

Land matters and rural development: 2015 (1)

1 General

Government has increased its focus on land reform and several redistribution programmes have been launched. The re-opening of the land restitution process in July 2014 has resulted in several new claims being instituted. By 30 January 2015, more than 46 058 claims have been received by the Commission on Restitution of Land Rights (CRLR) (Department of Rural Development and Land Reform (DRDLR) 'Annual Performance Plan 2015/16' <http://bit.ly/1dWfLDT> accessed 3 June 2015). The work of the CRLR has been severely criticised by the Human Rights Commission and in several court decisions. The annual reports of the DRDLR to parliament, however, all promise a new dispensation for the CRLR that would solve several of the challenges that the Commission is experiencing (see 2).

A new land use planning dispensation is foreseen with the introduction of the Spatial Planning and Land Use Management Act 16 of 2013 that came into operation on 1 July 2015. The intricacies of the Act and its regulations and its interaction with other land use and environmental legislation will most probably lead to interesting litigation (see 5.1). Land use may be complicated further with the possibility of the introduction of the Preservation and Development of Agricultural Land Framework Act (see the discussion on the draft bill 9.2).

In this note, 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 during the period April 2014 to May 2015 are discussed.²

2 Land restitution

In November and December 2013 the South African Human Rights Commission (SAHRC) undertook an investigation into the implementation of the Restitution Act

²In this note the most important literature, legislation and court decisions are discussed for the period 2014-04-30 to 2014-10-15.

since 1994 (<http://bit.ly/1KO6U1d> accessed 3 June 2015). In its presentation ('Findings on Systemic Challenges Affecting Land Restitution in South Africa') to the Portfolio Committee on Rural Development on 19 November 2014, the SAHRC emphasised that it did not agree with the submission by the DRDLR that the CRLR was one of the Department's branches or units: 'this is a concern for the SAHRC as it suggests that the CRLR will not construct its work in a manner that is impartial to and independent of the DRDLR'. On 27 May 2015 the CRLR responded to the SAHRC's findings and recommendations (<http://bit.ly/1HfoBHW>; <http://bit.ly/1dos36X> accessed 3 June 2015): The CRLR is understaffed, lacks technical skills, and has inadequate research capacity. In respect of claims lodged before the 31 December 1998 cut-off date, there were still 6 691 claims outstanding in the financial year 2014/2015 (of which 1 445 claims were supposed to have been finalised). On 27 May 2015 there were 8 035 claims that had not been finalised, of which the 5 152 claims were outstanding (ie, screening and categorisation had not yet been completed: Eastern Cape – 5; Gauteng – 192; KwaZulu-Natal – 1 134; Limpopo – 254; Mpumalanga – 1976; Northern Cape – 40; North West – 5, and Western Cape – 1034. Of these 5 152 claims, 2 660 would be investigated in 2015/2016.)

The CRLR also indicated that complex claims will have to be outsourced as the Commission does not have the capacity to deal with these claims, that some files pertaining to claims lodged before 1998 are lost and that mining rights, although allocated to communities, did not accrue to those communities despite court decisions such as the *Alexkor Ltd v The Richtersveld Community and Others* (2004 5 SA 460 (CC)). The CRLR also raised its concern that the amendments to the Restitution Act (Restitution of Land Rights Amendment Act 15 of 2014) may influence the finalisation of the pre-1998 claims as it is foreseen that an additional 397 000 new claims may be lodged. The CRLR will initially only process new claims that overlap with existing claims. Other challenges include the 'calculation and determination of the value of dispossessed land ... following the 2014 Constitutional Court decision in *Florence v Government of the Republic of South* (2014) SA 456 (CC); 2014 10 BCLR 1137 (CC)'. The Chief Surveyor General's office also does not have the capacity to 'perform historical research work' and it is not possible to determine which land is owned by the state despite the state land audit. The Restitution of Land Rights Amendment Act of 2014 determines that communal property institutions (CPIs) will no longer be able to own 'redistributed' land. The CRLR argues that the 2014 Act does not intend to have such an effect, and that the DRDLR minister is obliged to see to it that the land is restored to the community concerned, with equal access to all community beneficiaries. The CRLR statement that 'new claims are only processed with the old if they overlap' seems strange as the period for lodgement of new claims only closes on 30 June 2019, and no determination has been made as yet for the prioritisation of the submission of new claims in respect of specific geographic areas.

The Department of Performance Management and Evaluation (DPME) tabled a report in parliament on its restitution programme in November 2014 (<http://bit.ly/1Mz8rtf> accessed 3 June 2015). The DPME report recommended that the following actions, amongst others, should be taken with regard to the reconceptualisation and implementation of the Restitution Programme (<http://bit.ly/1QCwvvM> accessed 4 June 2015), namely that the CRLR should be (a) solely responsible for the administration of the restitution process, (b) that the roles and responsibilities of the staff should be clearly spelled out; (c) that a 'management information system should be developed to monitor and evaluate business processes; (d) more autonomy should be given to the provincial restitution managers with regard to staff and non-capital aspects, (e) the budget should be revisited; (f) 'all outstanding claims should be settled before any work begins on the processing of new claims' and (g) 'the operating procedures and MIS must be updated to reflect the criteria for new claims before any new claims are processed, and all necessary training of staff provided'.

In the DRDLR presentation of 4 March 2015 (<http://bit.ly/1Mz8rtf> accessed 4 June 2015) to parliament, the DRDLR indicated that the CRLR finalised an improvement plan and adopted two implementation methodologies (MSP – Managing Successful Programmes, and PCI (People Centred Implementation)). Four improvement objectives or themes (with 61 individual tasks in total) were identified relating to its mandate, resources, tools and change. A few of the most important shifts resulting from the implementation of the DPME recommendations include the recognition of the autonomy of the CRLR (reporting directly to the Minister, with the Director-General of the DRDLR being the accounting officer); the conclusion of service level agreements (implementation protocols) with the Department of Agriculture, Forestry and Fisheries (DAFF) and the Department of Human Settlements (DHS) as regards, amongst others, settlement support and the development of 'draft settlement models for sugar, mining, conservation, forestry, (and) high value agriculture'.

In its Strategic Plan 2015–2020 and its Annual Performance Plan (APP) 2015/2016 (submitted to the Portfolio Committee on Rural Development and Land Reform on 16 April 2015 - <http://bit.ly/1HfoUCA> accessed 3 June 2015) the CRLR indicated the outstanding old order (pre-31 December 1998 – see above) claims would be researched as follows: 2015/2016 – 2 660 (with the four quarterly targets being 532, 798, 1064 and 266 respectively); 2016/2017 – 1 530, and 2017/2018 – 3 098.

2.1 Notices

Several notices were issued in terms of the Restitution of Land Rights Act 22 of 1994. Some of the notices are still pre-1998 and some are already published in terms of the Restitution of Land Rights Amendment Act 15 of 2014. It is, however,

not always possible to determine whether the claims are old or new as the notices are not drawn up in the same manner (which may complicate the process other than indicated above by the CRLR). The following notices were issued: Western Cape (Worcester, Elsies River, Struisbaai, Kenilworth, Oranjezicht, Tygerberg, Lakeside, Kraaibosch/Redlands, Mossel Bay, Fish Hoek, Crawford, Kalk Bay, Mowbray, Parow, Kensington, Tulbach, Woodstock, Wellington 1 each; Plumstead, Lansdowne, Paarl, Retreat, Contantia, Stellenbosch, District Six 2 each; Grabouw 3; Newlands and Cape Town 4 each; Goodwood 6; Grassy Park 7; Claremont 8 and correction notices 7); Mpumalanga (Mtombela, Steve Tshwete and Lydenburg 1 each; Mbombela and Nkangala 3 each; Bushbuckridge 4; Gert Sibande 5; Thaba Chweu 8; amendment notices 5 and withdrawals 1); Limpopo (Waterberg 2 and Polokwane, Vhembe, Sekhukhune and no district 1 each; 2 amendment notices and 1 correction notice); Gauteng (Ekurhuleni, Johannesburg and Tshwane 4; Tshwane 4 with numerous claims); North-West (Ngaka Modiri Molema 1); Eastern Cape (Braunschweig, Peddie, Centane, Elliotdale, Fort Beaufort, Umtata, Keiskammahoek, Sterkspruit, Cala 1 each; Lady Frere 2; Cofimvaba 3; King Williamstown 4; Thornhill 10); KwaZulu-Natal (Port Shepstone, Dundee, Pongola, Ukulhela, Lower Tugela, Alfred Nzo, no district 1 each; notice was given that a community received just compensation and that the public could comment on the finding. Four amendment notices were also published); Northern Cape (the farms Papkuil, Kurrees and Nooitgedacht 1 each; Kai !Garib, Siyanda, no district 1 each and 1 amendment notice).

2.2 Case law

The Daantye Community v Crocodile Valley Citrus Company (Pty) Ltd (LCC 75/2008, 26 February 2015, Land Claims Court (LCC), Randburg) concerned an application for the rescission of a judgment granted by default in November 2008, in favour of the first respondent. Essentially it entailed reviewing and setting aside particular notices that were published under section 11(1) of the Restitution of Land Rights Act 22 of 1994 (Restitution Act) impacting on land belonging to the first respondent, comprising three farms all together. The application also involved an application for condonation for the late filing of the rescission application and an amendment of their notice to allow for such an application. The first respondent opposed both the rescission and the condonation applications.

The applicants, a claimant community, lodged a claim in respect of eight farms in Mpumalanga, leading to the publication of claimant notices to be published in the *Government Gazette* in December 2005. The first respondent, as owner of three of the farms identified, made written representations to the Commission challenging the validity of the claims insofar as it related to his property and sought the withdrawal of said claims (paras 9-11). Despite numerous representations, the Commission failed to respond to the first respondent's communications, resulting

in an application under section 36 of the Restitution Act. The application sought to review the decision of the Commission to publish the notices, the withdrawal of the notice and the dismissal of the land claim with respect to the three properties in question. While a notice of intention to participate was filed by the State Attorney (Johannesburg) on behalf of the Commission (later withdrawn and replaced by the State Attorney, Pretoria), no response was filed by the applicants themselves. Following much correspondence between the parties, relating to, *inter alia*, the refusal of the Commission to furnish the record of its proceedings to the first respondent (paras 16-22), and a subsequent notice setting down the review application, the matter came before the LCC on 20 November 2008. Summary judgment, by default, was ordered.

More than three years after the default judgment was handed down, the applicants applied for rescission of the judgment under rule 58(6), read with rule 64 of the Rules of the Court. Coupled with the rescission application, as mentioned, is the application for condonation (paras 25-39). While references were made to insufficient resources for legal representation (para 26.4), no real reason for the delays in bringing the application for condonation was furnished (para 29). In light of the background and facts of the matter, the LCC was satisfied that the applicants and their attorney took too long in getting the rescission application off the ground once they got knowledge of the court order. In this regard three aspects convinced the LCC of undue delay: (a) the delay in securing funding for the legal challenge was unreasonably long; (b) the contention that a rescission application was complex was unsustainable, given the low threshold to be met for such an application to be granted; and (c) when it became evident that counsel would not be available for approximately two months, the applicants should have briefed other counsel to deal with the matter as speedily as possible. To that end the Court could not find that the applicants and their counsel acted reasonably in the circumstances (para 33). In this regard neither a reasonable explanation for default, nor *bona fides* in applying, was present (para 37). The delay in finalising the matter has furthermore deprived the first respondent of finality regarding the land claim since 2008, which has impacted negatively in his planning and farming operations. The application for condonation was thus dismissed.

The application for rescission was thereafter dealt with by Canca AJ, with Mpshe AJ concurring (para 4-50). Apart from the time periods required, an applicant must also provide good cause for a rescission or variation of an existing judgment. Good cause in this context requires *inter alia*, giving a reasonable explanation or showing that he or she has a *bona fide* defence, including a *bona fide* case on the merits (para 44). On the evidence before the Court the applicants met none of these requirements. The Commission simply ignored, alternatively delayed, unreasonably, responding to the first respondent's representations made under section 11A of the Restitution Act. In line with research conducted by various specialists in the field of anthropology, no evidence existed that the

claimant community had any right in relation to the first respondent's property or part of the property in question (para 48). Confronted with the research, the Commission should have withdrawn the notices regarding the land claim immediately. No case to the contrary was made by the applicants in this application (para 49). In this light the application for rescission was dismissed.

The ineptitude of the Commission in handling the present matter is disconcerting. Not only would correct and immediate action of the Commission have dealt with the publication of the notices in the first instance, but an immediate response would also have avoided the present application. It is a pity that valuable resources have to be employed to revisit previous conduct and decisions. This theme also resonated in the cases below and was also a concern of the Human Rights Commission as set out above.

Niehaus v Regional Land Claims Commissioner ((116/2014) 2015 ZASCA 51 (27 March 2015)) dealt with an appeal against an order handed down by the LCC regarding the publication of a notice in the *Government Gazette* impacting on the appellant's property. The case has a long and complex history, of which an in-depth discussion is not required here. Suffice it to say that the appellant, as owner of two properties located in Limpopo province, had attempted, for longer than a decade, to acquire information regarding the status of land claims relating to his property – to no avail. Unfortunately the ineptitude of the first respondent, the Commission resonates throughout the whole period.

Despite numerous communications to the Commission and after employing legal counsel to gain access to information under the Promotion of Access to Information Act 2 of 2000 (PAIA) no clarity could be gained whether there were indeed land claims lodged in relation to the properties in question (paras 3-11). After receiving communication from the Commissioner in 2006 that the land-base had been checked and that there was at that stage no information regarding any land claims, the appellant received a notification in December 2009 that restitution claims had been lodged against the relevant properties by the fifth respondent, the Majadibodu community. Since that communication the appellant had been in a process of ascertaining the details of the claim, by way of communicating with the Commission and lodging applications with the LCC. (There were apparently discrepancies between hard copies that did not indicate claims and electronic files that reflected claims lodged, but without the necessary detail.) The LCC ordered a status report to be provided at the latest on 15 February 2013. While the status report that was filed confirmed that the properties in question were still being researched, a section 11(1)-notice under the Restitution Act was nevertheless published. The appellant thereafter attacked both the status report and the notice published in the LCC. On the facts the LCC could not grant an order declaring that no claims had been lodged in relation to the properties as the fifth respondent had in the meantime come forward and asserted that it had indeed lodged a claim. It is against these findings that the appellant appealed.

The Court per Bosielo JA (with Mpati P, Maya, Cachalia JJA and Van der Merwe AJA concurring) underlined exactly how unsatisfactory the whole situation was: the appellant had done everything in his power to ascertain the status of land claims on his land and yet, after a decade, had not been able to do so. Having a section 11-notice published in relation to one's property has particular implications: it prohibited the sale, exchange, donation, lease, subdivision or development of property in the absence of written consent from the Commissioner. Having to deal with a situation where no clarity exists, for an indeterminate period of time, is highly unsatisfactory. The impact of uncertainty also resonates with the fifth respondent, the claimant community, who requires clarity regarding the claims they had lodged. Hence the finalisation of the issue was critical – for all parties involved. In this regard the SCA stated as follows (para 25):

The conduct of the first respondent warrants comment and censure. It is important to emphasise the duties, responsibilities and obligations of the first respondent. Undoubtedly, the first respondent is pivotal to the entire process that is, the lodgement of claims to land, their registration, the issuing of notices, publications of claims in the *Government Gazette*, including informing the land owner in respect of whose property a claim had been lodged and any other party which might have an interest in the property. This includes investigations of claims lodged culminating in their finalisation, which might be through mediation or referral to the Land Claims Court, in appropriate circumstances. Self-evidently claims to land can never be properly processed without the co-operation and assistance of the first respondent.

The appeal was consequently upheld and the matter referred back to the LCC in order to afford all respondents the opportunity to address the court on the question of whether or not the fifth respondent (or any other person) had, prior to the former deadline of 31 December 1998, lodged any valid claim in terms of section 10 of the Restitution Act and to consider any other issue properly raised in the papers. A costs order was furthermore made against the first and second respondents.

The judgment has underlined the central role the Commission plays throughout the process of lodging, regulating and finalising land claims, as also set out above in the reports to parliament. In fact, the Commission is the only constant role player in the process. It is instrumental in guiding claimants in lodging claims in the first instance and is thereafter closely involved in the management and finalisation thereof. It is imperative that the various duties and responsibilities linked to the different stages of the land claim process are carried out precisely and timeously. In the present instance the whole process hinged on the starting point, thereby leaving the whole claim in limbo, so to speak. Apart from the fact that the process as a whole was put on hold, the immediate impact of the notice published under section 11(1) of the Restitution Act was potentially

catastrophic for the landowner, who was immediately limited in his conduct and farming operation. It is feared that the re-opening of land claims may exacerbate the problem further: not only will current problems have to be dealt with emanating from the first round of land claims, but a second round will inevitably mean that different sets of claims, progressed to different stages, will have to be dealt with simultaneously. Meticulous conduct is critical.

In *Philips v Minister of Rural Development and Land Reform* (LCC 76/2010, 2 February 2015, LCC, Randburg) the LCC had to determine whether one of the threshold requirements set out in section 2 of the Restitution Act had been met. A land claim may only be processed further if it has been lodged timeously and if no just and equitable compensation has been received yet. The issue to be determined was thus whether the plaintiff had already received just and equitable compensation when his land was dispossessed under the apartheid regime. If indeed that was found to be the case, the claim would not proceed further. If, however, no just and equitable compensation had been received, the claim continues. In the present matter the plaintiff argued that he had been under-compensated by a certain amount, calculated by using the Consumer Price Index (CPI) and that he had not been compensated at all for the loss that occurred when he was forced to terminate the existing farming partnership (paras 4-14). The existing partnership, comprising four brothers, landholdings and movables, was terminated in 1977 when the farms concerned were dispossessed to form part of the then Ciskei. The defendants, on the other hand, argued initially that no under-compensation occurred and that the plaintiff was in fact over-compensated by roughly R8 000. However, as the hearing progressed, the stance was changed to accept that some under-compensation had in fact occurred to the amount R20000, to which a *solatium* of R28375 was also added. Their further calculations led them to believe that an amount of R3209000 would constitute just and equitable compensation (para 14). Nevertheless, no award ought to be made, was argued by the defendants, when all of the factors in section 33 of the Restitution Act were considered.

A large part of the judgment is a record of the various approaches of the different valuers acting on behalf of the plaintiff on the one hand (paras 15-32, 46), and the defendants on the other (paras 33-45; 47-48). Different points of departure and different techniques were employed (paras 15-85), not reproduced here.

In her finding (para 46), Meer AJP (with assessor Stephenson A concurring) approached all expert reports from valuers, submitted on behalf of both the plaintiff and the defendants very critically. With the assistance of the assessor, a well-known and experienced valuator himself, the shortcomings inherent in the various approaches and contents of reports, were highlighted in detail. Without going into too much detail, the following difficulties regarding reports submitted on behalf of the defendants were highlighted: the defendants' valuations of the

subject properties were compiled on a desktop basis without actually visiting the properties (paras 90-91); no supporting maps, photographs or collateral evidence were provided (para 91); the defendants failed to access any relevant historical documents (para 91); the valuers were not open to any adjustments even though basic facts were changed and adjusted (para 92); and the properties were valued on the date of transfer and not on the date of dispossession (para 96). In this regard the Court found that '(a)ll in all the defendants' valuers were of little assistance to the Court. Their valuations were neither properly motivated nor adequately investigated. Their independence was questionable' (para 97). Likewise, the reports submitted on behalf of the plaintiff were scrutinised (paras 108-110). In this regard one valuator submitted three different reports in which each report contained a massive increase in the final total, without substantiating the increase sufficiently. In this regard the Court found itself unable to rely on the values put forward (para 110).

The defendants argued that the farms that the plaintiff bought with the funds received at the dispossession of his property in 1977 also had to be taken into consideration in determining whether just and equitable compensation had been received (para 114). With reference to the well-known case of *Haakdoornbult Boerdery CC v Mphela* (2007 5 SA 596 (SCA)) the LCC underlined that it was irrelevant what the dispossessed person or community subsequently did with the compensation received. Accordingly, the value of the Moltena properties, purchased by the plaintiff at a later stage, was thus of no relevance to any of the issues before the Court.

Finally, the LCC rejected both the plaintiff's and the defendants' valuation reports and was thus forced to 'don the mantle of the super valuer' (para 12). This was necessary to (a) determine the market value of the subject properties and then (b) the compensation to which the plaintiff was entitled. The LCC approached the matter by considering comparable transactions (paras 121-123) and thereafter to effect certain adjustments from the comparable transactions selected (paras 124-145). In light of the factors listed in section 33(e) of the Restitution Act and the Constitutional Court-judgment of *Florence v Government of the Republic of South Africa* (2014 6 SA 456 (CC)), which requires justice and equity with regard to the parties involved, as well as the *fiscus* and considering that limited resources are available, the LCC reached the following conclusion (para 148):

In my view the requirements of justice and equity dictate that a downward adjustment is called for, regard being had to the perspective of the plaintiff, the concerns of the national *fiscus* in a strained economy, such as ours, and the interest of a society in which many land claims still have to be settled. I come to the view that regard having had to all of these circumstances, it would be just and equitable if a downward adjustment of 10% were to be made. In so doing I caution that an adjustment of this ilk, if applied in other cases, should be informed by the

merits and particular circumstances of the case. Making this 10% adjustment I arrive at an amount of just and equitable compensation in the sum of R14 785 100.00 ... This in effect is a million Rand more than the amount the plaintiff was prepared to accept upon dispossession.

The attitude and conduct of the Commission again came under fire. In this instance the case had involved protracted litigation and was extremely expensive. Not only were numerous attempts to settle timeously rejected by the Commission, the plaintiff also ended up doing a lot of the groundbreaking research himself as the Commission claimed that it could not gain access to important historical documents (para 149). In this light the whole conduct and attitude of the Commission were unsettling. It did not play a mediatory role but instead sided with the state as a defendant and opposed the claim vehemently; it changed its stance drastically throughout the trial and the valuation reports were drafted in clear support of the defendant and intended to be of assistance to the LCC. With reference to *Hlaneki v Commission on Restitution of Land Rights* (2006 1 All SA 633 (LCC) para 30) and *In ReKusile Land Claims Committee: Land Restitution Claim, Midlands North Research Group* (2010 5 SA 57 (LCC)) a costs order was sought and granted against the Commission on the basis that they did not receive and investigate the claim in an objective, fair and responsible manner. Apart from the costs order against the DRDLR and the Commission, the final order confirmed that the plaintiff did not receive just and equitable compensation at the time of dispossession and that, consequently, the amount of R14 785 000 was to be paid by the first respondent.

Calculating whether just and equitable compensation had been paid at the moment of dispossession, is an extremely complex and difficult task. That is the case because different approaches and different mechanisms exist and because of the passage of time. The judgment is very detailed and is to some extent, a guide to how these kinds of cases should and should not be approached. By highlighting the various shortcomings inherent in both parties' approaches and reports, successive parties can learn much, although the LCC has gone to some length in stressing that different scenarios and circumstances may have varied results. Again, the conduct of the Commission has been disappointing. While the necessity of being meticulous in fulfilling duties and responsibilities has been pointed out in cases set out above, the stance of the Commission by failing to be objective is disconcerting. It is not only critical to comply with technical responsibilities, it is also crucial to be objective and in support of all parties, including the courts.

3 Land reform

On 18 February 2015, the DRDLR did a presentation on the Turn-Around Strategy

for the Recapitalisation and Development Programme (RADP) to the Portfolio Committee on Rural Development and Land Reform (<http://bit.ly/1HUI1in> accessed 1 June 2015; see also <http://bit.ly/1GiT8nv> accessed 1 June 2015 for an outline of the Programme). This follows an in-depth evaluation by DPME of the RADP (<http://bit.ly/1GsNjz> accessed 1 June 2015). Both successes and failures of the recapitalisation programme, identified during public hearings, were examined. Problems experienced included, amongst others, poor implementation by officials, limited beneficiation, procurement of goods and services by strategic partners and farmers not being monitored, and the non-alignment of lease agreements with RADP contracts. The DRDLR undertook to review the RADP policy and the manual. A redesign and overhaul of all public agricultural support programmes is needed, and existing silos of funding for agricultural support services must be done away with. An all-inclusive fund must be established to support land acquisition, extension services and mentorship, agricultural finance, and market access. The DRDLR is developing an automated RADP management system.

The DRDLR's Final Policy Proposals on 'Strengthening the Relative Rights of People Working the Land' (21 February 2014 <http://bit.ly/1dmAFLe> accessed 3 June 2015) was distributed at a Land Reform Indaba (March 2015). The Department made it clear that the relative rights of the people working the land must be protected and promoted. The proposed regime is based on the relative contribution of each category of people to the development of defined land portions or farm units; with the historical owner of the land automatically retaining 50% of the land and the labourers assuming ownership of the remaining 50% (proportional to their contribution to the development of the land, based on the number of years they have worked on the land). The government will pay for the 50% shared by the labourers, but payment will be made into an investment and development fund, jointly owned by the parties constituting the new ownership regime and to be used to develop the managerial and production capacity of the new entrants to land ownership, to further invest on the farm and to pay out people who wish to opt out of the regime. The farmer will also benefit from dividends allocated to the fund. The government will earn the status of an *ex officio* member of the management of the fund and will have a single representative. The percentage of equity ownership of the land will be calculated taking into account the number of years of disciplined service by the worker/dweller. A regime of duties and responsibilities which the worker-dweller must observe and comply with will be introduced. The worker-equity will be financed through the Land Reform Programme and through own historical contributions by the worker.

The DRDLR did a presentation on the Land Rights Management Facility to the Portfolio Committee on Rural Development and Land Reform on 29 October 2014 (<http://pmg.org.za/files/141029lrfm.ppt> accessed 2 June 2015). The Land Rights Management Facility was established in 2007 and became fully functional in mid-2008. It provides legal representation and mediation services to labour

tenants in terms of the Land Reform (Labour Tenants) Act, farm occupiers/workers in terms of the Extension of Security of Tenure Act, and claimants in terms of the Restitution of Land Rights Act. It also provides assistance and support to Communal Property Associations in terms of the Communal Property Association Act. During the period 2009/10 to 2013/14, 139 mediation matters were heard, 106 were closed, 42 were successful, 64 were unsuccessful, and 24 were pending. Legal services were mostly requested for eviction matters.

3.1 Land Titles Adjustment Act 111 of 1993

Notice was given of land to be designated in terms of the Land Titles Adjustment Act in the Rustenburg Local Municipality and Moses Kotane Local Municipality areas (Gen Not 93 in GG 38441 of 2015-02-06). Such land forms part of the redistribution process.

3.2 Extension of Security of Tenure Act 62 of 1997

In *Van der Merwe v Klaase* (LCC 09R/2014, 7 October 2014, LCC, Randburg) the issue was raised whether the spouse of a farm worker qualified as an occupier for purposes of the Extension of Security of Tenure Act 62 of 1997 (ESTA), thereby warranting her joinder in eviction proceedings. The background is briefly the following: the first applicant, the husband, had been employed on the relevant farm as a farm worker since 1972. He was allocated premises on the farm and had occupied a house with the second applicant, his wife (see for background paras 7-15). For reasons not set out in the judgment the first applicant was evicted by a magistrate's court in a judgment handed down on 14 January 2014. As required, the automatic review proceedings occurred under section 19(3) of ESTA by the LCC in Randburg. After reviewing the case, the eviction order was confirmed in March 2014. An application for leave to appeal to the SCA was subsequently lodged, followed by a separate application by the second applicant, the wife of the farm worker, that she had been informed of her rights under ESTA, that she had a direct and substantial interest in the proceedings that were lodged against her husband and that she ought to be joined in the proceedings. Accordingly, she also applied for a stay of the proceedings. She based her application on the following grounds: that she was born on the farm, that she was an occupier under ESTA as she had consent to reside on the farm and that she had permanent employment, which also included housing (paras 16-18). The first applicant, the husband, furthermore sought an order suspending the execution of the eviction pending the determination of his wife's rights under ESTA.

The issue the court had to decide was whether the second applicant, the wife, had indeed acquired an independent right to occupy, thereby rendering her an occupier for purposes of ESTA. In this regard the court confirmed the earlier classification made in *Landbounavorsingsraad v Klaassen* (2005 3 SA 410 (LCC)

425A-B) concerning occupiers in the narrow sense and occupiers in the wide sense (para 23). Occupiers in the narrow sense had a direct nexus with the person who granted consent, usually the landowner or person in charge. Occupiers in the wide sense included everyone else who derived their occupation via the main occupier. According to this approach the wife could only be an occupier in the narrow sense – and thus a person with an independent right to occupy – if there was a direct nexus between her and the landowner regarding consent. That would have been the case if she had her own employment agreement or where the landowner granted her consent explicitly. She was unable to prove that on the facts: she was not born on the farm as she averred and was clearly only a seasonal worker with no independent contract or occupational right (para 25). To that end she qualified as an occupier in the wide sense and therefore need not be joined in proceedings.

The other issue dealt with by the LCC was the application for leave to appeal. Instances where a magistrate's court handed down a decision, it had to be reviewed by the LCC which could then confirm or change the decision. A confirmed order following an automatic review process remains an order of the magistrate's court. An appeal against such an order would have to be to the LCC, consisting of two judges; and thereafter to the SCA. The Court per Canca AJ confirmed that no appeal from the magistrate's court directly to the SCA was therefore possible (para 35). All of the applications were therefore dismissed: the second applicant had no independent right that would transfer occupier status to her, the execution of the eviction order would not be suspended and the leave to appeal not granted as there were no prospects of success.

It is unfortunate that the plight of spouses, especially women (and their children) gets lost in the process of distinguishing between occupiers in the narrow and occupiers in the wide sense. Such an approach totally negates the issue of tacit consent even though the Act specifically provides for tacit consent to operate and does not adhere to section 26(3) of the Constitution. What effectively happens is that the spouse, who is not the main occupier, is evicted without having had any opportunity to place her circumstances before the court.

In *Lebeko v Strydom* (LCC 177/2014, 19 March 2015, LCC, Randburg) an application was lodged on an urgent basis regarding the restoration of electricity and water to respective houses of the applicants, as well as access to a road leading to their homes. The application was founded on the allegation that the first respondent had cut off the electricity and water supply the applicants had enjoyed previously and that the respondent also closed or discontinued the use of the road leading to the applicants' homes. While the issues to be determined were formulated as follows, namely whether access to water and electricity respectively, was a constitutional right, the judgment does not embody an in-depth analysis of constitutional matters at all. That is the case because, as it transpired, much of the application was based on incorrect and untrue allegations.

Having accepted that the applicants were occupiers under ESTA, the application to re-connect their electricity flowed from section 6(1) of the Act. Essentially this entailed a right to reside and to have access to such services as had been agreed upon with the owner or person in charge, whether expressly or tacitly. On the facts, however, the following transpired: The applicants effected their own access to electricity by installing an unlawful connection from the main electricity source (para 37). Not only was the electricity link to the applicants illegal, but the lessee of the first respondent's property, Mr Ingwersen, failed to pay his electricity account, which was in arrears to the amount of R11 000. Hence the disconnection of the electricity supply. The first respondent, the landowner, was thus not involved at all in providing (or disconnecting) electricity and could not be held responsible for re-connecting it.

Originally the applicants averred that there was an absence of water on the premises. In reply, they amended the statement by stating that the owner controlled the flow of water, thereby resulting in interrupted flow of water (para 44 ff). On inspection it became clear that two taps on the premises and a water tap outside the premises were indeed dry (para 44). The only tap with strong running water was some distance away from the residences. While there was no substance in the allegation that no water was supplied to the premises, the LCC encouraged the landowner to ensure that water was supplied to the taps inside the residences (para 46).

The issue relating to the lack of an access road was likewise disconcerting. On inspection it became abundantly clear that at least three roads were at the disposal of the applicants. While not all of the roads were equally useful or practical, a clearly usable road was specifically created by the first respondent for use by the applicants (para 48.4). In fact, three separate roads allowed applicants access to the main road.

In light of the false assertions and incorrect statements the LCC departed from its usual approach not to grant costs orders due to the kind of litigation that occurs here (para 50). It is imperative that time is not wasted and that important and necessary applications are dealt with by courts as expeditiously as possible. In this regard legal representatives have an integral role to play in preparing documents precisely and truthfully.

4 Unlawful occupation

Motete v Mogorosi ((A20/2014) 2014 ZAFSHC 175 (18 September 2014)) entailed an appeal against an eviction order handed down by a magistrate's court, calling for a restoration order. The respondent (applicant in the original eviction application) based the original eviction application on an alleged purchase and sale agreement of a house located in Selosha, ThabaNchu. The agreement was concluded between the respondent and the North West Housing Corporation

(NWHC) on 21 September 2011. On the basis that the applicant was the contractual purchaser and person in control of the property, coupled with the fact that the present appellants occupied the house without his consent, an eviction order was duly granted (see paras 2-5 for background).

The eviction order was being appealed on various grounds, including that the appellants had been in lawful and peaceful occupation since 2004; that the deed was invalid as it had only been signed by one official or representative of the NWHC (instead of two persons); and that the house was not the property of the NWHC and could therefore not be disposed of to the respondent (para 8). Accordingly, the respondent was neither the owner nor the person in control of the property, as was required under the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), in order to lodge an eviction application. While the whole of the order was being appealed, it was in essence one of the basic principles of eviction applications that was being questioned, namely that of the *locus standi* of the applicant to lodge an application in the first place.

With regard to the title of the NWHC to the property, which previously fell under the Bophuthatswana Housing Corporation, it was argued by the respondent that the title now vested in the Housing Corporation as decided previously by the SCA under *Khoete v Dimbaza* ((A448/07) 2009 ZAFSHC 129 (12 November 2009)). On the strength of that judgment the NWHC was entitled to conclude the deed of sale and once concluded, the purchaser became the person in charge and was consequently endowed with the necessary *locus standi* (para 9). Motloug AJ with Rampai AJP concurring first set out all the relevant legislative measures, particularly those pertaining to the definitions of 'owner' and 'person in charge' (para 11). The Court thereafter confirmed that PIE had national application and underlined that all laws previously applicable in parts of South Africa, including Bophuthatswana, had been repealed to the extent that such laws were inconsistent with PIE (para 11). In this regard section 22 of the North-West Housing Corporation Act 24 of 1982 required signatures of the General Manager or Chairman of the Board and any other member of the Board duly authorised thereto by the Board before a binding disposition of the property of the NWHC could take place.

The first issue addressed was whether the applicant in the original application was indeed the owner or person in charge of the property, as defined in PIE. If the respondent were neither, then the respondent could not qualify as a person or entity entitled to lodge eviction proceedings, which would mean the end of the matter. However, if the respondent had *locus standi*, then the court would have to proceed further and check whether all the substantive requirements of PIE had been complied with (para 13). An 'owner' is defined as the person or entity in whose name the property is registered. In the present instance it was trite that the property was neither registered in the name of the respondent when the proceedings were lodged, nor in the name of the NWHC.

Even if a valid sale had occurred, the respondent would still only qualify as an owner when the transfer was effected in the deeds registry. To that end the respondent was not the owner and consequently did not acquire *locus standi* on that basis (para 14).

A person in charge is a person who has legal authority to give permission or allow another to enter onto or occupy property or conversely, to refuse consent (para 15). In this regard the decision alluded to above, *Khoete v Dimdaza*, became relevant. In that judgment it was decided that with regard to certificates of occupation issued under regulation 11 of Proclamation R293 of 1962 the North-West Housing Corporation became vested with authority to deal with these relevant properties under the North-West Housing Corporation Amendment Act 9 of 1994 (para 18). Once a certificate of occupation had been cancelled validly, the NWHC became fully entitled to conclude a deed of sale with an interested party. In the *Khoete* case the facts and circumstances enabled the person lodging eviction proceedings to do so on the basis of being in charge of the property at the time the eviction proceedings began. While the NWHC still did not qualify as 'owner' because the property was not registered in its name, on the strength of the *Khoete* judgment Motloutj AJ found that the NWHC would qualify as a 'person or entity in charge'. That would mean the NWHC was indeed bestowed with legal authority to either allow or refuse someone entry to or occupation of the property (para 19.1). To that end the NWHC was entitled to dispose of the house. In order to dispose of the property so that ownership was transferred, all requirements had to be met to secure a valid disposition. To that end the deed of sale had to meet the requisite formalities. In particular, it had to comply with section 22 of the North-West Housing Corporation Act 24 of 1982, which required *two* signatures, as set out above. On the facts, the deed did not meet the requirement as it was only signed by one representative whose status was not stated or declared (para 19.4). Accordingly, the respondent could not and indeed did not acquire any rights flowing from an invalid deed of sale. The respondent was therefore neither the owner nor the person in charge of the property and had no *locus standi* at the time of instituting eviction proceedings (para 20). The magistrate consequently erred in granting the eviction order.

Despite the complexity and the various technicalities that emerge due to the fact that former national state institutions and functionaries are involved, the basic premise remains solid: only owners or persons in charge of property have the required *locus standi* to lodge eviction applications. To that end the *locus standi* of applicants has to be clear from the outset.

Denneboom Service Station v Phayane (2015 1 SA 54 (CC); 2014 12 BCLR 1421 (CC)) dealt with an application for leave to appeal against an eviction order handed down in the North Gauteng High Court. The facts were briefly the following: the relevant property was owned by Mr Chiloane and his wife in community of property and comprised a service station and convenience store.

In 1992 Mr Chiloane was sequestered and the property, finally sold at a public auction, was transferred to Mr Phayane in May 2010. In 2012 Mr Phayane lodged an eviction application as registered owner on the basis that the occupiers were unlawful. In response the title of Mr Phayane was disputed. It was furthermore pointed out that certain residents were also present on the premises and that the requirements of PIE had not been complied with when the order was handed down. The pleadings were thereafter amended so as to exclude the 'residential occupants' from the ambit of the eviction proceedings. The eviction order was finally granted ejecting Denneboom and all persons working through them. Leave to appeal was sought on the basis that the order was ambiguous and wrongly authorised the eviction of Mr Chiloane, who was a residential occupant (paras 2-7). In the Constitutional Court the applicants sought leave to appeal on various grounds, including that Mr Phayane failed to comply with the Uniform Rules of the Court when he sought to amend his pleadings, that he was not the owner of the property and that the sale was defective because Mr Chiloane's wife was joint owner of the property and her estate was not sequestered (para 8).

Judge Khampepe was satisfied that none of the contentions had any merit. Mr Phayane was indeed the rightful owner and he indicated that by attaching the deed of transfer to his application. The parties were further married in community of property, resulting in both the husband and wife's estates being sequestered, automatically. However, the contention that the constitutional rights of Mr Chiloane had been infringed required further attention. While the property was mainly commercial in nature, it also consisted of a residential part. As the order presently stood, it was ambiguous as it potentially authorised the eviction of Mr Chiloane, a resident, without complying with PIE. PIE gave practical effect to section 26 of the Constitution and regulated the eviction of unlawful occupiers, including those who resided on commercial premises (para 16). Accordingly, with regard to shelter or structures used for residential purposes, PIE would be invoked and the formalities and requirements would have to be met in particular. The eviction of commercial occupants and juristic persons did not, however, fall within the ambit of PIE (para 17). Mr Phayane therefore did not need to comply with any of PIE's provisions with regard to the ejection of Denneboom and persons working for it. In that respect the High Court did not err in granting the eviction order. The CC consequently granted leave to appeal on the narrow issue of the eviction of Mr Chiloane only and amended the order to state explicitly that eviction was only authorised with regard to commercial and not residential occupants (para 18). With respect to any of the other issues listed above, the applicants were unsuccessful.

The judgment underlined the basic point of departure that, where structures or shelters are used for residential purposes or as a home, section 26 immediately enters into the picture, thereby involving PIE that gives practical effect to it. No person in unlawful occupation may be evicted from or deprived of

housing, except in strict accordance with PIE. On the other hand, ejection from commercial, trade, industrial and business premises does not involve housing issues and therefore need not comply with section 26 or PIE. To that end eviction would be possible when ownership of the applicant is clear, usually by way of producing a title deed, and when occupation of the premises by the respondent is unlawful. The common law eviction procedures and requirements are thus still relevant, but only when no housing, shelter or residential issues are at stake. This is also the case with regard to holding over (see for more detail Pienaar *Land Reform* (2014) 701-714).

While the above judgments dealt with the granting or not of an eviction order, *Khumalo v Polkadots Property (Pty)* ((30023/2013) 2014 ZAGPJHC 294 (29 October 2014)) dealt with eviction retrospectively in that it entailed an application for rescission of a default judgment constituting an eviction order. The application was based on rule 42(1)(a) of the Uniform Rules of Court on the basis the order was erroneously sought and granted due to defective service and alternatively, on the common law that a *bona fide* defence existed. The facts are briefly the following: The applicant purchased the house in 2003 and had been in occupation since that time until 2013 when a default judgment was granted against her. The applicant purchased the property by way of a bank loan which was secured by registration of a mortgage bond. The applicant resided in the house with three children, two of whom were still minors. In 2012 the applicant started to default on her payments and consequently entered into a verbal agreement with the bank to pay back the overdue amounts in extended instalments (paras 4-5). In June 2013 she was informed by a person that he had purchased the property and that he was the new owner. The applicant thereafter received communication that she was to be evicted and that she had to vacate the property on 14 October 2013. A default judgment had indeed been granted against her on 9 October 2013 (para 9). She immediately thereafter started inquiries and sought legal assistance to apply for rescission of the judgment.

The applicant was adamant that she was unaware of the eviction application and that, had she been aware, she would have opposed it. It was furthermore unclear as to how the property was sold and registered in the respondent's name as the applicant never received any summons (para 16). Her application was opposed on the basis that the notices had been served properly and that the applicant did not have a *bona fide* defence (para 17). With reference to the rule developed in *Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* (1984 3 SA 623 (A) 634H-I) the court per Mosikatsana AJ confirmed that the applicant's denial that she was duly served had to prevail. He consequently proceeded to deal with rescission under the common law. In order for the applicant to succeed, she had to demonstrate that (a) she was not in wilful default; (b) that the application was brought *bona fide*; and that (c) she had a *bona fide* defence which held some prospects of success. With regard to the latter it was argued by the

applicant that she was a single parent with two minor children who had nowhere to go if they were evicted and that she was entitled to legal protection under PIE (para 27). In this light section 26(3) of the Constitution automatically became relevant. With reference to the main aim of PIE and the importance of balancing the rights of land and property owners to those of unlawful occupiers, the Court posed the question whether the Court in granting the eviction order by default, properly executed its constitutional and statutory mandate (para 33):

Evidently, all relevant information relating to the circumstances of the first applicant were not placed before the court. The court was also bereft of the views of the municipality which is favourably placed to inform the court as to available land within its jurisdiction and processes that the court would implement to temporarily or permanently accommodate the first applicant and her minor children.

In this light good cause was shown for a rescission order under the common law. Having rescinded the eviction order at least enabled the applicant to place all her circumstances before the court. So too did the landowner have an opportunity to state his case. Only when all the relevant circumstances of both parties are considered, would the Court be able to decide whether the granting of an eviction order would be just and equitable.

Meadow Glen Home Owners v City of Tshwane Metropolitan Municipality (2015 1 All SA 299 (SCA); 2015 (2) SA 413 (SCA)) dealt with the aftermath of the well-known judgment in *Tswelopele Non-profit Organisation v City of Tshwane Metropolitan Municipality* (2007 6 SA 511 (SCA)). The *Tswelopele* case dealt with an unlawful eviction of occupiers and the destruction of their rudimentary shelters and property. A successful reconstruction order granted by the Supreme Court of Appeal (SCA) eventually resulted in establishing a settlement in Woodlane Village within a demarcated, fenced area (paras 4-7). The area so demarcated was located in close proximity to properties belonging to more affluent landowners in a formal residential area. The relevant homeowner associations had since the establishment of the Woodlane settlement instituted various proceedings against the municipality, *inter alia* contending that the settlement existed in conflict with town planning regulations and sought broad-based relief in the form of various structural orders. Over the years several of these orders were granted in favour of the homeowner associations against the municipality, usually by consent (paras 6-10). The appellants consistently complained that the municipality made no proper attempt to comply with the terms of the orders, especially with regard to regularly inspecting and repairing the boundaries and fences; regulating access control and checking permits of residents. The main focus was on restricting numbers to prevent expansion while the municipality was also enjoined to provide basic services, including water and sewerage services.

Following failed compliance of these orders, an attempt was finally made to commit to prison for contempt of court Mr Fenyani, the municipal director for housing. When that application was dismissed, the present appeal was lodged.

While various issues arose concerning the efficacy of structural orders in principle, the crux of the matter was, as worded by Wallis JA and Schoeman AJA (with Cachalia and Zondi JJA and Dambuza AJA concurring) whether 'the incarceration of one of its employed officials is the way in which to address this problem' (para 3). Linked to this, was the question on which basis the courts were asked to make structural orders and whether their terms were sufficiently definite to form a foundation for contempt. It was furthermore questionable whether the blunt instrument of contempt of court was indeed an appropriate means of securing enforcement orders directed at resolving complex social issues. Having regard to the wording of the structural orders handed down (see para 6), the SCA pointed out that the generality of the terms would inevitably lead to disputes between the municipality and the homeowners associations. Despite the generality of terms and the difficulty experienced by the municipality to comply with the conditions, neither the municipality nor the homeowners associations approached the courts for amendments, variations or clarity. To that end the unsatisfactory cycle of orders by consent, non-compliance and suspension of orders continued (paras 8-10). Finally, an order was handed down by consent that Mr Fenyani would be imprisoned if certain conditions were not met. These included the usual requirements of inspection and patrols alluded to above, but also that the municipality had to establish a township in respect of the area of the settlement and adjacent land, to allocate serviced residential erven to certain residents ('qualified persons') and to bring eviction proceedings against remaining residents (para 10). In November 2012 an application was lodged to commit Mr Fenyani to imprisonment on the basis that certain conditions had not been met. Being unsuccessful, the present appeal was lodged.

The SCA first considered what a contempt of court order entailed and the reasons behind it (paras 16-24). The SCA was satisfied that, although some punitive elements were involved, the main objectives of contempt proceedings were to vindicate the authority of courts and to coerce litigants into complying with court orders (para 16). While it was essentially an issue between the court and the party who did not comply, it also entailed a public interest element. That was the case because the failure or refusal to obey court orders affected the very effectiveness and legitimacy of the judicial system (para 18). With regard to a suspended order of committal proof of a wilful breach of conditions of suspension also became relevant. In this regard the fact that the committal order in relation to Mr Fenyani was made by consent, was thus important and inevitably begged the question on what factual basis the order was made (para 19).

A further difficulty was that although Mr Fenyani was cited, it was unclear on what basis he became the subject of the order in the first place (para 20). Mr

Fenyani was the director of the housing resource management of the municipality, but was not responsible for all of the incidences complained of and which formed the basis of the order. Instead, a variety of obligations had to be performed by various other municipal officials. The SCA highlighted that where contempt of court was concerned it had to be clear beyond reasonable doubt that the official in question was the person who wilfully and with knowledge of the court order failed to comply with its terms (para 22). To that end the SCA set out the various officials, including the municipal manager and the executive mayor, and their respective responsibilities (para 23). Where court orders were concerned, it was the municipal manager that was responsible for overseeing the implementation thereof (para 24). Having established that the wrong official was cited, the SCA proceeded to establish whether there was indeed non-compliance of the order, as averred. Sufficient evidence was placed before the court that complaints were lodged regularly and that inspections of the fence were irregular and ineffective (para 25). Although the responsibilities to patrol the area and securing the access were contracted out, the municipality did not oversee the work of contractors sufficiently and effectively. The overall impression gained by the SCA was that the municipality was 'less than diligent' in seeking to comply with the orders handed down (para 28). Even though the wording of the orders was general and rather ambiguous no applications for variation or amplification of any terms were lodged. Yet, despite all of the shortcomings and the lack of diligence on the part of the municipality, it was still not possible to hold Mr Fenyani accountable on the basis that he wilfully refrained to comply with the conditions, thereby resulting in his imprisonment (para 28).

As highlighted before by both the Constitutional Court and the SCA, it was imperative that courts were creative in framing remedies that addressed and resolved complex social issues effectively. According to the SCA in this process various factors also emerged, including (para 35):

how they are to deal with failures to implement orders; the inevitable struggle to find adequate resources; inadequate or incompetent staffing and other administrative issues; problems of implementation not foreseen by the parties' lawyers in formulating the order and a myriad other issues that may arise with orders the operation and implementation of which will occur over a substantial period of time in a fluid situation. Contempt of court is a blunt instrument to deal with these issues and courts should look to orders that secure on-going oversight of the implementation of the order.

The appeal was consequently dismissed and the parties were urged to find a workable solution. Ideally, litigation should not be the tool employed. The judgment managed to capture the complexity of the issue and to highlight the various factors that may impact on the successful implementation of court orders.

Even in instances where the correct official is identified for purposes of contempt of court proceedings, the efficacy of this kind of remedy remains questionable. To that end it is better to prevent the situation of a contempt of court to arise in the first place. Obviously, that remains extremely challenging. Even a supervisory function built into a structural order, as pleaded for by the SCA in this instance, can still be ineffective. That much is abundantly clear from *Residents of Joe Slovo Community, Western Cape v Thubelisa Homes* (2009 9 BCLR 847 (CC) ; 2010 3 SA 454 (CC)) when the complex and detailed structural order (with a built-in supervisory dimension) was abandoned a few years after it was handed down and replaced by a new order. This has shown that making provision for oversight *per se* is no guarantee that the structural order would be implemented successfully. Ultimately, dedication and commitment to solving problems are integral and required from all parties involved.

One such way is commissions of enquiry as was applied in the Western Cape. The work of the Commission of Enquiry into the Eviction of the Informal Settlement Community of Lwande, Cape Town had been extended to 30 September 2014 (Procl 696 in GG 37973 of 2014-09-04). The final report has not been released by the writing of this note.

5 Land use planning

5.1 *Spatial Planning and Land Use Management Act 16 of 2013 and Spatial Data Infrastructure Act 54 of 2003*

The Spatial Land Use Management Act 16 of 2013 (SPLUMA) came into operation on 1 July 2015 (Procl 26 in GG 38828 of 27 May 2015). The Act applies to the whole of South Africa (s 2) and repeals the Removal of Restrictions Act 84 of 1967, the Physical Planning Act 88 of 1967, the Less Formal Township Establishment Act 113 of 1991, the Physical Planning Act 125 of 1991 and the Development Facilitation Act 67 of 1995 (s 59). The objectives of the Act are, amongst others, to provide 'a uniform, effective and comprehensive system of spatial planning and land use management system for the Republic'. SPLUMA makes provision for spatial development frameworks on a national, provincial, regional and municipal level (ss 2 and 5 read with chapter 4) as well as development principles, norms and standards to guide spatial planning, land use management and land development (ss 2 and 6-8). The legal nature of a provincial spatial development framework, published in the *Provincial Gazette* is that it does not 'confer on any person the right to use or develop any land except as may be approved in terms of this Act, relevant provincial legislation or a municipal land use scheme' (s 17). Only municipal spatial development frameworks will influence a Municipal Planning Tribunal as it must take the framework into consideration when making a decision (s 22, subject to

exceptions). Municipalities must adopt single land use management schemes within five years after commencement of SPLUMA (s 24(1)). This scheme must include, amongst others, appropriate categories of land use zoning and regulations for the municipal area, take cognisance of land use management instruments adopted in terms of environmental legislation, include provisions for areas under traditional leadership and make provision for areas for affordable housing (s 24(2)). A land use scheme has the force of law and all landowners, users of land and municipalities are bound to the land use scheme. The land use scheme will replace all existing land use schemes and will provide for land use and developmental rights (s 26). If no land use scheme existed prior to SPLUMA, the land may only be used for a use listed in Schedule 2 of the Act (s 26(3) – mining is, for example, a listed activity). A Municipal Planning Tribunal (established in terms of ss 35-39) may change a permitted land use and a municipality may amend a land use scheme after public consultation (s 26(4)-(5)). Land use schemes may be reviewed every five years (ss 27-28). SPLUMA also provides for transitional arrangements (s 60).

Sections 12, 14 to 18 of the Spatial Data Infrastructure Act 54 of 2003 commenced on 30 June 2015 (Procl 25 in GG 38822 of 29 May 2015). A Base Data Set Custodianship Policy and Policy on Pricing of Spatial Information Products and Services were additionally published. These Policies came into operation on 16 March 2015 (GN 96 in GG 38474 of 2015-02-16). The purpose of the Base Data Set Custodianship Policy is to 'outline the criteria for the identification and appointment of custodians' for different data sets and to promote cooperative governance between custodians of these data. There should also be improved access to data sets, elimination of duplication of data sets, protection of privacy, improvement of the quality of information in the data sets and integration of base data sets (para 4). The objectives of the Pricing Policy is to promote transparency in the public sector and to ensure that cost is not a barrier to access to information, to ensure access to spatial information products and services, to ensure consistency in the public sector with regard to pricing of products and services and encourage job creation and economic activity (para 4).

The Minister of Trade and Industry published draft special economic zones regulations in terms of the Special Economic Zones Act 16 of 2014 for comment (Gen Not 251 in GG 38592 of 2015-03-20). The regulations deal, amongst other things, with the administration and management of the special Economic Zones Fund (chapter 2), support for businesses to be located in such zones (chapter 3) and guidelines for the preparation of a feasibility study (schedule to the regulations). The feasibility study must include a risk assessment relating to, for example, the operational, financial, market, environmental and regulatory risks. The study should also include reference to the governance and institutional risks (item (ix) of the Schedule).

5.2 Case law

Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council (2014 4 SA 437 (CC)) entailed an application for confirmation of an order of the High Court, Western Cape, declaring section 44 of the Land Use Planning Ordinance 15 of 1985, Western Cape (LUPO) unconstitutional. Section 44 gives the Western Cape provincial government (the Province) the power to decide appeals against municipalities' decisions and to replace them with its own. In this regard the question emerged as to whether direct provincial intervention in particular municipal land use decisions is compatible with the Constitution's allocation of functions between local and provincial government. As the facts had already been conveyed fully in the discussion of the High Court judgment alluded to above (*The Habitat Council v Evangelical Lutheran Church, Strand Street* (2013 6 SA 113 (WCC)), it will not be repeated here, suffice it to say that the application arose from two planning decisions, the *Gordonia Properties (Pty) Ltd* and the *Habitat Council* decisions, respectively (see also paras 2-3 for factual background and paras 4-9 regarding the High Court judgment).

Before the Constitutional Court the issues were identified as follows: (a) were the provincial appellate powers in LUPO constitutionally valid; and (b) if so, what was the appropriate remedy? The court per Cameron J (with Moseneke ACJ, Skweyiya ADCJ, Dambuza AJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Majiedt AJ, van der Westhuizen J and Zondo J concurring) departed from the concession that the provincial minister had already acknowledged that section 44 of LUPO was indeed unconstitutional (para 11). Essentially that stance was based on the fact that the Constitution has moved away from a hierarchical division of governmental power and has ushered in a new vision under which the sphere of local government is interdependent, but subject to possible constraints set out in the Constitution. Because section 44 enables the provincial appellate capability to usurp the power of local authorities to manage municipal planning and thereby to intrude on the autonomous sphere of authority the Constitution affords to municipalities, it cannot withstand constitutional scrutiny (para 13). The planning competence ascribed to municipalities includes the zoning of land and the establishment of townships. Municipalities were responsible for zoning and subdivision decisions as they were best suited to make those decisions (para 14). In this context section 44, which enables the Province to interfere in all municipal land use decisions and to substitute its decisions with those of the municipality, was clearly unconstitutional and invalid. However, would there be any circumstances in which a province could permissibly hear appeals against municipal land use decisions? In the High Court the question was answered in the affirmative with reference to two broad instances. These included firstly, development applications that engaged the Province's competences; and secondly, when a provincial

appellate power is necessary in the exercise of its powers of 'oversight' over municipalities. With regard to the former, it was argued that there had to be some provincial legislative and executive surveillance over municipal planning decisions because big municipal zoning and subdivision decisions could have extra-municipal effects. Without oversight the Province would be powerless to stop very large development that could have ruinous effects on the province as a whole (para 18). Judge Cameron underlined that, despite these fears, all municipal planning decisions encompassing zoning and subdivision – no matter how big – lie within the competence of the relevant municipality (para 19). Instead, what the Province had to do in these instances was to coordinate powers to withhold or grant approvals of their own. Accordingly, the power did not relate to the right to veto developments, but to harness the myriad of development approvals, which lay on provincial and national levels, to guide the development effectively. Concerning the latter issue dealing with oversight, the Constitution specifically provided for the other two spheres of government to regulate the exercise by municipalities of their executive authority (para 20). However, within the relevant context 'regulating' meant creating norms and guidelines for the exercise of a power or the performance of a function. It did not mean usurpation of the power or the performance of the function itself (para 22).

When urged to also elaborate on the content of 'provincial planning' the Court declined the invitation, stating that draft legislation was in the process of being formulated and that courts ought not pronounce on these intricate matters under legislative scrutiny (para 24). In this regard reference was made specifically to the Western Cape Land Use Planning Bill of 2014 and the Spatial Planning and Land Use Management Act 16 of 2013.

Having concluded that section 44 was indeed unconstitutional, the court explored the issue of suitable remedies (para 25 ff). 'Reading in', as called for by the Province, gave the Province interim appellate powers that were incompatible with the competence afforded by the Constitution to municipalities (para 25). Suspending the declaration of invalidity would likewise temporarily preserve an appellate power that was unconstitutional in its entirety (para 26). While it was true that many municipalities lacked capacity and that the need to develop such capacity was urgent, it did not justify suspending the declaration of invalidity. In this regard the Court concluded that (para 27): 'Instead, the province is obliged to use its constitutional powers, which are not insubstantial, to assist municipalities to make planning decisions properly. That it can do by helping them increase their capacity'. The invalidity of section 44 was accordingly confirmed. The declaration was not retrospective and did not apply to appeals pending in terms of that section. The judgment brings finality to an important issue that had been hinted at in decisions before (eg *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd* 2014 1 SA 521 (CC)), but had not been adjudicated on specifically. How the new SPLUMA and its regulations will

affect planning in the provinces will be a new feature in South African law. Whether the legislation is too complicated and too costly to implement remains to be seen (Kuhn 'The role of provincial authorities in strengthening municipal bylaw-making capacity: a cooperative government perspective' Unpublished Paper delivered at Faculty of Law and Konrad AudenauerStiftung Conference 'The Role of Municipal Bylaws in Good Local Governance in South Africa' 4 June 2015 Potchefstroom).

6 Housing

The Rental Housing Amendment Act 35 of 2014 was published on 5 November 2014 (GG 38184 of 2014-11-05) and will come into operation on a date as published in the *Government Gazette* (s 22). In terms of the newly introduced section 1A the objectives of the Rental Housing Act 50 of 1999 will be to 'create mechanisms to promote the provision of rental housing property, promote access to adequate housing through creating mechanisms to ensure the proper functioning of the rental housing market, lay down general principles governing conflict resolution in the rental housing sector, provide for the facilitation of sound relations between tenants and landlords and provide for legal mechanisms to protect the rights of tenants and landlords against illegal actions by the other party by affording speedy means of redress at minimum cost to the parties'. The Minister of Housing will in future have to monitor the application of this Act especially on poor and vulnerable tenants and develop policies and other measures to address any challenges that may arise (s 3). The Amendment Act also introduces, amongst others, new definitions for 'habitability' and 'maintenance' (s 1). The Act also sets out the rights and obligations of tenants and landlords in a more comprehensible manner (ss4A-4B) and requires leases to be in writing (s 5(1)). The Minister must develop a *pro forma* contract that is to be available in all languages (s 5(6A)). Chapter 4 will in future be applicable to all provinces (s 6). MECs will have to establish Rental Housing Tribunals within the first financial year following the commencement of the Act (s 6). Section 9 determines the composition of the Tribunal (the sections dealing with the composition, rules and procedures of the Tribunal were also amended – see ss 10, 13-17 of the main Act).

The Amendment Act introduces an appeal procedure against decisions of the Tribunal to a panel of adjudicators appointed by the MEC (s 17A). Local municipalities have to establish Rental Housing Information Offices to advise tenants and landlords with regard to the rights and obligations (s 14). The Act further provides for norms and standards for rental housing that may relate to the terms and conditions of leases, safety, health and hygiene measures, basic living conditions, size, overcrowding and affordability (s 15(fA)). The Minister must issue regulations as well as norms and standards within 12 months after commencement of the Amendment Act (s 15(3)).

The Minister of Housing published a notice for exemption from the provisions from regulations 6 to 14 of the Housing Development Schemes for Retired Persons Act 65 of 1988 in order to allow the developer to 'retain ultimate control in the operation and administration of the scheme rather than to hand these functions to a management association' for a period of 10 years (GN117 in GG 38458 of 2015-02-13). The period to provide comments on the Home Building Manual issued in terms of the Housing Consumers Protections Measures Act 95 of 1998 was extended to the end of February 2015. The Home Building Manual of 1999 will be repealed (BN 37 in GG 38441 of 2015-02-06). The Minister of Human Settlements in consultation with the Estate Agency Affairs Board published a penalty payable for late payment of levies and contributions in terms of the Estate Agency Affairs Act 112 of 1976 (GN R244 in GG 38603 of 2015-03-27).

Rules on the transfer or disposal of social housing stock funded with public funds were published in terms of the Social Housing Act 16 of 2008 (Gen Not 1106 in GG 38283 of 2014-12-03; Gen Not 64 in GG 38427 of 2015-01-28). The Minister of Human Settlements also invited interested parties to nominate persons to serve on the Council for the Social Housing Regulatory Authority (Gen Not 894 in GG 38109 of 2014-10-24). The Minister of Public Works appointed members to the Council for the Built Environment in terms of section 5 of the Council for the Built Environment Act 43 of 2000 (BN 112 in GG 37979 of 2014-09-12). The Minister of Finance stopped the transfer of funds in terms of the Human Settlement Development Grant to the Limpopo Province and re-allocated funding to KwaZulu-Natal, Eastern Cape, Mpumalanga and Western Cape (GN 99 in GG 38483 of 2015-02-16).

7 Deeds

A new Schedule of fees of office was published at the end of March 2015 under section 9(9) of the Deeds Registries Act 47 of 1937 (GN 269 in GG 38628 of 2015-03-31).

8 Surveying

The Department presented its Land Audit Report to the Portfolio Committee on Rural Development and Land Reform on 17 September 2014 (<http://bit.ly/1RVzyl5> accessed 3 June 2015). The Chief Surveyor-General conducted an audit of registered state land and a desktop analysis of private land ownership in South Africa. The audit of registered state land included land owned by the state, ie all spheres of government, the former homelands, public land (*Ingonyama* land), and state-owned enterprises, but excluded surveyed land not registered. The private land audit provides statistical information in terms of gender, race (not obtainable), nationality or citizenship, percentage share (company ownership and shareholding

not yet available from the CIPC), marital status, and living status. The distribution of registered state land parcels per province is as follows: Eastern Cape 9%, Free State 5%, Gauteng 2%, KwaZulu-Natal 28%, Limpopo 15%, Mpumalanga 11%, North West 14%, Northern Cape 11%, and Western Cape 6%. Government entities owned 22.3% of such land, municipalities 12.3%, national government 40.3% and provincial government 18.6%. The remaining 6.4% of state land has not yet been classified. The majority of national state land is used for agriculture and fisheries (19.7%), residential (16.9%), recreation and leisure (13.3%), and conservation (9.1%). Undeveloped (vacant) state land comprises 10.1% of all state land. National state land is mostly used by government departments (28.2%), traditional authorities (25.6%), and municipalities (19.1%). Most private land is owned by individuals (48.2%), followed by trusts (26.7%), companies (22.2%), private organisations (2.8%) and not classified owners (0.0%).

There are 28737622 individual landowners in South Africa, the majority of which are male (22726252) (with 5191159 being female, and 821096 not identified). The most unaccounted land is in the Eastern Cape (24%), followed by Gauteng (18%), and Mpumalanga (13%). A total of 14% of land in South Africa is state-owned while 79% is privately owned (7% is unaccounted). There are 59356 sectional schemes, and 853694 sectional units in the country, the most of which are in Gauteng. The Department is in the process of drafting legislation to create a centralised database for land owned by all spheres of government and their entities (see the DRDLR's presentation: 'The State and Public Land Management in South Africa', to the Portfolio Committee on Rural Development and Land Reform on 17 September 2014 <http://bit.ly/1QCIXfX> accessed 3 June 2015). The National Agricultural Marketing Council (NAMC) and the Department have commenced with the identification of 1 million hectares of land, including state land and former homeland areas for food security, which will be followed by an audit of existing infrastructure. NAMC will analyse the suitability of land in terms of agricultural variables. The Department developed a procedure document to be applied in dealing with restitution claims on state land. The extent of state land that was released for redistribution and transferred under restitution (per province) since 1994 was also set out in the presentation.

The Land Survey Regulations (GN R1130 in GG 18229 of 1997-08-29) were amended and came into operation 30 November 2014 (GN 832 in GG 38128 of 2014-10-31).

9 Rural development and agriculture

9.1 Rural development

The DRDLR presented its Strategic Plan 2015-2020 and Annual Performance Plan 2015-2016 to the Portfolio Committee on Rural Development and Land

Reform on 18 March 2015 (<http://bit.ly/1Mg7bKE> accessed 2 June 2015). The following policies are envisaged for the period 2015/2016, namely the Policy on Rural Enterprises and Industry Development, the Policy on the Strengthening of Relative Rights for People Working the Land, the Policy on a Rural Development Investment and Finance Facility, the Electronic Deeds Registration Policy, as well as policy reviews on Recapitalisation and Development, Proactive Land Acquisition and Farm Share Equity Schemes; for the period 2016/2017, the Policy on the Exceptions on the June 1913 Cut-Off Date for the Restitution of Land Rights, a National Land Tenure Policy: Responses to Historically Racial Based Social and Economic Disparate Spaces and the Policy on Access to Historical Land Marks and Heritage Sites on Private Land (in collaboration with the Department of Arts and Culture); and for period 2017/2018 the Rural Settlements Operations Policy (in collaboration with other departments) and the Policy on a Rural Development Agency. The Department identified seven strategic goals for the five year period of the Strategic Plan (<http://bit.ly/1HUIfWE> accessed 2 June 2015), namely corporate governance and service excellence; improving land administration for integrated and sustainable growth and development; promoting equitable access to and sustainable use of land for development; promoting sustainable rural livelihoods; improving access to services; ensuring sustainable rural enterprises and industries and restoring land rights.

According to DRDLR's Annual Performance Plan 2015/16 (see 2 above), the Department will focus on increasing investment and capacity in rural infrastructure that supports production and market opportunities and the agricultural value chain in its entirety by way of a number of initiatives (eg the establishment of Mega Agri-Parks in each of the 27 poorest District Municipalities). The roll-out of Agro-Village Industries will commence in the 2015/16 financial year. Agri-Parks will create sustainable rural enterprises and industries, agro-processing, trade development, production hubs for food security, local markets and financial services. In addition, the DRDLR will aim to accelerate the pace of land reform and the protection of vulnerable communities, including farm labourers and people living on farms. The DRDLR plans to implement the so-called 50/50 policy framework (see above) in 10 pilot areas, and to submit and/or finalise the following pieces of legislation: the Regulation of Land Holdings Bill (to regulate land ownership by foreign nationals), the draft Communal Property Associations Amendment Bill, the Electronics Deeds Registration Bill, and the Extension of Security of Tenure Amendment Bill. The Department will endeavour to establish the Office of the Valuer-General and to finalise the policy and legislation relating to land ceilings.

The DRDLR will establish district land committees to serve as vehicles for public-private partnerships (PPPs), to implement agricultural value chains, to identify strategically located land by the state and to facilitate the selection of farmers and appropriately located farms for land reform purposes. The rural economy transformation will be implemented through an agrarian transformation