly, this judgment was directly in conflict with the finding in the *Blue Moonlight* decision, which imposed a direct and positive obligation on a private person.[130] The fact that the owners had to accommodate the unlawful occupiers for a few months was not based on any positive duties imposed by a constitutional right. Instead, it amounted to a prohibition

122 ibid para 148.
123 ibid para 153.
124 ibid para 157.
125 ibid para 158.
126 ibid para 162.
127 ibid para 163.
128 ibid para 167.
129 ibid para 171.
130 ibid para 177.

restraining the landowner from removing the occupiers from property before the date determined by the Court.[131] The scenario applicable to the *Blue Moonlight* case[132] was therefore not the same as that in the present instance, where an occupier wanted to effect improvements to her home. This line of argument was proceeded with further in relation to socio-economic rights generally which, likewise, did not impose any positive duties on private parties.[133]

Having concluded that here was no positive duty on the landowner, he considered the application of ESTA to the particular factual situation. In this regard he found that, instead of a positive duty, there was in fact a negative obligation on the landowner to refrain from interfering with the exercise of the rights of Ms Daniels.[134] That meant that the right, properly construed under ESTA, also included making improvements that were necessary to make the dwelling suitable for human habitation. By preventing her from effecting the necessary improvements, they effectively interfered with her right to reside on the property. This had nothing to do with providing access to land, which was the duty of the State only.[135] ESTA became relevant only after access to land had already been gained. In that context the Act safeguarded her residence by prescribing the conditions under which her rights could be terminated:

> But where a private person has voluntarily permitted an individual to reside on his or her property, everyone including the state has a negative obligation to interfere with the exercise of that right of residence, unless the interference is justified by law which passes constitutional muster.[136]

Central to the security of tenure that the Act sought to promote was the consent of the landowner to reside on and use the land.[137] Because there was indeed interference with her right to reside on the property, this judgment ultimately also supported the order handed down.

The final judgment was that of Zondo J, which formulated the legal question as follows: Did the landowner have the right to prevent an occupier defined under ESTA from effecting improvements to their dwelling which would enable them to live in the dwelling under conditions that did not violate their right to human dignity?[138] In this

131 ibid para 183.
132 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC).
133 ibid para 186 and further.
134 ibid para 193.
135 ibid para 195.
136 ibid para 197.
137 ibid para 201.
138 ibid para 209.

regard the judgment confirmed that an occupier had a right to effect such improvements—tied to human dignity—without the landowner's consent. The basis of this finding was in section 5 of ESTA, which set out the various rights of occupiers, including the right to human dignity.[139] The rights of landowners were, however, listed in section 6. Accordingly, when considerations of justice and equity were taken into account and a balance was struck between the rights of the applicant and those of the respondents, there could be only one answer to the question: the improvements were basic, they would not prejudice the landowner and would—on the other hand—mean a great deal for the applicant and her family. Therefore: on balance the answer had to be that the applicant had a right to effect the improvements. However, having the right did not mean that she could do whatever she wanted—she would have to engage with the landowner regarding the logistical implications. To that end, the order handed down in the main judgment was also supported.

As explained, all of the individual judgments supported the handing down of the order. In all of the judgments the right of the applicant to effect these specific improvements was confirmed. The main judgment reached the conclusion that the applicant, as occupier and on the basis of human dignity, had the right to effect the improvements—also because there was a positive duty on the landowner to ensure access to land and ultimately to secure tenure. The Froneman and Cameron judgments did not alter these findings, except to the extent that the Froneman judgment emphasised the necessity to change the role, function and concept of ownership in South African law in general and specifically in the light of the need for redress and acknowledgement of the wrongs of the past. This dimension is critical and ought to have been highlighted much more in the main judgment; it ought also to have been commented on in the subsequent judgments. The Cameron judgment warned against the incompleteness and built-in bias in the reporting and writing of history and pointed out that, until what had occurred in South Africa was reckoned with in full, history would linger—also in judicial fora and courts.

While supporting the order handed down as there was specific interference with Ms Daniels' exercising her right to reside, that judgment denied any positive duty placed on private landowners in broadening access to land or securing tenure. Instead, from the point of departure that human dignity is tied to tenure, a negative duty is placed on the landowner not to interfere with the exercise of the right set out and framed in legislation. The final judgment of Zondo called for the rights and duties of landowners and occupiers to be balanced and finding the balance in that process. Where the specific improvements are considered, together with the surrounding circumstances, then it is clear that Ms Daniels must have the right to effect improvements.

139 ibid para 212.

The state of Ms Daniels' dwelling stands to be improved markedly: she will be living in conditions suitable for human occupation. She will have redeemed her human dignity. That is the case because tenure security is inextricably tied to human dignity. Precisely what this means for a landowner is, however, not crystal clear: Is a positive duty indeed placed on landowners to secure access to land and guarantee security of tenure? Is that the case because of the Constitution—generally, but in terms of section 25(5) and (6) specifically—or is that tied to the changed role and function of ownership in modern South African law? Or is that duty possibly the result of a balancing act? Or is the reality totally different: Is there not perhaps a negative obligation on all landowners not to interfere with rights set out in legislation specifically? In the present instance, the improvements were not luxurious and Ms Daniels had opted to pay for them herself. The logistics would be worked out by the relevant parties with respect to the actual work being conducted on the farm and to the dwelling, and to the coming and going of workers. What would be the case if the improvements were not so basic and where an occupier such as Ms Daniels refused to bear the expenses—would that have made any difference to the duties of the parties respectively?

Unlawful Occupation

RP Jacobs v Communicare, a Non Profit Company and the City of Cape Town[140] deals with an appeal against an eviction order granted by the Goodwood magistrate's court. The first respondent provided low-cost housing to economically deserving tenants.[141] In 2002 the respondent rented a flat to the Jacobs family in Ruyterwacht for a minimal amount, although the rental could increase from time to time, as provided for in the lease agreement.[142] Inevitably, increases occurred, resulting in the appellant being unhappy with the extent of the increase. He forthwith approached the Rental Housing Tribunal, after which a hearing was scheduled. Following a rescheduling of the hearing, the appellant was unexpectedly informed that the Tribunal had in fact made a default ruling in his absence due to his failure to appear. On enquiry it transpired that incorrect hearing dates were made public, causing the appellant to urge the Tribunal to reconsider its ruling, unfortunately to no avail.[143] As the Tribunal remained resolute, the appellant sought a review of the new rental determination. Despite initially continuing to pay the rental amount that had been in place before the ruling, the appellant fell behind and ultimately the lease was cancelled in October 2015.[144]

Eviction proceedings were thereafter lodged against the appellant in terms of section 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act

140 Case no A 389/2016, 14 March 2017, Western Cape High Court, Cape Town.
141 ibid paras 1–3.
142 ibid para 4.
143 ibid para 5.
144 ibid para 6.

19 of 1998 (PIE). The appellant opposed the eviction, citing the incorrect hearing dates and his dire personal circumstances, that is, his unemployment status, and that he would be rendered homeless if the eviction application were successful.[145] He furthermore claimed disability on the basis of post-traumatic stress disorder, but without providing any medical evidence.[146]

The Court, *per* Gamble J, highlighted the fact that the appellant's affidavit did not raise any sustainable defence on the merits of the eviction, including the incorrect date furnished by the Tribunal.[147] Instead, the first respondent had lawfully exercised its rights in terms of the lease agreement to increase the rental and the increase would stand until the Tribunal held otherwise, which it did not. Therefore, when the appellant fell into arrears, the first respondent could cancel the lease agreement, resulting in the appellant's continued occupation of the property being unlawful.[148] An eviction application could therefore be lodged under PIE. Since the appellant's period of unlawful occupation had not exceeded six months, section 4(6) of PIE was relevant. The magistrate hearing the matter had a duty to consider 'all relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women.' An order could then be made if it were just and equitable to do so. Because the unlawful occupation was less than six months, the question of alternative accommodation to be made available by the municipality or another organ of State did not arise. However, the first respondent did purport to give notice to the City of Cape Town, even though the application for eviction was not brought under section 4(7) of PIE, which also involved the issue of alternative accommodation. Interestingly, despite the City being cited as the third respondent, there was no evidence that the notice was indeed served on the City. Nor was there any other indication of the City's participation. Previously, in other cases, the City of Cape Town had provided the Court with very useful information regarding alternative housing, including emergency housing, so as to avoid homelessness. In this context the failure of the magistrate to consider a report by the local authority was deemed to have been a procedural defect in the proceedings.[149] Gamble J referred to the case of *City of Johannesburg v Changing Tides 74 (Pty) Ltd*,[150] where it was held that a magistrate could also assume a proactive duty to request a local authority to provide the Court with a local authority report.[151]

Since the appellant did not have a defence on the merits of the claim for eviction and because the lease had been validly cancelled, the Court had to determine whether a fair

145 ibid.
146 ibid para 7.
147 ibid para 8.
148 ibid.
149 ibid para 27.
150 2012 (6) SA 294 (SCA).
151 ibid para 27.

notice period had been provided. In the absence of the local authority report, Gamble J was reluctant to hold that the procedural defect was fatal.[152] On the facts, it was clear that the appellant had known for a considerable period of time that his lease had been terminated and that he had had to find alternative accommodation. Yet he had done nothing. During the proceedings, including a reinstatement of the application after it had been struck down for failure to prosecute timeously, the first respondent had waited patiently while being unable to earn a fair rental. In these circumstances, referring the matter back to the magistrate to reconsider the period of notice would have prejudiced the first respondent, considering that the appellant had been enjoying a roof over his head at the reduced rental. For these reasons, the appellant was ordered to vacate property by the end of April 2017.

This decision highlights once again the need for the joinder of the local authority in eviction proceedings, coupled with the obligation to provide the court with information on the availability of alternative accommodation and/or emergency housing, depending on the facts of the matter.

Likewise, *Geneva Claasen v The MEC for Transport and Public Works, Western Cape Provincial Department and the City of Cape Town*[153] deals with an application for the rescission of an eviction order from property belonging to the State. The facts of the matter were briefly as follows: the applicants had resided at the property, Geneva House,[154] for a long time. The property belonged to the first respondent, who had applied for and was granted an eviction order to be executed on 29 February 2016. At the time of the eviction application there were approximately 115 people living on the premises, half of whom were female-headed families, families with minor children and some elderly and disabled persons.[155] The applicants approached the court for the rescission of the eviction order, which was granted in their absence. When the matter reached the court, only nineteen adults and about thirty-seven children resided at the property, because more than eighty people had left to find alternative accommodation on the day of the actual eviction. Although the first respondent tendered to find all of the current occupiers alternative accommodation in other shelters, the applicants refused the offer on the basis that they did not want to be separated from one another and because they would be on the streets the whole day as they had nowhere to go during the day. Following a postponement, all the persons indicated in an annexure were ordered to

152 ibid.

153 Case no 23595/2015, 11 November 2016, Western Cape High Court, Cape Town.

154 Geneva House was once operated as a non-profit organisation aimed at assisting destitute persons, especially women and children.

155 ibid paras 3–4.

remain on the property pending the determination of the dispute. The following transpired from this determination:

In terms of a lease agreement concluded between the first respondent and the Geneva Crisis Centre in 2003, the lease would expire on 31 March 2004, after which the centre had two months to vacate the premises.[156] When the centre did not vacate the property, various events occurred which finally led to the deregistration of the centre and the applicant's forming and registering another non-profit organisation, Geneva House, in June 2004. At the time of lodging the eviction application in 2015, which was opposed despite no opposing papers having been filed, no formal lease agreement existed between the first applicant and the first respondent. Leading up to the eviction application, various complaints were lodged with the Department of Transport and Public Works, including allegations of drug and sexual abuse at the centre and allegations of prostitution and gang-related activities.

When the matter was heard in January 2016, the Court *a quo*, *per* Blignault J, enquired as to the absence of the applicants and ordered the respondent to request their attendance, failing which the eviction order would be granted. Various attempts to contact the applicants were unsuccessful. When the applicants failed to appear on the date of the hearing, the eviction order was consequently granted.[157] It was against this order that the application for rescission was lodged.

Two points were raised *in limine*, including whether the first applicant had the necessary standing to act on behalf of the third applicant. This issue was raised as counsel for the applicants neither set out who comprised the third applicant nor produced confirmatory affidavits in support. In response, the first applicant claimed standing under section 38 as she was acting in the public interest and therefore also on behalf of the group. Davis J accepted that a purposive interpretation of section 38 would be in favour of standing and therefore dismissed the first point.[158]

The second *in limine* point related to the basis on which the rescission application was brought, which had an impact on Rules 42(1) and 31(2)(*b*) of the Uniform Rules of Court. Davis J queried the reliance on Rule 42(1), since the applicant had not indicated how the eviction order had been granted in error. Reliance on Rule 31(2)(*b*) was likewise unclear, since it related to a rescission of a default judgment, embodying a judgment granted where the defendant did not deliver a notice of intention to defend, which was not the case here. As to the rescission of the eviction order in terms of the common law, the applicants had to provide a reasonable explanation for default, that the

156 ibid para 6.
157 ibid para 13.
158 ibid paras 14–17.

application was made bona fide and that there was a bona fide defence which had prospects of success.[159] The applicants' response in this context was contradictory and confusing, which led the court to entertain a degree of latitude, provided that the other requirements for rescission were met. As to the requirement of providing a bona fide application, Davis J held that the Court was compelled to take the view that the case involved applicants who would be homeless.[160] It was difficult to see on what basis the rescission application had not been launched as a final, desperate and bona fide attempt to ensure the security of a dwelling in parlous circumstances.[161]

With regard to the prospect of success based on the merits of the case, the Court had to engage fully with the implications of the eviction application and was compelled to consider a range of factors in its deliberations.[162] With reference to *City of Johannesburg v Changing Tides 74 (Pty) Ltd & Others*,[163] Davis J stressed that courts were:

> obliged to ensure that all the relevant parties are before them, that proper investigation have been undertaken to place the relevant facts before them and that the orders they craft are appropriate to the particular circumstances of these cases. If, despite appropriate judicial guidance as to the information required, the judges are not satisfied that they are in possession of all relevant facts, no order can be granted.[164]

Therefore, since eviction would have a massive effect on the persons in question, it was imperative that engagement must be meaningful and aimed at alleviating homelessness. On the facts of the case it was clear that the Court was not in possession of key information regarding the identity of the residents or the number of children, disabled persons or households headed by women, or their personal circumstances. This was the case despite the involvement of social workers and the efforts of the Court *a quo* to order the applicants to appear before it.

With regard to the question what would be a just and equitable order, all the relevant facts, events and circumstances had to considered, including allegations of unsafe and dangerous living conditions and the possibility of accommodation in alternative shelters. In this regard, Davis J held that meaningful engagement had to take place in a manner that would cause the least disruption for the affected occupiers.[165] The initial order therefore had to be rescinded as it was inconsistent with the requirements of the Constitution and had to be replaced by an order designed to protect and enforce the rights of those affected. To that end the State Attorney had to be furnished with all the

159 ibid paras 25–26.
160 ibid paras 28–33.
161 ibid paras 25–26.
162 ibid para 29.
163 2012 (6) SA 294 (SCA) para 27.
164 ibid para 32.
165 ibid paras 41–49.

personal particulars of the applicants plus the necessary supporting affidavits. The first and second respondents were obliged to submit a report regarding the accommodation to be made available to the occupiers, its availability and its proximity to Geneva House. The respondents were further ordered to provide the applicants with temporary emergency housing within seven days from the date of receipt of the supporting affidavits, given the available resources, suitable accommodation and the needs of school-going children.

This judgment is an excellent example of the difficulties involved in the rescission of an eviction order and the balance to be found between appreciating the plight of the applicants and upholding constitutional values. Yet again, meaningful engagement and the availability of sufficient information were integral in the matter.

At the heart of the matter in *Mtshali and the Occupiers of 238 Main and Berea Streets v Masawi, Masawi, Makhaya, City of Johannesburg Metropolitan Municipality and the National Commissioner: South African Police Service*[166] was an application for the rescission of an eviction order[167] and a structural interdict[168] which required the City of Johannesburg to provide the appellants with temporary emergency housing. The appellants were unlawfully occupying a hijacked warehouse in the inner city of Johannesburg that belonged to the first and second respondents. The appellants had made forty-five makeshift rooms with partitions on the basis that they were leasing the property from the owner, one Makhaya, and paid rental to a representative of Makhaya, a person called 'Never'.[169] The first and second respondents then instituted and obtained an eviction order in the Johannesburg magistrate's court on 19 December 2012.[170] The respondents failed to record the personal particulars or circumstances of the unlawful occupiers, since the first respondent was threatened with violence when he approached them to inform them of his status as the owner of the property.[171]

Shortly after the first respondent went to the property he received a letter from an attorney informing him that the Makhaya family had bought the property. Proof of sporadic payments was attached to this letter. It later transpired that the sale of the property by the Makhayas fell through for failure to honour the purchase agreement.[172] The first and second respondents successfully asserted their rights as the registered

166 Case no A5008/2012, 9 November 2016, Gauteng Local Division, Johannesburg.
167 ibid paras 7–8.
168 ibid para 6.
169 ibid para 29.
170 ibid para 1.
171 ibid para 10.
172 ibid paras 11–14.

owners of the property and challenged the Makhayas to prove any competing rights to the property, but the Makhayas and their attorney were unable to do so.[173]

The owners, the current respondents, started with the eviction application and served the corresponding section 4(2) notice on all the unlawful occupiers, including on one Tenten, who appeared to be in control of the property.[174] On 28 March 2012 the eviction application was granted and a copy of the eviction order was affixed to the principal door of the building.[175] The Sheriff, with the assistance of the Red Ants, effectively evicted the occupiers from the property on 19 December 2013, after which the occupiers and their children took up residence under a bridge close to the property. The appellants tried to regain entry to the building but were removed again a couple of days later. The appellants brought an urgent spoliation order against Mr Makhaya as they believed him to be responsible for their eviction.[176] However, when the appellants realised their mistake, they withdrew their application and instituted a new application against the first and second respondents. Initially, the relief sought was to declare the appellants' eviction unlawful and to direct that they be restored to undisturbed possession of their rooms *ante omnia* pending the finalisation of an application to rescind the eviction order which had been granted on 28 March 2012. The City of Johannesburg was joined to the proceedings, although initially no substantive relief was sought against it.[177]

When the appellants' application for leave to appeal was denied by the Johannesburg High Court, they petitioned the President of the SCA and introduced new evidence without indicating that they had in fact done so.[178] The SCA granted the appellants leave to appeal to a full bench of the High Court.

The appellants averred on appeal that neither the section 4(2) notice nor the actual eviction application notice had been served. This failure deprived them of the ability to exercise their rights under PIE. The appellants also tendered to pay the monthly rental of R400 if occupation were restored.[179] In addition, the appellants raised objections to the payment of R10 per person per day for emergency housing. According to the appellants, this amounted to the City's outsourcing its constitutional obligation to provide emergency accommodation. It was also the contention of the appellants that the Court *a quo* should have stipulated in its structural order a time period for the provision of temporary emergency accommodation and should have provided a mechanism to regulate the process. These failures had resulted in the order granted being open-ended

173 ibid para 12.
174 ibid para 17.
175 ibid para 16.
176 ibid para 19.
177 ibid para 25.
178 ibid para 21.
179 ibid para 101.

and leaving the parties uncertain as to their rights and obligations. There were, furthermore, no directives for meaningful engagement and report-back sessions.[180]

The respondent argued that, since the property was located in an area zoned for business and commercial use, it was unfit for human habitation. There was also an unprecedented high risk of fire, disease, contamination and the possibility of social unrest owing to the limited or non-existent services since the warehouse had inadequate water and electricity installations as well as insufficient sewage facilities for the number of unlawful occupiers.

Expert testimony indicated that affordable low-cost housing was scarce and would be made available by the City only if ordered to do so by the Court. It was clear that the appellants would 'struggle to access lawful affordable housing[181] whether from the State or from any private housing provider, in and around the inner-city' and that if they found alternative lawful accommodation, then it would be at the expense of their income and livelihood.[182] This was because the appellants' livelihood strategies depended on living as close to, or adjacent to, formally established townships in the urban core. Relocation to an informal settlement or a township at the outskirts of the City would destroy the livelihood strategies developed by the occupiers; the income of the occupiers was insufficient to cover daily commuting from the urban periphery.[183] The appellants contended that, owing to the serious predicament they had found themselves in in being thrown out onto the street, the process of determining whether each individual evictee actually qualified for temporary emergency housing should be held over until the City had provided them with temporary accommodation. This contention was authoritatively sanctioned by *City of Johannesburg v Changing Tides 74 (Pty) Ltd & Others.*[184]

The City accordingly replied in its answering affidavits that it had moved the appellants from under the bridge to temporary emergency housing at Ekhaya House in Hillbrow, for no more than seventy-two hours. The City claimed there was no other temporary emergency housing available for the appellants, except for possibly at the Ekhutuleni building, which was already partially occupied by other evictees, and the remainder was earmarked for other evictees. The City explained that the applicants rejected the other available temporary emergency accommodation because the terms imposed were considered to be degrading and destructive of family life.[185] The City also conceded that it did not have an opportunity to assess the appellants' eligibility for temporary emergency accommodation because of the paucity of information provided by the appellants. According to the City, the appellants should have engaged the City when it

180 ibid paras 1–6.
181 ibid paras 42–47.
182 ibid para 47.
183 ibid.
184 2012 (6) SA 294 (SCA) para 53.
185 ibid paras 50–55.

became clear in May 2011 that their continued occupation of the hijacked building was precarious. In comparing and determining the individual circumstances of each evictee with the needs of other persons in the same position, the City stated that in order to identify those entitled to emergency housing it had adopted a process of registration on both the Gauteng Demand Data Base and on the city's own Expanded Social Package. The City indicated that it provided both its own rental accommodation and other rental accommodation provided by Joshco[186] and other municipal-owned entities.

From all of this it was clear that the City had engaged with the evictees in trying to give effect to its constitutional duties. The Court on appeal therefore refused to rescind the eviction order, holding that the appellants had failed to establish a bona fide defence.[187] The Court also ordered the City to provide temporary accommodation to the appellants whose names appeared on the revised list of evictees identified. If the prevailing arrangement for accommodation continued, then those who earned an income as reflected on the list 'may be required to pay R10 on a daily basis and this will apply only to adults and not children.'[188]

The following issues had to be determined on appeal: (*a*) whether the eviction order should have been rescinded, which was now a moot point since the building had been demolished; (*b*) whether the City was entitled to outsource or charge for the provision of temporary emergency accommodation to any class of person; and (*c*) whether the Court should have granted a structural order with a report-back dimension.

With regard to (*a*), Splig J held that the appellants were unable to demonstrate an entitlement to a rescission of the judgment since they alleged in the appeal papers that they knew Makhaya was not the real owner and when they were approached by the real owner they were hostile and violent towards him. The further claim that they were unaware of the eviction order was also rejected since they were aware of the eviction notice which was served by the Sheriff of the Court. They were therefore fully informed of the date of the application and their rights, including the right to file opposing papers setting out their personal circumstances.[189]

Concerning (*b*), Splig J held that even if the appellants were unsuccessful with the rescission of the eviction application, they would still have recourse to temporary emergency accommodation. However, that determination had to be made, taking into consideration the requirements of legality, reasonableness and (possibly) rationality. Because the appellants could not point to any provision in the Constitution or enabling

186 The Johannesburg Social Housing Company.
187 ibid paras 87–107.
188 ibid paras 63–64.
189 ibid paras 87–107.

legislation which precluded the City from engaging private enterprises to provide services on its behalf, the City's actions were therefore lawful. The City had provided detailed information about temporary emergency accommodation, including which sections were available and which were earmarked for other evictees. The City's conduct was therefore reasonable in charging rental and outsourcing its services.[190]

Finally, with regard to (*c*), Splig J highlighted two matters in particular: first, a court exercised its judicial discretion in determining whether a structural order ought to be granted in a particular case; and, secondly, courts should be conscious that in crafting a structural order dealing with temporary accommodation they may usurp a municipality's ordinary administrative and policy functions.[191] A court should also note that such an order ran the risk of prioritising the evictees over others who might be in greater need or who had applied timeously when threatened by eviction, but could not be heard. At the time of the hearing the appellants were already accommodated at Ekhaya house, albeit for an extremely short period. It was clear that the parties had engaged meaningfully in an attempt to resolve the accommodation issue. Therefore the Court did not consider the City's responses to be unreasonable or that continued court oversight would be necessary. If negotiations subsequent to this decision were to break down, they would still be at liberty to approach a court. Accordingly, on the facts, the Court had no reason to find that the Court *a quo* had failed to exercise its judicial discretion properly in refusing to grant the structural order sought. The appeal of the appellants was therefore dismissed.

As in the previous cases alluded to above, the need for meaningful engagement in eviction proceedings and the joinder of the local authority were highlighted. As emergency accommodation is scarce and the demand for it great, access to it has to be fair and reasonable. Also in this regard, the role of local authorities is integral.

Housing

A civic organisation in the Edumeni municipal area had approached the KwaZulu-Natal High Court to 'compel the Edumeni municipality to process applications for RDP housing in a "fair and transparent" manner.' The rights group was of the opinion that waiting lists are manipulated and that corruption interferes with the allocation of houses in the area.[192]

The Minister of Human Settlements indicated in her 2017/2018 budget vote speech that not everyone will be granted a house free of charge. People (excluding the indigent) would receive a subsidy to build a home, which they would have to erect within a certain

190 ibid paras 108–152.
191 ibid paras 155–157.
192 Anonymous, 'Litigation: Crucial Case Tackles Housing for Poor' *Legalbrief Today* (9 May 2017).

period. The government would set specific targets as to who may be involved in these projects in terms of broad-based black empowerment and the participation of women and the youth.[193]

The Draft Home Loan and Mortgage Disclosure Amendment Bill, 2016 was published for comment.[194] The Bill

> extend[s] the powers of the Office of Disclosure to investigate public complaints on financial institutions relating [to] home loans.[195]

The Bill also amends the definition of 'financial institution' to ensure that it relates to any institution that provides credit for housing and not only to banks.[196] The Bill also inserts section 9A, which will provide for the regulation of any conflict of interest that the chairperson or any member of the Office of Disclosure may have. The Bill also increases the fine that that may be imposed on financial institutions from R100 000 to R10 million.[197] Section 3 of the Act is to be amended to regulate clearly the information that a financial institution has to disclose.[198]

Restructuring zones were published in terms of the Social Housing Act 16 of 2008,[199] and the South African Council for the Project and Construction Management Professions (SACPCMP) published a Draft Amended Continuing Professional Development (CPD) Policy for comment in terms of the Project and Construction Management Professions Act 48 of 2000.[200]

Surveying

The South African Council for the Quantity Surveying Profession constituted a disciplinary tribunal in terms of the Quantity Surveying Profession Act 49 of 2000.[201]

193 South African Government, 'Minister Lindiwe Sisulu: Human Settlements Dept Budget Vote NCOP 2017/18' (6 June 2017) <https://www.gov.za/speeches/minister-lindiwe-sisulu-human-settlements-dept-budget-vote-ncop-201718-6-jun-2017-0000> accessed 10 June 2017; see also Anonymous, 'Policy: Free Housing Over, Except for Indigent – Minister' *Legalbrief Today* (10 June 2017).

194 Gen N 247 GG 40733 (31 March 2017).

195 Long title and cl 4.

196 Clause 1 amending s 1.

197 Section 15 amended by cl 7.

198 Clause 3.

199 GN 390 GG 40815 (28 April 2017).

200 BN 189 GG 40480 (9 December 2016).

201 BN 16 GG 40660 (3 March 2017).

Rural Development and Agriculture

A Draft Regulation of Agricultural Holdings Bill, 2017 was published for comment.[202] The Bill introduces another institution, namely, a Land Commission, that has, among other duties, to maintain a register of all private and public landownership.[203] The commission will also be able to conduct investigations into land ownership and into the race and gender of the owner of the land.[204] It seems that the government is reverting to the apartheid era where officials will determine the race and gender of the people of South Africa for a specific purpose—something that we hoped we would never see again in the new dispensation. The criteria that the commission will use to determine this is not spelled out. It may not be the original idea of the writers of the Bill, but it is a consequence of the manner in which the Bill is phrased.

The Bill also prohibits foreign ownership of agricultural land; however, a foreigner or a foreign legal person may conclude a long-term lease.[205]

The Bill defines 'agricultural land' as 'all land', with a number of exclusions, mostly related to land zoned for township purposes or non-agricultural purposes.[206] It does not refer to land excluded in terms of the National Environmental Management: Protected Areas Act 57 of 2003 or other land that may be protected in terms of other environmental legislation or international conventions. The definition of 'juristic person' does not include traditional authorities or CPAs and it is not clear whether they will fall within or outside the scope of the Act.[207] Some traditional authority land and land that was redistributed or restituted to CPAs are still registered as State land. There is no indication in the proposed Bill whether this land will be registered in any register or if the so-called 'race' of the 'owner' of the land will be indicated—which may provide a skewed percentage as to who owns the land in South Africa. The definition of 'public agricultural land' is also unhelpful in this regard.[208] The Act also does not provide whether it should be indicated if public agricultural land is currently used for settlement.

The Bill makes provision for access to information in the registers and for correcting that information. The question is how the information officer will deal with the information in the register in relation to the Protection of Personal Information Act 4 of 2013, especially the information with regard to race and gender.

202 Gen N 229 GG 40697 (17 March 2017).
203 Chapters 2 and 3.
204 Clause 1(4) read with cls 9(*a*) and 27.
205 Chapter 6.
206 Clause 1.
207 Clause 1.
208 Clause 1.

The minister may set a ceiling on land ownership.[209] In determining the ceiling, the minister will have to take certain factors into account: for example, the agricultural potential of the land, the farm size, climatic conditions and natural resources.[210] Farm size may therefore differ from one region to another and the government will have to ensure that sufficient information is made available to the public to explain this difference clearly—otherwise a debate may again ensue as to equality, access to land, percentage of land use, and so on.

Clause 26 is not quite clear as to whether it relates to land owned above the land ceiling or whether all landowners will have to indicate which land will be available for land redistribution. Following on clause 25 dealing with land ceilings, it is assumed that clause 26 will relate to land that is above the land ceiling and whether the land available for land redistribution will have to be indicated in the clause 15 notification. The Bill provides for a right of first refusal to black people to buy the indicated land and if no black person would like to buy the land, the State will do so.[211] If the State and the owner cannot agree on a price, the land may be expropriated.[212]

The Bill describes the role of parliament in allocating funds for establishing the commission as well as for land redistribution. Although it is laudable that after approximately twenty-five years we have an Act that deals with land redistribution, these new creatures of statute may detract from the limited funding available for land reform.

Conclusion

Land reform is and will always be an emotional issue; however, the need for land reform cannot be denied. The proposed new legislation includes methods to achieve and expedite land reform. Whether the creation of more institutions and committees will achieve this ideal remains to be seen: the more fragmented a land-reform system becomes, the less it may achieve. It is the manner in which land reform is carried out and the enthusiasm of the officials who execute their mandate that will achieve land reform—not necessarily new institutions.

It is clear that the courts are also committed to land reform and that they will not tolerate abuse of the land legislation. The case of *Daniels*, where the Constitutional Court links the right to housing to the right to dignity, is a landmark case in land-reform history and an indication of the need to resolve land issues in South Africa. If it can be achieved quickly and in a just administrative manner, it may achieve stability in the country. If parliament agrees to the proposed legislation, it must also provide the budget to

209 Chapter 7.
210 Clause 25(2).
211 Clause 26(2).
212 Clause 26(3).

implement it properly, otherwise the legislation will simply remain laws on the statute book.

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