LAND MATTERS AND RURAL DEVELOPMENT: 2016 (2)

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GENERAL

In this note on land matters, the most important measures and court decisions pertaining to restitution, land redistribution, land reform, unlawful occupation, housing, land-use planning, deeds, surveying, rural development and agriculture are discussed.[1]

LAND RESTITUTION

Notices

The number of notices published in terms of the Restitution of Land Rights Act 22 of 1994 (Restitution Act) increased substantially during the reporting period. It is not possible to distinguish whether the claims are new claims due to the amendment of

1 In this note the most important literature, legislation and court decisions are discussed for the period 31 May 2016 to 30 November 2016.

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the Act and submitted before the Constitutional Court's (CC) decision (see section 2.2 below) or whether the Commissioners are still trying to finalise outstanding claims. On 31 March 2016 there were still 7 419 old land claims (of which 2 763 required research) outstanding.[2] It is disconcerting that such a large number of claims has never been published previously in the *Government Gazette* since the claims were submitted eighteen years ago. The Deputy Chief Commissioner of the Commission on the Restitution of Land Rights (CRLR) informed the Portfolio Committee that no new claims would be received or processed after 27 July 2016. By 13 July 2016, 161 052 new claims had been lodged in accordance with the provisions of the Amendment Act.[3] The CRLR submitted its Annual Report 2015/16 to the Portfolio Committee on 12 October 2016.[4] It indicated that a policy had been drafted to ensure that the non-finalised claims lodged by 31 December 1998 would be prioritised for processing, settlement and implementation.

Case Law

In *Land Access Movement of South Africa v Chairperson of the National Council of Provinces*[5] the Restitution of Land Rights Amendment Act 15 of 2014, which commenced on 1 July 2014, was found to be unconstitutional. The necessity of the restitution programme and its aims and objectives are alluded to in the introductory paragraphs of the unanimous judgment handed down by Madlanga J. This background is relevant, because it underlines the importance of the restitution programme generally and the Amendment Act in particular. While the submission date for lodging claims was set at 31 December 1998, the Amendment Act provided for a second wave of land claims to be lodged, with a new deadline set at 30 June 2019.[6] The constitutionality challenge deals with procedural defects, namely (*a*) that the re-opening of land claims would gravely prejudice claimants who had filed their claims by the original date but whose claims remained unresolved; and (*b*) that section 6(1)(*g*) of the Amendment Act, which provides that 'priority will be given' to claims lodged in 1998, was impermissibly vague and thus failed to protect the interests of existing claimants.[7]

2 Parliamentary Monitoring Group (PMG), 'Portfolio Committee on Rural Development and Land Reform Meeting: Communal Property Associations Performance; Constitutional Court Judgment: Implications for Commission on Restitution of Land Rights; with Deputy Minister' (PMG, 7 September 2016) <https://pmg.org.za/committee-meeting/23228/> accessed 7 October 2017.

3 PMG (n 2).

4 Commission on the Restitution of Land Rights, 'Annual Report 205/16' (PMG, 12 October 2016) <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/crlr_annual_report_2015-16_cd.pdf> accessed 7 October 2017.

5 *Land Access Movement of South Africa v Chairperson of the National Council of Provinces* 2016 (5) SA 635 (CC).

6 *Land Access Movement of South Africa* (n 5) at paras 8–11 regarding the reopening of a land claims process.

7 *Land Access Movement of South Africa* (n 5) at para 4.

Apart from the preparatory work and research linked to the matter of re-opening claims, public consultation processes were important—both within departments[8] and in the National Assembly.[9] The public consultation processes relating to the NCOP[10] and the provincial legislature, respectively, are dealt with in detail in the judgment.[11] While much detail is provided in the judgment, the following facts are important for this discussion: the *ad hoc* committee dealing with the Bill was set up in June 2013, at which time the tight schedule and difficulties in meeting the deadlines were already highlighted. In October 2013 the public consultation process started, which included a tour to eighteen locations, also involving feedback and responses. From start to finish the provinces had less than one calendar month to fully process and digest a complex piece of legislation with profound social, economic and legal consequences.[12] The tight timeline was highlighted from the outset, which was also 'suspiciously close to the upcoming elections'.[13]

Although detailed information of what transpired in each province is set out in the judgment, the following seemed to be common occurrences: there was generally insufficient time to notify the public before hearings were to take place (at average three–five days' notice before hearings); not only one Bill, but numerous Bills, would all be discussed at one hearing; the venues were crowded, many queries were raised by interested persons, leading to insufficient time to deal with all the queries; not everyone who wanted to participate had an opportunity to do so; people had to travel long distances to attend hearings; there were insufficient translations and summaries of the Bill and documents and often no translation services at all.

In the light of the general trends in these hearings, the CC proceeded to explore the necessity and value of public participation in principle, as provided for in section 72(1) *(a)* of the Constitution of the Republic of South Africa, 1996 (the Constitution). In this regard the CC highlighted that the notion of public participation was a direct enunciation that South Africa's democracy contained both representative and participating elements and that they supported and buttressed one another. In this context both dimensions were integral and important.[14] In order to ascertain whether the public participation obligation had been adhered to, the standard of 'reasonableness' was employed. What would be reasonable would depend on the particular facts and circumstances of each case. Of importance here were the following: the constraints, limited resources and expenses linked to rolling out an in-depth, all-encompassing public participation campaign, balanced against the great importance of the Amendment Bill and its impact.[15]

8 *Land Access Movement of South Africa* (n 5) at paras 10–11.
9 *Land Access Movement of South Africa* (n 5) at paras 12–15.
10 *Land Access Movement of South Africa* (n 5) at paras 16–19.
11 *Land Access Movement of South Africa* (n 5) at paras 20–47.
12 *Land Access Movement of South Africa* (n 5) at para 17.
13 *Land Access Movement of South Africa* (n 5) at para 31.
14 *Land Access Movement of South Africa* (n 5) at para 57.
15 *Land Access Movement of South Africa* (n 5) at para 60.

In other words: given the importance of the Amendment Bill and the impact it could have—socially and economically—to what extent ought limited resources constrain the participation process? Of particular relevance were the following: the nature and the importance of the Amendment Bill, the value of restitution, the link of restitution to dignity and the fact that restitution would also enable other human rights in practice.[16]

An Act of paramount importance required reasonable public participation.[17] Instead, the urgent timeline was self-imposed—there was nothing in the Bill itself that inherently made the process so urgent.[18] Given the importance of the Bill and the necessity of public participation, the timeline was inherently unreasonable. It was 'simply impossible' for the public to participate meaningfully.[19] Not only was the rush unexplained; the views and opinions that were raised during the public consultations did not have sufficient time and opportunity to filter through for proper consideration.[20] Accordingly, the efforts made by the provincial legislatures were flawed and did not pass constitutional muster. This was even more disconcerting as provincial legislatures were closer to the people and were geographically better located than national institutions. Their contribution to participatory democracy could not be overstated.[21]

Overall, three issues were highlighted in particular:[22] (*a*) the notices fell short of informing persons timeously of the date, the venue and the Bill(s) that stood to be discussed; (*b*) the quality of the public hearings left much to be desired as either no or unsuitable translations were provided and more than one Bill was dealt with at a time; and (*c*) the lack of introspection in that all barring two provincial legislatures, accepted the rigid timelines. This in itself reflected poorly on the provincial legislatures. In the light of all of the above, the CC concluded that the public participation process was unreasonable and therefore unconstitutional: '[t]he deficient conduct taints the entire legislative process and is a lapse by Parliament'.[23]

Declaring the Amendment Act unconstitutional in its entirety still left the difficulty of crafting the correct remedy as the Restitution Act had been in effect for some time already and many persons had already taken steps in terms of it, acting *bona fide*. On this basis it would be unjust merely to invalidate all the claims that had already been lodged.[24] Finally, the following order was made: while the Commission could not process any land claims lodged since 1 July 2014, the Commission could continue to receive and acknowledge receipt of claims lodged. All claims lodged in 1998 had to be

16 *Land Access Movement of South Africa* (n 5) at para 63.
17 *Land Access Movement of South Africa* (n 5) at para 64.
18 *Land Access Movement of South Africa* (n 5) at para 65.
19 *Land Access Movement of South Africa* (n 5) at para 67.
20 *Land Access Movement of South Africa* (n 5) at para 71.
21 *Land Access Movement of South Africa* (n 5) at para 74.
22 *Land Access Movement of South Africa* (n 5) at para 75.
23 *Land Access Movement of South Africa* (n 5) at para 82.
24 *Land Access Movement of South Africa* (n 5) at para 86—roughly 400 000 new claims were apparently lodged; see, however, section 2.1 for the real number of claims.

finalised first before the second wave of claims could be processed. In the meantime, the state had twenty-four months to draft legislative measures setting out exactly how the second wave of land claims was to be approached and dealt with. Only after the 1998 claims had all been dealt with could the July 2014 claims be processed. If, at that time, the state had not promulgated the Act as required, any interested party could approach the CC for guidance as to how the second wave of land claims had to be processed.

This judgment is somewhat reminiscent of *Tongoane v Minister of Agriculture and Land Affairs*,[25] which was handed down in May 2010 by the CC declaring the Communal Land Rights Act 11 of 2004 (CLARA) unconstitutional. CLARA was flawed because the incorrect tagging procedure had been followed. Instead of using section 76, the Act was tagged as a section 75 Act, and as a result it charted the incorrect course through parliament. The Restitution Amendment Act was tagged correctly, but the process was so rushed that it could add no value whatsoever, rendering public participation meaningless. Accordingly, meeting the technical requirements at some level and to some extent is not enough—the requirements are there for good reason. Achieving the real goals are the actual test and not the superficial ticking off of checklists only.

LAND REFORM

Interim Protection of Informal Land Rights Act 31 of 1996

The application of the provisions of the Interim Protection of Informal Land Rights Act has been extended from 31 December 2016 to 31 December 2017.[26] This is the twentieth time that the Act has been extended and it is an indication of the lack of reform of the land-tenure system. Many people in South Africa still have insecure tenure rights that therefore need protection in terms of this Act.

Communal Property Associations Act 28 of 1996

The draft Communal Property Associations Amendment Bill of 2016 was published for comment on 22 April 2016.[27] Although an amendment Act was in the pipeline for many years, given the difficulties experienced with the Communal Property Associations Act 28 of 1996,[28] it is possible that the CC judgment in *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority*[29]

25 *Tongoane v Minister of Agriculture and Land Affairs* 2010 (6) SA 214 (CC).
26 GN 1488 in *GG* 40466 of 2 December 2016.
27 GN 243 in *GG* 39943 of 22 April 2016.
28 See eg Juanita M Pienaar, *Land Reform* (Juta 2014) 494–495.
29 *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority* 2015 (6) SA 32 (CC).

provided the necessary impetus for the recent publication of the draft Bill. The draft Bill suggests the following amendments at an overarching level: it scraps provisional communal property associations (hereafter CPAs) while setting out some provisional measures for (existing) provisional CPAs in the process of finalisation; it provides for the establishment of a CPA Office with a new Registrar heading the Office as well as for regional offices, where relevant; it enables the establishment of CPAs by former labour tenants who were successful with labour tenancy claims under section 22 of the Land Reform (Labour Tenants) Act 3 of 1996; it provides for the transformation of similar entities (of collective ownership constructs) into CPAs, and sets out detailed guidelines as to the content of the annual report that has to be tabled in parliament.

The Act applies to a community which is entitled to land or property resulting from the restitution programme (either resulting from a court order or under section 42D or 42E of the Restitution of Land Rights Act 22 of 1994, relating to framework agreements) or to communities where the minister has approved the formation of an association under clause 2(2) of the draft Bill. With regard to the last of these, the grounds for constituting an association may be the result of state assistance or an agreement in terms of any law or where property was donated, sold or otherwise disposed of to a community or any other instance where a community acquired land or rights to land and wishes to form an association under the draft Bill. Included here are also instances where labour tenants had been awarded land under the labour tenancy legislation and the minister has approved such a community on condition that an association is be formed in accordance with the draft Bill.[30] The minister's approval of a community for the purposes of the Bill is guided by the public interest, having regard to the nature and current use of the land.[31] It is also possible for similar entities to apply to the minister to be transformed into a CPA. Similar entities here include a trust contemplated in the Trust Property Control Act 57 of 1988, a co-operative as contemplated in the Co-operatives Act 14 of 2005 and any other recognised association of persons or a company registered in terms of the Companies Act 71 of 2008. The process for such transformation is set out in clause 2(3) and entails the de-registration of the former construct within a period of three months, under relevant legislation. Evidence to support such de-registration must be provided to the registrar. Where property was awarded in terms of labour tenancy legislation, such CPAs would relate to tenants who resided on a farm or farms adjacent to one another.[32]

Section 2 of the current Act dealing with the application of the Act is followed by new provisions comprising clauses 2A, 2B, 2C, 2D and 2E, respectively dealing with: the transfer of property in the name of the community or the name preferred by the community; a general plan for property—setting out the various uses of land or parts of land within the relevant jurisdiction of the CPA; establishment of the CPA Office at a national, overarching level; the appointment and conditions of service of the

30 Communal Property Associations Amendment Bill, 2016 cl 2(1).
31 Communal Property Associations Amendment Bill, 2016 cl 2(2).
32 Communal Property Associations Amendment Bill, 2016 cl 2(6).

registrar; and, finally, the functions of the registrar. Clause 2E lists no fewer than twelve functions of the registrar, including the duty to provide assistance to and to register associations in order to ensure compliance. In the light of the *Bakgatla* judgment, it is to be hoped that the institution of this new office and its functionary will go a long way towards providing much-needed assistance and oversight, so as to generally improve governance and transparency.

Clause 8 deals with the registration of associations. All applications for registration have to be lodged with the registrar, who considers each application in the light of the relevant constitution and all prescribed information. The main object of the association is now set to be 'the administration and management of communal land on behalf of a community.'[33] Considering that provisional associations will no longer exist (barring the transitional provisions), the registrar must now register an association if he or she is satisfied that the association qualifies for registration, and, if so, allocate a registration number and issue a certificate of registration.[34] This amendment is directly linked to the *Bakgatla* judgment in that the CC found that a CPA effectively exists the moment when it qualifies for registration, in other words, when it meets the requirements. In this context there is no room for or no use for provisional associations. However, having no room for provisional associations does not necessarily mean the path to automatic registration will be a smooth one. CPAs may be registered only when all the requirements were met. Clause 8(4) therefore provides that, where the registrar is not satisfied that the association qualifies for registration, the community will be notified accordingly. The steps that need to be taken in order to procure the necessary registration must accompany that notification. The registrar is therefore also involved in assisting and advising so as to ensure registration.[35] Upon registration, the association acquires the authority to perform various acts, as listed under clause 8(6). Also in this regard, some changes were effected by deleting the reference to the acquisition and disposal of property and the right to encumber immovable property. Clause 8(6)(*c*) now only provides for the administration and management of communal land on behalf of a community. The CPA's authority regarding the disposal, sale or encumbering of property is now dealt with under clause 12 of the Bill.

Clause 9 of the Bill sets out the principles to be dealt with in the CPAs' constitutions. These principles were relied on heavily by the CC in its 2015 judgment.[36] While the bulk of the principles have remained unchanged, references have been inserted in relation to communal property in particular, for example, fair access to communal property; the administration and management of communal property for the benefit of the members, and a member may not be excluded from access to or use of any part of communal land which has been allocated for such member's exclusive or communal use except in

33 Amended under Communal Property Associations Amendment Bill, 2016 cl 8(2)(*b*).
34 Communal Property Associations Amendment Bill, 2016 cl 8(3)(*a*).
35 Communal Property Associations Amendment Bill, 2016 cl 8(5).
36 *Bakgatla* (n 29) at paras 25–26.

accordance with the procedures set out in the constitution. Clause 9(*d*)(iii) now provides that an association may sell, donate or encumber communal land or any substantial part of it only in accordance with the provisions of clause 12(1). All financial and banking matters are now dealt with under clause 9(1)(*e*).

Apart from the important role played by the registrar in assisting with dispute resolution in clause 10, clause 11 also provides an important overarching role for the registrar in monitoring and inspecting in general. It was also in this context that the CC was very critical of the lack of supervision and support provided to communities.[37] Also linked to clause 10 is clause 11(6), which deals with disputes that arise within associations. Here the registrar may on their own accord or at the request of a member enquire into the activities of the association, advise the association, make a person available to assist in resolving the dispute and, on good cause, may even dissolve a committee or relieve a committee member of their duties, and appoint an interim committee, where necessary. The registrar therefore has an integral role to play in supporting communities and in ensuring that transactions and conduct are above board and that governance of associations is generally sound.

Clause 12 provides for 'approval for certain transactions'. This means that an association may not sell, donate or encumber communal land or immovable property or conclude transactions relating to it or purchase any immovable property without (*a*) the written consent of the minister; and (*b*) a resolution to that effect supported by at least sixty per cent of the total number of households with ownership or leasehold rights present at a meeting where such resolution is adopted. Furthermore, where a resolution is adopted to sell communal land, the director-general and the department must be informed and must have the first option to acquire the land in question. Within three months of receipt of such notice the department must indicate whether it would want to proceed with purchasing the land, and that purchase must take place within nine months from the date of receipt.[38] This is a brand-new clause which is seemingly aimed at two objectives: first, to protect communal land and property held by the association; and, secondly, to ensure that the government has the first opportunity to acquire such land. The timeline tied to the transaction furthermore ensures that land transactions do not drag on indefinitely but that certainty is achieved within nine months at the latest.

As alluded to above, the draft Bill provides no definition of 'communal land'. Clearly, the absence of a definition has an impact not only on this section but on all other provisions dealing with 'communal land'—for example, in clause 8(2)(*b*) (where the main objective of a CPA is defined to be the administration and management of communal land on behalf of a community). 'Communal property' is also referred to in various other provisions, for example, in clause 9(1)(*d*) (where it forms part of the principles to be taken into account when drafting and adopting constitutions; clause 9(1)(*d*)(i) and (ii) contains principles relating to the access, administration and management

37 *Bakgatla* (n 29) at para 51.

38 Communal Property Associations Amendment Bill, 2016 cl 12(1)(*a*).

of communal property, as opposed to communal land). Clause 2 also relates to movable property and the sale, donation or encumbering of it, in terms of which the consent of the majority of members is also required.[39] Lease agreements relating to immovable property are dealt with in clause 12(1)(*c*); they also require the prior consent of the registrar. Any sale, mortgage, encumbrance or purchase contrary to the provisions of the Act is voidable.

For many years, concerns have been raised regarding the complexity of the Act, its formulation and terminology. Implementing the Act successfully has also proved to be difficult and time-consuming, especially within traditional communal areas where traditional authority constructs operate. Internal conflicts among CPA members are rife, although these issues do not always reach the courts and so reported judgments do not ensue. For these reasons an amended Act, aimed at better efficacy, is both timeous and necessary. The new amendments to the CPA Act have to be read together with new developments relating to communal land tenure and the CC judgment of *Bakgatla-Ba-Kgafela.* While measures dealing with communal land tenure are apparently underway, no official draft measures have been made available yet. It is especially within the context of alignment and/or contradiction with communal land concepts that the absence of definitions in the interpretation clause regarding 'communal land', 'communal property' and 'immovable property' is especially disconcerting. The term 'communal land' may have different meaning in different contexts. The precise content and conception of the term is therefore important in the CPA context. As the draft Amendment Bill stands at present, the words 'communal land', 'communal property' and 'immovable property' are all used inter-changeably, resulting in legal uncertainty and vague and confusing measures.

Doing away with the two-phased formalisation process of CPAs will certainly speed up the overall process and will put more pressure on role-players to adhere to tighter timeframes. Legal uncertainty as to when exactly a provisional association ceases to exist and becomes a final association will, furthermore, be removed. Hopefully this more streamlined process will have real benefits in practice for all the parties involved. Setting out specific requirements linked to the sale, disposal and encumbrance of property, as well as the purchase of property by the CPA, will go some way towards protecting the members of associations and their property rights against exploitation, loss and dispossession. Of course, that is only the case when the requirements are adhered to in practice. It would be of no use if this remains paper law only and members and associations continue to dispose of property at will. It is especially the more vulnerable sections of society that will be disadvantaged if such conduct continues. Offering communal land for sale to the department first is also a move in the right direction. This way, the government may acquire land that can be used for other objectives related to land reform, possibly at a more affordable price and in a more sustainable fashion.

39 Communal Property Associations Amendment Bill, 2016 cl 12(1)(*b*).

However, exactly what is deemed to be 'communal land' in this context is, as explained, unclear.

Although the amended version of the Bill is therefore to be welcomed, one also has to be realistic regarding the current constraints within which government institutions are often forced to function. All in all, however, the amendments have not made the Act as a whole less complex and more streamlined. The end result remains a lengthy and complex legislative measure. The real test of the success of the amendments will probably emerge only once the amended Act is in operation, alongside new communal land developments (in whichever format they eventually emerge), new legislation dealing with traditional courts and the Traditional Leadership and Governance Framework Act 41 of 2003. It is within this context—where communities, councils, committees and CPAs have to function together alongside traditional leadership constructs—that concepts of power, authority, control and ownership will really come to the fore.

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

In *Drakenstein Municipality v Cillie*[40] the municipality lodged an appeal against particular paragraphs of a judgment and an order was handed down by the Wellington magistrate under ESTA. As the eviction order was granted under ESTA, the automatic review proceedings took place as required under section 19(3) of ESTA, which resulted in the LCC's confirming the eviction order.[41] The local authority lodged an appeal against the confirmation on the basis that particular responsibilities were handed to the local authority, which was joined to the proceedings, without the applicants in the *a quo* litigation seeking relief against the local authority. In this regard the local authority was ordered to set aside land for emergency housing. It is against this particular obligation that the local authority levelled its appeal.

Three grounds for appeal were formulated:[42] (*a*) the magistrate should not have found that the appellant was obliged to provide the occupiers with land for alternative accommodation in the absence of proper evidence concerning the occupiers' position to afford alternative accommodation themselves; (*b*) the magistrate's order was underpinned by an erroneous finding that the appellant had alternative land available; and (*c*) the reasonableness of the municipality's plans. The first two grounds of appeal were unsuccessful.[43] However, it is with respect to the first ground that a particular statement of the LCC warrants more discussion. The fact that the magistrate did not investigate the financial circumstances of the occupiers was offered as a ground for appeal.[44]

40 *Drakenstein Municipality v Cillie* (unreported case number LCC 44/2015, Land Claims Court, Cape Town, 3 June 2016).

41 *Drakenstein Municipality* (n 40) at para 3.

42 *Drakenstein Municipality* (n 40) at para 11.

43 *Drakenstein Municipality* (n 40) at paras 12–18.

44 *Drakenstein Municipality* (n 40) at para 13.

The appellant was successful on the last ground of appeal as the magistrate was not prepared to immediately order the provision of alternative land for the benefit of the occupiers, as there was no indication that such relief would be sought against the local authority.[45] As the appellant had no warning that a mandatory order would be granted against it, that part of the order in which that relief was granted could therefore not stand.[46] However, striking out the paragraphs without giving the court that granted the order an opportunity of being addressed on the issues raised in the LCC would not be just and equitable. The matter was thus referred back to the court of first instance for reconsideration and in particular compliance with section 9(3) of ESTA, which provides for a probation officer's report.

While the legal measures employed in the *Drakenstein* and the *Arthurvillage* cases were different and the problems dealt with were not identical, a comparison between the conduct of the relevant magistrates is interesting, especially in the light of the judgments of *Pitje v Shibambo*[47] and *Molusi v Voges*.[48] In the *Molusi* case the new eviction paradigm, which replaced the common-law eviction remedy, was emphasised specifically, whereas the *Pitje* case underlined the point that courts cannot be passive where eviction is dealt with.[49]

Therefore, irrespective of whether the eviction is approached under ESTA, as in the *Drakenstein* case, or under PIE, as in *Arthurstone village*, the constitutional eviction paradigm requires a particular approach from presiding officials. These officials have to be involved, have to be pro-active and ask questions, make enquiries and find out what the relevant circumstances are. That is the case for all presiding officials where eviction is dealt with. The statement in the *Drakenstein* case that that particular function of interventionist approach is reserved for specialised courts, such as the LCC, is incorrect. Where eviction is at stake, the actual lives of persons, their homes and everything connected to that are also at stake. Courts cannot be passive. Merely rubber-stamping processes is simply not tenable.

In *Magubane v Twin City Developers (Pty) Ltd*[50] leave to appeal was granted to consider the issue whether a probation officer's report, provided for under section 9(3) of ESTA, is an absolute requirement before a court can grant an eviction order. Section 9(3) provides that a court has to request a probation report so that certain information can be placed before the court. Such information would relate to the availability of suitable accommodation, the effect of the eviction on the constitutional rights of persons, including the rights of children to education, the undue hardships that may result from eviction as well as any other relevant matter. The application for leave to appeal was

45 *Drakenstein Municipality* (n 40) at para 22.
46 *Drakenstein Municipality* (n 40) at paras 20 and 24.
47 *Pitje v Shibambo* 2016 (4) BCLR 460 (CC).
48 *Molusi v Voges* 2016 (3) SA 370 (CC).
49 *Pitje* (n 55) at para 19.
50 *Magubane v Twin City Developers (Pty) Ltd* (LCC 126/2014) [2016] ZALCC 7 (18 April 2016).

granted because case law is unclear whether the probation report is mandatory or whether it is advisory only.[51]

The discussion of the two judgments above has underlined the importance of ensuring that all the necessary information is before the court before adjudication can take place. Because all the rights and interests of all the parties have to be weighed up and balanced, true balancing cannot take place if integral information is lacking. On the other hand, requesting and waiting for the probation report may be very time-consuming and could lead to protracted and time-consuming proceedings. It is high time that clarity were obtained in this regard.

An important judgment that has the potential to affect greatly families in occupation of farm land in particular was handed down in the CC. *Klaase v Van der Merwe*[52] embodied various appeals against certain decisions of the LCC: firstly, confirming the eviction on automatic review of the first applicant—Mr Klaase; and, secondly, the refusal of an application for joinder by the second applicant, Mrs Klaase. Of essence is the interpretation and application of the concept 'occupier' for the purposes of ESTA, with particular application to spouses.

The problem is well known and has been commented on numerous times before.[53] Essentially, female occupiers are often evicted on the basis that they enjoy occupation *via* their husbands or partners, without having been joined to the proceedings and, therefore, without having had the opportunity to place their particular circumstances before the court. In reality, this practice embodies a gross violation of section 26(3) of the Constitution.[54]

The facts were as follows: Mr Klaase is a farm worker and started working on the farm in 1972. Initially he resided in a house with his father, but after becoming romantically involved with the second applicant and their having a child together, the second respondent's father built a small cottage on the farm to be occupied by the young Klaase family. The couple married in 1988 and had been living on the farm, together as a family, since then. Following a disciplinary hearing due to absconding from work, Mr Klaase's employment was terminated in 2010. The matter was settled and Mr Klaase received a monetary settlement in exchange for vacating the farm. As he never vacated the house, his right to residence was consequently terminated and formal eviction proceedings were lodged in the magistrate's court. In those proceedings Mr Klaase was cited as the respondent, although the proceedings were also levelled at everyone occupying through him, including his wife. A probation officer's report was requested, meaningful engagement ensued and on 14 January 2014 an eviction order was granted. As usual, the automatic review by the LCC under section 19(3) of ESTA followed. On review the eviction order was confirmed on the basis that his right of

51 *Magubane* (n 50) at paras 15–16; Pienaar (n 28) at 406–407.

52 *Klaase v Van der Merwe* 2016 (6) SA 131 (CC).

53 See eg JM Pienaar and K Geyser '"Occupier" for Purposes of the Extension of Security of Tenure Act: The Plight of Female Spouses and Widows' (2010) 73 THRHR 248.

54 Pienaar (n 28) at 397.

residence was terminated when the settlement agreement was entered into and that all official requirements had subsequently been met.[55]

Following the review confirmation, Mrs Klaase launched a three-fold application in the LCC, respectively for (*a*) joinder; (*b*) suspension of further proceedings; and (*c*) consolidation of the application with the eviction application.[56] The basis of Mrs Klaase's application was that she has continuously resided on the farm for many years in her own right as a general farm employee and with the consent of the owner. In this regard she was protected under the provisions of ESTA as she had been in occupation for at least thirty years with the knowledge of the landowner. Relying on the presumption provided for in ESTA, the onus was on the respondent to show that she did not have the requisite consent, it was further argued. In response the landowners argued that Mrs Klaase had never received an independent right to occupy on the farm, even though she came to live on the farm as a prospective spouse. Furthermore, seasonal workers were never granted independent rights to occupy. Instead, her right of residence was derived from her marriage to Mr Klaase and in that regard she occupied *via* him.[57] Her application was dismissed by the LCC as there was no evidence that supported her allegations and because various 'classes' of occupiers existed, namely a 'resident', on the one hand, and an 'occupier', on the other. Because Mrs Klaase fell within the first category or class as being a resident,[58] she could not be joined in the proceedings.[59]

Following the dismissal of her applications, Mrs Klaase appealed to the Supreme Court of Appeal (SCA), which application was likewise unsuccessful. In the CC the application was aimed at setting aside the decisions of the LCC. In this regard Mrs Klaase's contention was that she was an occupier under ESTA in her own right.[60] The respondents argued that she did not allege that express or tacit consent was given to her and that, contrary to the rule that a case must be properly presented and pleaded, her case had since then segued between three differing and mutually exclusive versions.[61] While the issues before the CC also related to condonation,[62] admitting new evidence,[63] and Mr Klaase's eviction,[64] this discussion settles on the interpretation of the concept 'occupier' and how this relates to Mrs Klaase's status, her joinder and eviction only. In this regard the CC was satisfied that the matters raised constitutional issues of public importance and that it had implications for many persons in similar positions, which

55 *Klaase* (n 52) at paras 2–14.
56 *Klaase* (n 52) at para 15.
57 *Klaase* (n 52) at para 18.
58 *Klaase* (n 52) at para 21.
59 *Klaase* (n 52) at para 22.
60 *Klaase* (n 52) at para 27.
61 *Klaase* (n 52) at para 27.
62 *Klaase* (n 52) at paras 33–36.
63 *Klaase* (n 52) at paras 37–40.
64 *Klaase* (n 52) at para 44.

would also have an impact on equality and human dignity.[65] Consequently, the matter was ideally suited to be dealt with in the CC.

The decision consists of two judgments: a majority judgment handed down by Matojane J (with Moseneke DCJ, Cameron J, Madlanga J, Nkabinde J and Wallis AJ concurring as well as Jafta J supporting the order granted) and a minority judgment handed down by Zondo J (with Mogoeng CJ and Van der Westhuizen J concurring). The CC first addressed the matter of whether Mrs Klaase had to be joined. In this regard the test for joinder was highlighted, namely whether a party had a direct and substantial legal interest in a matter.[66] As it was clear that Mrs Klaase, being a person who had resided on the farm for about thirty years, indeed had a direct and substantial interest in Mr Klaase's eviction proceedings, the CC was satisfied that the LCC had erred and should have joined her to those proceedings.[67] Understandably, the bulk of the judgment deals with whether Mrs Klaase is an occupier for the purposes of ESTA. In this regard, an occupier is a person who has consent to reside on property belonging to another, or another right in law to do so. Consequently, both tacit and actual consent are included.[68] When interpreting the definition, the process starts with the Constitution and the purposive approach to it. This means that where Mrs Klaase is concerned, in reality, a combination of fundamental rights emerge, including her right to access to housing, not to be evicted from her home without a court order made after considering all relevant circumstances, her right to equality, and her right to have her human dignity respected and protected.[69] Whereas a purposive approach would enable a more generous approach, the LCC had followed a narrow or limited approach in that Mrs Klaase was deemed to be a resident and not an occupier. The CC found that that conclusion was misconceived.[70] The LCC had reached its conclusion by focusing on the fact that a person must be or must have been a party to an agreement with the landowner in order for consent to be present.[71] However, this approach would negate the possibility of tacit consent, which restricted meaning of 'consent' was 'not justified'.[72] This approach, furthermore, did not take account of the presumption that persons who have continuously and openly resided were deemed to have received consent. Mrs Klaase had lived on the farm for a continuous period of about thirty years, openly, with the consent of the farm owner.[73]

65 *Klaase* (n 52) at para 31.
66 *Klaase* (n 52) at para 45.
67 *Klaase* (n 52) at para 48.
68 *Klaase* (n 52) at para 49.
69 *Klaase* (n 52) at para 52.
70 *Klaase* (n 52) at para 54.
71 *Klaase* (n 52) at para 55.
72 *Klaase* (n 52) at para 57.
73 *Klaase* (n 52) at para 64.

The CC was satisfied that Mrs Klaase was indeed an occupier under ESTA and therefore entitled to the protection set out in the Act,[74] including that her right of residence must be terminated on lawful grounds. That had not taken place in this instance, meaning that section 8 of ESTA had not been complied with.[75] In this context, it became unnecessary for the court to determine whether the consent was tied to particular conditions or whether, if proper notice had been given, her eviction would have been just and equitable. The majority judgment concluded as follows:[76]

> The Land Claims Court's finding that Mrs Klaase occupied the premises 'under her husband' subordinates her rights to those of Mr Klaase. The phrase is demeaning and is not what is contemplated by section 10(3) of ESTA. It demeans Mrs Klaase's rights of equality and human dignity to describe her occupation in those terms. She is an occupier entitled to the protection of ESTA. The construction of the Land Claims Court would perpetuate the indignity suffered by many women similarly placed, whose rights as occupiers ought to be secured.

Mrs Klaase's appeal was thus successful and the decision to evict her was set aside. The minority judgment essentially focused on how and/or when a family member would cease to be a resident and become an occupier under ESTA. Linked with this is the nature of consent required and whether there is qualified or unqualified consent.[77] The majority judgment found that Mrs Klaase was an occupier, as defined, for two main reasons:[78] (*a*) Mrs Klaase had resided on the farm for many years with the knowledge of the owners without any objection from them and without their taking any steps to evict her; and (*b*) Mr Van der Merwe (Sr) had consented to her occupation of the cottage with her husband. The problem with the majority's decision was that, at some point, all residents would then automatically 'graduate' into an occupier as defined after residing on the farm for some time without the owner objecting to their residence or taking steps to evict them. Instead, the minority judgment explores the matter from the point of departure that the South African law acknowledges the concept that one person may occupy property under or through another person,[79] for example, in the case of sub-lessees. If the lessee's right were lawfully and validly terminated, the other person's rights linked to the lessee would also come to an end. In this regard, various sections of ESTA are highlighted as encapsulating this concept, including section 6(2)(*d*) (which defines a family member of the occupier); section 8(5) (which refers to the dependant or spouse of a long-term occupier after the latter's death); and section 19(3)(*c*) (which refers to a person who also occupies a home with the occupier and whose permission to reside there was wholly dependent on his or her right of residence). Essentially the

74 *Klaase* (n 52) at para 65.
75 *Klaase* (n 52) at para 65.
76 *Klaase* (n 52) at para 66.
77 *Klaase* (n 52) at para 69.
78 *Klaase* (n 52) at para 78.
79 *Klaase* (n 52) at para 83.

argument is that, clearly, the Act provides for different kinds of person occupying homes under ESTA.[80]

With regard to the issue of consent, the minority judgment raised the question whether the fact that the landowner did not object to Mrs Klaase's residence automatically resulted in the kind of consent contemplated for being an occupier.[81] Stated differently: will failure to object automatically constitute consent for the purpose of being an occupier? If this is the case, then every person residing with an occupier would automatically 'graduate' to becoming an occupier for the purposes of ESTA.[82] This approach also refrains from enquiring why the landowner did not object. Nor does this approach explain whether in law the owner had a right to object or a right to evict.[83] In the present instance the landowner enabled Mrs Klaase to accompany her husband and to live together in the house. Her residence was thus enabled as a result of her relationship with Mr Klaase. Therefore, failure to object cannot be relied upon to draw an inference sought to be drawn when there is a plausible explanation for the failure to object.[84] In this regard the minority found no evidence that consent was granted to Mrs Klaase to reside on the farm independently from Mr Klaase. Instead:[85]

> All the evidence overwhelmingly points to the conclusion that, to the extent that Mr Van der Merwe (Sr) may have given his consent for Mrs Klaase to reside on the farm, that consent was for her to reside on the farm through or under Mr Klaase Jr.

The approach followed by the majority furthermore does not take account of the right to family life of occupiers, specifically provided for in ESTA. With respect to the latter, the family member in occupation in a home does not require the consent of the landowner, but does require the consent of the occupier him- or herself.[86] If the consent of the property owner were required, that person would become an occupier, so defined. The minority further found that the non-joinder of Mrs Klaase in the eviction proceedings, despite the fact that she had a direct and substantial interest, vitiated the eviction order.[87] That order had to be set aside and the matter adjudicated afresh so that Mrs Klaase would have the opportunity to place her circumstances before the court.

While the result of the two judgments is to be welcomed, neither of the two judgments is satisfactory as some shortcomings remain. It is unacceptable that persons—usually spouses—are evicted without having the opportunity to place their circumstances before the court. That problem can be addressed rather simply by the joinder of all relevant parties, in particular the spouse. The joinder, coupled with the

80 *Klaase* (n 52) at para 97.
81 *Klaase* (n 52) at para 112.
82 *Klaase* (n 52) at para 116.
83 *Klaase* (n 52) at para 118.
84 *Klaase* (n 52) at para 122.
85 *Klaase* (n 52) at para 128.
86 *Klaase* (n 52) at paras 136–137.
87 *Klaase* (n 52) at para 153.

probation officer's report—as required in section 9(3)—should go a long way in forcing courts to consider all the relevant circumstances so as to determine whether an eviction would indeed be just and equitable.

However, the status of parties and whether they fall within the ambit of ESTA is quite clearly a greater problem. It remains a conundrum in that the inherent difficulties and implications of findings were not canvassed in detail in the judgments handed down. With regard to the majority judgment, various questions remain unanswered: At what point exactly does one stop being a resident and become an occupier under ESTA? Are there in principle different classes of occupier or would everyone eventually automatically fall within the ambit of the Act? If the latter is indeed the case, then why is it necessary to provide for a right to family life, for example, when everyone would in any event enjoy occupier status? The implications of the finding of the majority judgment are unclear: Would that mean that Mrs Klaase can remain on the farm with her husband, as she would have a right to family life? What would happen to Mr Klaase's eviction, which was confirmed in the CC? The minority judgment is unclear as to the exact basis on which Mrs Klaase was joined in the proceedings. Was that because of her direct interest or because she was a resident? If it was the latter, would that mean that all residents would automatically be joined?

The root of the problem remains the current set-up in terms of which vulnerable persons are unable to access their own housing and are forced to rely on housing provided to them, with strings attached. On the one hand, vulnerable persons are in need of employment and housing—while having the right to dignity and to live as 'normal' a family life as possible. On the other hand, farm owners have agricultural enterprises to run, with food security and sustainability being some of the overarching objectives. As long as housing is tied to employment, these livelihood issues will remain prominent and enduring, irrespective of what class or what kind of resident or occupier is involved.

Snyers v MGRO Properties (Pty) Ltd[88] dealt with eviction and CCMA proceedings in general and the matter focused in particular on whether the referral of a labour dispute between the first appellant and the employer (first respondent) was still pending when the employer issued and served a notice to vacate under section 8(3) of ESTA. The LCC had previously found that no real dispute was pending before the CCMA and consequently dismissed the appeal. The facts were briefly the following:[89] the appellant, Mr Snyers, commenced working on the farm in 1981 as a farm labourer. His employment was linked to his right of residence. In 2010 the farm was acquired by new owners and a new employment contract was negotiated. Again, the right of residence was linked to Mr Snyers' employment on the farm. In 2011 he tendered his resignation, citing the new owners' style of management and the human relations on the farm as reasons. The respondents accepted his resignation, he ceased working four weeks later and on the same day referred a constructive dismissal dispute to the CCMA. In that referral he

88 *Snyers v MGRO Properties (Pty) Ltd* [2016] 4 All SA 828 (SCA).

89 *Snyers* (n 88) at paras 2–10.

cited the fact that he could get access to his pension proceeds only by resigning and not the conduct as such of the new owners. In March 2011 the respondents served a notice in terms of section 8(3) of ESTA on Mr Snyers. However, under section 8(2) and (3) of ESTA any dispute over whether an occupier's employment was terminated has to be dealt with in accordance with the provisions of the Labour Relations Act 66 of 1995 and the termination takes effect once any dispute over the termination has been determined in accordance with that Act.

There was some confusion concerning the time of the referral to the CCMA, which resulted in an application for condonation by Mr Snyers. After that, the CCMA refused the condonation and ruled that it consequently lacked jurisdiction to entertain the dispute. In the meantime, Mr Snyers persisted in his refusal to vacate the farm, thereby causing a further notice to be served on Mrs Snyers. In 2013 the eviction application was served on both Mr and Mrs Snyers. In the LCC it was found that because no dispute had been referred to the CCMA on 18 January 2011, there was therefore no dispute pending when the first notice to vacate and terminating the appellants' right of residence was given in March 2011. For this reason, the LCC held that both notices were valid.[90]

On appeal to the SCA, the argument was made that the LCC had erred in its finding and granting of the eviction order because the notices to vacate that were served were invalid as they preceded the termination of the right of residence under section 8 of the Act.[91] Linked to this is the appellant's averment that he was forced to resign under the pretext that he would receive his pension money.[92] In this regard he had been constructively dismissed, which dispute was still before the CCMA when the notices were served in March and May 2011. In contrast, the respondents averred that Mr Snyers had resigned voluntarily, that they had no information about a pending dispute, and that the onus was on Mr Snyers to bring section 8(3) to bear.

Similarly to the CC judgment discussed above, the approach to interpreting ESTA was set out clearly in the judgment by Mathopo JA (with Mhlantla, Leach, Willis and Zondi JJA concurring), namely that the spirit, purport and objects of the Bill of Rights should guide the process. In this regard, a generous construction over a merely textual or legalistic one is preferred so as to afford claimants the fullest protection of their constitutional guarantees.[93] Given the necessary background, the SCA proceeded to deal with the validity of the notices served. The court was satisfied that the notices had been served without the labour dispute before the CCMA having being determined.[94] That was in contravention of section 8(3) of ESTA. As long as the dispute was still pending, the termination of employment for the purposes of ESTA could not have taken effect.[95]

90 *Snyers* (n 88) at para 12.
91 *Snyers* (n 88) at para 13.
92 *Snyers* (n 88) at para 14.
93 *Snyers* (n 88) at para 16.
94 *Snyers* (n 88) at para 18.
95 *Snyers* (n 88) at para 18.

Furthermore, when an occupier's tenancy was subsidiary to his employment and their dismissal was disputed, then the dispute over its fairness had to be finally determined before the subsidiary tenancy could be terminated. The validity of the notice so given was vitiated by the lack of determination of the labour matter. As the notices were invalid, the eviction process as a whole was vitiated.[96]

The position of Mrs Snyers, against whom an eviction application had been also lodged, was approached in the light of the *Klaase* judgment set out above.[97] In this regard, the court found that, despite Mrs Snyers having been given proper notice terminating her right to occupy the farm in terms of section 8, because of the irregular eviction proceedings brought against Mr Snyers, if an application for eviction were to be allowed against her while it was refused against her husband, the result would effectively be to divide the family. Therefore, despite Mrs Snyers' notice of termination of her right to reside on the farm having been given validly, being denied that right would infringe on Mr Snyers' right to family life. It would have been undesirable to allow her eviction for as long as Mr Snyers remained on the farm, pending the determination of his labour dispute. Accordingly, the appeal was upheld and the order of the LCC was set aside.

Unfortunately, this judgment contributes to the conundrum alluded to above, especially with regard to the status of persons, whether or not they fall within the ambit of ESTA, and the implications of such a finding. It is correct that the eviction matter cannot be finalised if the labour dispute is still pending. On that basis alone the eviction application cannot go ahead. However, the findings regarding Mrs Snyers do not contribute to solving the matter at all. On what basis was an eviction application lodged against Mrs Snyers? Was that because she was a resident as she derived her occupation *via* her husband or was she an occupier in her own right? If she was an occupier in her own right (and there are no indications of that in the judgment), then her right to residence would have had to have been terminated specifically. If she was a resident who derived her occupation *via* her husband, on what basis was an eviction application lodged against her and on what basis could that possibly have succeeded? The only conclusion to be reached here is that, as Mr Snyers has a right to family life and as his eviction was not dealt with in line with the Act, she could not be evicted because of Mr Snyers' right to family life.

How could the previous judgment handed down in *Klaase* then be employed to assist Mrs Snyers here? What would have been the result if Mr Snyers' eviction application had proceeded in line with ESTA—in other words, the notices had been served only after the labour dispute had been settled? On what basis would Mrs Snyers then have been 'saved' and allowed to continue living on the farm, because she had done nothing wrong?

The *Klaase* and *Snyers* judgments, read together, highlight particular shortcomings in the judges' reasoning in an attempt to solve the interpretation challenges posed by the

96 *Snyers* (n 88) at para 19.
97 *Snyers* (n 88) at paras 21–23.

legislation: Mrs Klaase was successful in her endeavour only because she had already been in occupation for about thirty years and because it was deemed that consent had been granted for her occupation as the owners had not objected to her presence in the house. The particular development in the *Klaase* case is limited and the protection afforded to women (spouses) generally is again limited. Read together, the particular conditions in the *Klaase* case therefore fail to assist Mrs Snyers and other women in similar situations. Apart from the fact that Mr Snyers had been in occupation on the farm since 1981, there is no indication of when and for how long Mrs Snyers was also in occupation. There is, however, a reference to her being a seasonal worker at some time.[98] Of the essence is that Mrs Snyers had done nothing wrong, had not contravened any agreement and was able to continue her occupation only because her husband—whose eviction was flawed—has a right to family life. This result is not in line with the general thrust of the *Klaase* judgment, which warns against subordinating the wife's rights and her dignity to those of her husband. In fact, seemingly, under the *Snyers* judgment, the wife's rights are again dependent on those of her husband.

UNLAWFUL OCCUPATION

City of Johannesburg v Dladla[99] deals with an appeal by the City of Johannesburg against an order handed down previously in the Gauteng Local Division regarding the operation of the Ekuthuleni Overnight/Decant Shelter House.[100] The dilemma can be traced back to litigation that was initiated as early as 2011 concerning the eviction of occupiers resident in a dilapidated building in Saratoga Avenue, Berea in terms of which the CC ordered that the occupiers be provided with temporary accommodation.[101] While the search was on for suitable temporary accommodation, some occupiers who had been evicted managed to negotiate with the City to stay in a particular building in Johannesburg subject to the payment of a rental of R600 per unit per month.[102] The rest of the group were informed that they could remain in the shelter, which arrangement led to two different groups in two different locations.

The second group remaining in the shelter had to sign a document that they would comply with the House Rules. These House Rules related to a variety of issues, including the preparation of food, the use of electrical and household appliances, and the prohibition of alcohol, drugs and dangerous weapons on the premises. While these House Rules were accepted and adhered to, rules 3 and 4 were challenged on the basis that they were unconstitutional. Rule 3 provided for the closure of the shelter by 20:00 every night and the completion of a register, whereas rule 4 required all residents to vacate the shelter at

98 *Snyers* (n 88) at para 11.

99 *City of Johannesburg v Dladla* 2016 (6) SA 377 (SCA).

100 *Dladla v City of Johannesburg Metropolitan Municipality* [2014] 4 All SA 51 (GJ).

101 *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) para 98.

102 *City of Johannesburg Metropolitan Municipality* (n 101) at para 6.

08:00 on Mondays to Fridays and at 09:00 on Saturdays and Sundays. The court *a quo* found that these rules were indeed unconstitutional.[103] The court furthermore found that the refusal to permit residents to reside in communal rooms together with their spouses or permanent life partners was an infringement of their constitutional rights to dignity and privacy. It was against these findings that the City lodged an appeal to the SCA.

In dealing with the appeal, the court *per* Willis JA first set out the design and operation of the shelter,[104] consisting of thirty small dormitories, comprising of two to four bunks per dormitory. The gender differentiation meant that spouses as a rule did not share the same dormitory. Regarding the amenities of the shelter and the services that it offered, the court highlighted the following: a free hot lunch every day, training facilities, local newspapers, access to healthcare and opportunities for recreation. While these benefits were manifold, the court underlined that the shelter, as a 'managed care model', was intended to provide 'short-term, often overnight, accommodation for the destitute' only.[105] While the City had succeeded in providing the occupiers with shelter or a 'roof over their heads', the shelter was not designed to address all of the needs of persons in the occupiers' position.[106] Highlighting that the housing need is great in Johannesburg and that everything is relative, the court emphasised that, compared to thousands of others, the position of the occupiers was a rather privileged one.[107]

While as a point of departure citizens would have a right to freedom of movement, as well as rights to dignity, privacy, association and residence, these rights are not enshrined in the Bill of Rights as being absolute.[108] Of critical importance is that the City emphasised right from the outset, in line with the CC judgment, that it was providing emergency accommodation only and that in this context housing so provided remains temporary only. In this regard, the occupiers could not refer to the shelter as their 'home'. The shelter was only temporary and could not constitute their home as such. Accordingly, occupiers could not claim the same rights they would have had if they had been living in their homes.[109] With reference to *City of Cape Town v Hoosain*,[110] the court emphasised that those persons who need to occupy such accommodation must therefore accept less than would ordinarily be acceptable.[111]

Focusing on the House Rules themselves, the court reiterated that these rules were formulated for particular reasons: they were designed, inter alia, for the safety and protection of the occupiers, and generally intended to discourage dependence.[112] There

103 *City of Johannesburg Metropolitan Municipality* (n 101) at para 8.
104 *City of Johannesburg Metropolitan Municipality* (n 101) at para 10 ff.
105 *City of Johannesburg Metropolitan Municipality* (n 101) at para 13.
106 *City of Johannesburg Metropolitan Municipality* (n 101) at para 14.
107 *City of Johannesburg Metropolitan Municipality* (n 101) at para 15.
108 *City of Johannesburg Metropolitan Municipality* (n 101) at para 18.
109 *City of Johannesburg Metropolitan Municipality* (n 101) at para 19.
110 *City of Cape Town v Hoosain* (1033/2011) [2012] ZAWCHC 180 (24 October 2012).
111 See the quotation in *City of Johannesburg Metropolitan Municipality* (n 101) at para 12.
112 *City of Johannesburg Metropolitan Municipality* (n 101) at para 23.

was also a costs factor involved, as well as considerations of decency, modesty and decorum. With regard to the co-habitation of husbands and wives, the rule had already been relaxed. However, also in these instances, the right to live with a spouse had to yield, albeit temporarily, to the broader practical demands in view of the reasons for which the shelter had been designed.[113] Given this situation, the court suggested other avenues—for example, an application by couples wanting to reside together for alternative accommodation that would enable them to do so. In the context and circumstances surrounding temporary accommodation in particular then pertaining, the court argued that the House Rules were not unreasonable and therefore not unconstitutional.[114]

The distinction between temporary accommodation and a home is interesting. By focusing on the element of duration, the court went to great lengths to stress that temporary accommodation cannot, to all intents and purposes, constitute a home. In this context, the rights usually linked to a home are therefore separated from those of persons in temporary accommodation.

The matter of *Residents of Arthurstone Village v Amashagana Tribal Authority*[115] entailed an application for a review of an order granted by the Thulamahashe magistrate in terms of which unlawful occupiers in occupation of land within the relevant municipal area were evicted and their homes demolished. In support of the application for review was an affidavit by a Commissioner of the South African Human Rights Commission (SAHRC), enjoined to investigate and report on the observance of human rights.[116] The community lodged a complaint with the SAHRC immediately following their eviction and the demolition of homes. The investigation established that the eviction and demolition affected schoolchildren, elderly persons and households headed by women and children (orphans), and that the demolitions occurred when the children were at school and the parents were at work.[117] While the eviction application was lodged under section 4 'and 5', some five months after the demolition order was executed, except for a copy that was attached to a pole, no notice of intention to evict and demolish was given to the applicants.[118] In other words: all of the eviction proceedings as well as the execution of the eviction order granted occurred without any notice (bar the one attached to a pole) to the occupiers themselves.

The court *per* Van Niekerk AJ approached the review application with reference to section 38 of the Constitution in terms of which any person may approach a competent court on the basis that a constitutional right had been infringed or threatened. In such cases, the court may grant appropriate relief, including a declaration of rights.[119] In this

113 *City of Johannesburg Metropolitan Municipality* (n 101) at para 23.
114 *City of Johannesburg Metropolitan Municipality* (n 101) at para 23.
115 *Residents of Arthurstone Village v Amashagana Tribal Authority* (17978/15) [2016] ZAGPPHC 408 (8 June 2016).
116 *Residents of Arthurstone Village* (n 115) at para 5.
117 *Residents of Arthurstone Village* (n 115) at para 6.
118 *Residents of Arthurstone Village* (n 115) at para 6.
119 *Residents of Arthurstone Village* (n 115) at para 9.

regard, the possible contravention of section 26(3) of the Constitution was the focus of the application, which automatically also resonated with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), its applications and its requirements. Of importance here is the notice requirement and whether, if not actual compliance, at least substantial compliance had occurred.[120]

Having regard to the facts and circumstances of the case, the court underlined specifically that the land unlawfully occupied was state land and that the first respondent, being an organ of state, had the duty and responsibility of upholding the values in the Constitution.[121] Apart from the fact that the local authority did not adhere to these duties, material non-compliance with the Act was clear in the light of section 4(2) of the PIE Act, dealing specifically with notice requirements. It is within this context that the conduct of the third respondent, the relevant magistrate, also becomes relevant:[122]

> The third respondent clearly derelicted its duties in ensuring that there was compliance with the constitutional imperatives and the applicable law, in this case the PIE Act and numerous decisions pertaining to the proper application of the provisions of the PIE Act as delivered by the Constitutional Court and should never have granted the order in the circumstances as it did.

From the outset, the application was approached on the basis of urgency without any grounds for such rash conduct. It was clear that the magistrate had not applied his mind.[123]

After discussing the matter in open court, the learned judge found that it was clear that the second respondent (the local authority) accepted its responsibility to assist in restoring the applicants to a position in which they could be afforded shelter, privacy and amenities. This endeavour would also be subject to the SAHRC monitoring the situation.[124] Regarding the conduct of the magistrate, the court stated the following:[125]

> I am further of the view that the Third Respondent's dereliction of duty is so gross and untenable that the Magistrate's Commission should be directed to investigate the conduct of the Third Respondent to determine whether or not disciplinary and/or any other steps should be taken against the relevant Magistrate.

In this light the order *nisi* was reviewed and set aside, the first respondent was ordered to construct temporary habitable dwellings for the applicants who had been evicted and who still required them, so as to afford them shelter, privacy and amenities within thirty days. In addition, the first and second respondents were ordered, jointly and severally, to construct for the applicants who were evicted permanent habitable dwellings at a site to be agreed on within four months from the date of the order. All of

120 *Residents of Arthurstone Village* (n 115) at para 10.
121 *Residents of Arthurstone Village* (n 115) at para 12.
122 *Residents of Arthurstone Village* (n 115) at para 14.
123 *Residents of Arthurstone Village* (n 115) at para 14.
124 *Residents of Arthurstone Village* (n 115) at para 15.
125 *Residents of Arthurstone Village* (n 115) at para 16.

these orders were to operate under the auspices of the SAHRC. The registrar was also ordered to forward the judgment to the Magistrate's Commission.[126]

The *Arthurstone Village* case highlights a variety of shortcomings and problems. It is inconceivable that a court can grant an eviction order, also entailing the demolition of homes, without any consideration of the facts and circumstances of the case and without any regard for the formal legal requirements. This situation was further exacerbated by the fact that the land is state land and that organs of state were also involved in the process: neither the local authority as organ of state obligated to uphold constitutional norms and values nor the court enjoined to adjudicate within the context of what is just and equitable did its job. Quite the contrary, in fact. An eviction order was effectively granted without clarity as to which application procedure was relevant—section 4, 5 or 6, whereas the formal requirements regarding notice and process were not complied with at all. Not even substantial compliance was at stake here: the occupiers had no way of knowing that an eviction order had been sought and what the grounds for eviction were, with the result that they were unable to prepare for the process awaiting them. Moreover, the adjudication process in terms of which all the relevant facts and circumstances had to be considered so as to decide whether granting the eviction order would be just and equitable took place without any involvement by or participation of the persons who would be affected by it. The occupiers were given no opportunity to place their particular circumstances before the court. The court, furthermore, had no information at its disposal regarding suitable accommodation or what the particular housing conditions were within the jurisdictional area of the local authority. That was the case because no report to that effect was placed before the court, because the court had not bothered to request its submission.

In *Minister of Human Settlements, Western Cape v Penhill Residents Small Farmers Co-operative*[127] the respondents occupied land owned by the provincial government. They were of the opinion that in terms of an agreement with the provincial government they were entitled to occupy the entire farm, while the provincial government had earmarked some of the land for a housing project. The dispute was one of fact. The occupiers of the farm land were 'interdicted from taking further occupation of additional land and erecting new structures' as they 'did not have consent of owner to settle on additional land and were not deprived of any right unlawfully'. The court also found that they could not have had any legitimate expectation to occupy the additional piece of land.

126 *Residents of Arthurstone Village* (n 115) at para 18.

127 *Minister of Human Settlements, Western Cape v Penhill Residents Small Farmers Co-operative* (429/2015) [2016] ZASCA 99 (3 June 2016).

HOUSING

The Social Housing Regulatory Authority made rules relating to the accreditation of social housing institutions in terms of section 11(4) of the Social Housing Act 16 of 2008, and they were published in September 2016.[128] Two months later, the South African Council for the Project and Construction Management Professions published an amendment to their fee schedule.[129]

In a related sphere of housing—the registration of property—another significant ruling was handed down in November 2016. In terms of section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 a registrar of deeds may not register a property if a municipality does not certify that all outstanding rates and taxes for the preceding two years have been paid. In effect this meant that the new owner had to pay the historical debt owed by the previous owner before a property could be transferred to the new owner. The constitutionality of section 118(3) was contested in *Jordaan v City of Tshwane Metropolitan Municipality; New Ventures Consulting & Services (Pty) Ltd v City of Tshwane Metropolitan Municipality; Livanos v Ekurhuleni Metropolitan Municipality; Oak Plant Rentals (Pty) Ltd v Ekurhuleni Metropolitan Municipality*.[130] Section 118(3) states that

> [an] amount due for municipal service fees, surcharges on fees, property rates and other municipal taxes, levies and duties is a charge upon the property in connection with which the amount is owing and enjoys preference over any mortgage bond registered against the property.

The court considered whether section 118(3) constitutes a deprivation in terms of section 25 of the Constitution and whether the deprivation is arbitrary. The court found that section 118(3) is an arbitrary deprivation of the subsequent landowners' rights.[131]

The court found, further, that section 36 of the Constitution does not apply[132] and that section 118(3) is unconstitutional. It is to be welcomed that the court is not prepared to place unnecessary burdens on subsequent owners even though the municipalities may have at first glance the right to ensure that the debts are paid.

128 Gen Notice 624 in *GG* 40312 of 30 September 2016.

129 BN 185 in *GG* 40465 of 1 December 2016.

130 *Jordaan v City of Tshwane Metropolitan Municipality; New Ventures Consulting & Services (Pty) Ltd v City of Tshwane Metropolitan Municipality; Livanos v Ekurhuleni Metropolitan Municipality; Oak Plant Rentals (Pty) Ltd v Ekurhuleni Metropolitan Municipality* (74195/2013; 13039/2014; 13040/2014; 19552/2015; 23826/2014) [2016] ZAGPPHC 941 (7 November 2016) paras 7–9.

131 *Jordaan* et al. (n 130) at paras 38–39.

132 *Jordaan* et al. (n 130) at para 44.

SECTIONAL TITLES

The Sectional Titles Schemes Management Act 8 of 2011 came into operation on 7 October 2016.[133] The Minister of Human Settlements issued Sectional Titles Schemes Management Regulations in terms of section 19 of the Act.[134] The regulations provide that the body corporate of a sectional title scheme must now provide for a reserve fund[135] and insure the property against certain specified risks.[136] Annexure 1 to the regulations contains the Management Rules that may, subject to certain exceptions, be amended or substituted. Annexure 2 contains Conduct Rules and Annexure 3 various forms.

RURAL DEVELOPMENT AND AGRICULTURE

The Department of Rural Development and Land Reform (DRDLR) submitted its Annual Report 2015/2016 to the Portfolio Committee on Rural Development and Land Reform on 12 October 2016.[137] It provides an overview of the Rural Economy Transformation Model by defining institutional roles and role relationships, with authority vesting in the state; administrative responsibility in a governance structure (which could be a traditional council, a communal property association committee or a trust, as the case may be), and operationalisation in an investment and development financing facility. Households are deemed to be the basic unit of production and retailing, being manufacturers and consumers of goods and services, and ratepayers as well as voters. Institutionalised use rights will be made available; such rights can be bequeathed on death, can be used as collateral; moreover, in order to provide protection against land sharks, three successive rights of refusal have been instituted: first, the household; secondly, the governance structure concerned, and, thirdly, government.

Regarding the Rural Economy Transformation Model, mention was made of an Agrarian Transformation System, which is defined as 'a rapid and fundamental change in the relations (systems and patterns of ownership and control) of land, livestock cropping and community'.

DAFF published the revised Preservation and Development of Agricultural Land Bill and the Draft Policy on the Preservation and Development of Agricultural Land on 2 September 2016 for public comment for a period of thirty days.[138]

133 Proc 54 in *GG* 40334 of 7 October 2016.
134 GN 1231 in *GG* 40335 of 7 October 2016.
135 GN 1231 (n 134) at reg 2.
136 GN 1231 (n 134) at reg 3.
137 Department of Rural Development and Land Reform, 'Annual Report 2015/2016' (PMG, 12 October 2016) <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/161012drdlr_ar.pdf> accessed 3 December 2016.
138 GN 984 in *GG* 40247 of 2 September 2016.

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Land Reform (Labour Tenants) Act 3 of 1996

Preservation and Development of Agricultural Land Bill, 2016

Prevention of Illegal Eviction from and Unlawful Occupation Act 19 of 1998

Restitution of Land Rights Act 22 of 1994

Restitution of Land Rights Amendment Act 15 of 2014

Sectional Titles Schemes Management Act 8 of 2011

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