LAND MATTERS AND RURAL DEVELOPMENT: 2016 (1)

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1. GENERAL

The amendment of the Restitution of Land Rights Act 22 of 1994 (Restitution Act) led to a renewed interest in restitution matters. The number of land claims is increasing. It seems that the courts are still struggling with the interpretation of the Extension of Security of Tenure Act 62 of 1997 (ESTA) and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE). Similar problems are experienced with housing. Parliament and the Council of Provinces approved the controversial Expropriation Bill [B4D-2015].[1]

This note covers land issues: 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.[2]

1 Anon, 'Parliament Approves Land Expropriation Bill' *Mail & Guardian* (26 May 2016) <http://mg.co.za/article/2016-05-26-parliament-approves-land-expropriation-bill> accessed 3 July 2016.

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

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2. LAND RESTITUTION

The Commission on the Restitution of Land Rights made a presentation at the strategic planning session of the Portfolio Committee on Rural Development and Land Reform (CRLR) on 3 February 2016.[3] The presentation included the challenges that the CRLR experiences and that relate, among other issues to strategy, structure, systems, style, staff and skills. The CRLR did not provide feedback on the manner (and extent) of implementation of the findings and recommendations of the Department of Performance Monitoring and Evaluation and the South African Human Rights Commission.[4] A number of strategic interventions for the financial years 2016/17 to 2018/19 were identified, among others, three strategic goals: 'land rights restored in order to support land reform and agrarian transformation by 2020', 'lodgement of restitution land claims re-opened for people who did not meet the 1998 deadline' and 'organisational change management'. The Exceptions Programme was mentioned that would focus on the identification of land to be made available to members of the Khoi and San communities (whose land had been dispossessed prior to the cut-off date of 27 June 1913). This process would be in accordance with the provisions of the Redistribution Programme and would identify relevant heritage sites for said communities. Within this context, an interdepartmental task team as well as a multi-disciplinary, multicultural research team would be established. The CRLR emphasised that, in principle, old order claims, meaning claims that were lodged before the cut-off date of 31 December 1998, would be processed first. New claims, lodged after 1 July 2014, would first have to be investigated. By the end of 2015, 7 584 claims that had been submitted prior to 31 December 1998, were still outstanding (3 610 still in Phase 2 – screening and categorisation; 350 in Phase 3 – determination of qualification in terms of s 2 of the Restitution Act; and 3 624 in Phase 4 – negotiations). The provincial breakdown for claims still in Phase 2 was as follows: Eastern Cape (366); Free State (0); Gauteng (155); KwaZulu-Natal (738); Limpopo (24); Mpumalanga (1647); Northern Cape (8); North-West (4) and Western Cape (668).

2.1. Notices

There was an increase in the number of land claim notices published in the *Government Gazette*. The notices (with the exception of a few) do not indicate the date of the claim, making it difficult to determine whether the notices are applicable to the pre-amendment phase or indeed are notices submitted as a result of the Amendment Act. The following number of notices was published with regard to the various provinces: Western Cape: Cape Town (including Eerste Rivier. Kuilsrivier, Newlands, Retreat, Diep Rivier, Oranjezicht,

3 Commission on the Restitution of Land Rights, 'Presentation to the Portfolio Committee on Rural Development and Land Reform Strategic Planning Session' (3 February 2016) <http://bit.ly/29HBjaC> accessed 30 June 2016.

4 (2015) 30 (1) SAPL 239.

Green Point, Maitland, Constantia, Athlone, Rosebank, Goodwood, Claremont, Belville, Parow, Bonteheuwel, Ravenswood, Elsies River) forty-six; Lambert's Bay, Montagu, Observatory, Mfuleni, Worcester, Willowvale, Sunnydale, Struisbaai, Aghulhas, Tulbagh, Bitou, Somerset West, Plettenberg Bay, Wittenberg, Stellenbosch, Strand, Franschhoek, Eden and Noordhoek – one each; Mosselbay, Ceres, Hout Bay, De Rust, Simon's Town, Pniel, Grabouw and Matroosfontein – two each; George, and Oudtsdhoorn – three each; Eastern Cape: Port Elizabeth (five); Grahamstown (twenty-three); Sterkspruit/Joe Gqabi (four); Cofimvaba/Chris Hani, Peddie and Stockenstrom – three each; Alice, Queenstown, Mthatha, Cala, Stutterheim and Lady Frere – two each; Keiskammahoek, Port St Johns, Somerset East, Bizana, Qumbu, Elliotdale, Lusikisiki, Komga, Whittlesea and Herschel – one each; KwaZulu-Natal: Ethekwini (including Cato Manor) fifteen; Mount Currie and New Hanover – four each; Piet Retief, Pietermaritzburg, Lions River, Umvoti, Camperdown, Lower Tugela, Eshowe, Port Shepstone and Newcastle – two each; Dundee (three); Egotshe, Lower Umfolozi, Mtonjaneni, Mtunzini, Upongola, Richmond and Umgungundlovu – one each; Limpopo: Thulamela and Vhembe – two each; Greater Tabatse, Polokwane, Elias Motswaledi, Mookgopong and Sekhukhune – one each; Gauteng and North-West: Tshwane (eleven); Johannesburg (seventeen); Zeerust (seven); Bojanalo (four); Thembisile, Ekurhuleni, Lichtenburg and Kungwini – one each; Mpumalanga: Mbombela (ten); Thaba Chweu and Emakazeni – nine each; Delmas (seven); Bushbuckridge (six), Gert Sibande, Victor Kanye and Emalahleni – four each; Steve Tshwete (three); Thembisile and Nkomazi – two each, Umjindi, Lydenburg, Chief Luthuli, Albert Luthuli and Govan Mbeki – one each; Free State and Northern Cape: Bultfontein/Sterkspruit/Spaansefontein (fifteen); Kara Hais and Kai! Garib – two each; Harrismith, Dihlabeng and Keimoes – one each. Several amendment, withdrawal and correction notices were also published.

By 30 November 2015, 3 290 685 ha of land (costing R19 291 888 564, 05) had been awarded to qualifying claimants; however, only 1 444 000 ha had been transferred in ownership to beneficiaries. In respect of the re-opening of the lodgement of claims, 144 112 new land claims had been submitted during the period from 1 July 2014 onwards (to March 2016). It was indicated that the 'drastic reduction in the compensation of employees budget throughout the DRLR' (Department of Rural Development and Land Reform) had impacted negatively on staffing in the CRLR, and that only 'unequivocally critical posts' would be filled. Within this context it is noteworthy that the following three critical directorates were still vacant (as on 6 April 2016), namely Restitution policy, Restitution research and Project management. It is foreseen that the outstanding (31 December 1998) claims would be researched as follows: 1 530 in the 2016/17 financial year and 3 098 in the 2017/18 financial year.[5]

5 See CRLR, 'Annual Performance Plan 2016/2017' (6 April 2016) <http://pmg.org.za/files/160406Commission_APP.pptx> accessed 30 June 2016. See also CRLR, 'Annual Performance Plan 2016/17 of the Commission on Restitution of Land Rights' <http://www.drdlr.gov.za/publications/annual-performance-plans/file/4395-annual-performance-plan-2016-17-of-the-commission-on-

2.1.1. Case law

The Restitution Act led to a number of court decisions dealing, among others, with disputes relating to the acquisition of the land and the formalisation of settlement agreements. In *Pienaar v Minister of Rural Development and Land Reform*[6] two matters were dealt with: (a) the *final amount* offered for the acquisition of certain farms in Mpumalanga, as well as (b) *how* the amount was decided. Following the lodgement of various land claims by the Sibiya and Mahlangu communities relating to various farms comprising portions of the farm Hartbeesfontein, agreements to acquire said land were entered into by two sets of owners and the defendants. The Botha Trust owned portions 6, 10 and 11 and the Van der Walt family owned portions 3, 5 and 8. The plaintiffs did not contest the land claims and did not oppose the acquisition of land or the initial valuations. The initial amounts offered were respectively R7.3 million and R7.4 million in April 2008. However, when the parties reconvened to finalise the agreements in September 2008, the amounts were adjusted downwards to R2.3 million and eventually finalised at R5.2 million. The application before the Land Claims Court (LCC) was for damages comprising roughly R2 million each on the basis that the amounts represented the difference between reasonable market value and what was paid to them following the settlement of the land claim. The cause of action was founded on fraudulent misrepresentation of the officials involved in the process. In the alternative it was also claimed that the plaintiffs were compelled to accept the offer and alternatively that the amount (the 'compensation') offered did not constitute just and equitable compensation in accordance with section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution).[7]

Basically, the plaintiffs testified that they were under the impression that the amounts offered had been finalised and that they had consequently ceased some of their farming activities and had entered into other agreements, invariably resulting in financial obligations. When they convened for what they considered to be the finalisation of the agreements, they were shocked to hear that the amounts were not final and that they had been adjusted downwards rather drastically without sufficient explanation. They were further compelled to accept the offers, for various reasons, including (a) they did not have time to consult with counsel, and (b) they were threatened with expropriation should they not accept the offer. It was their impression the latter would result in a lengthy court battle.[8] During cross-examination both parties acknowledged that they knew the final amounts and concomitant agreements still had to be approved by the first defendant, the Chief Land Claims Commissioner, before they could be deemed final. To that end it was clear that the amounts had not been finalised during the April 2008 negotiations. Testimony of the state officials underlined that the initial valuations,

restitution-of-land-rights> accessed 30 June 2016.

6 2015 JDR 2444 (LCC).

7 ibid paras [1]–[3].

8 ibid paras [16]–[26].

which were not contested by the plaintiffs, represented the full spectrum of valuations, including both the highest and the lowest ends of the spectrum.[9] The initial valuations reflected only the highest end of the spectrum, whereas the final valuations related to the lower end of the spectrum. The adjustment was done after comparable sales in the area were taken into account, as well as consideration of budgetary restrictions.

With regard to the cause of action dealing with fraudulent misrepresentation, Canca AJ scrutinised whether the officials made a representation which they knew to be untrue with the intention that the plaintiffs would act thereon.[10] The statement that the properties would be expropriated was not a fraudulent misrepresentation as the properties could be expropriated, which would result in a referral to the LCC, which could indeed be a time-consuming and protracted process.[11] The argument was further made that the parties were compelled to accept the offer as the department was in a better position to bargain and the defendants' conduct was heavy-handed.[12] In this regard the court accepted that the conduct of the defendants may have been heavy-handed, but denied that they compelled the plaintiffs to accept the offer. That was the case because the pressure experienced by the plaintiffs was self-created in that they had concluded transactions which put enormous financial pressure on them. These agreements were entered into on their own accord.[13] If they had not entered into other purchase agreements, they would not have been forced to accept the offer and could have referred the matter to court. The same stance was also taken with regard to the claim that the defendants had unduly influenced the plaintiffs as there was no evidence to support that contention.[14]

The next issue the court dealt with was whether the 'compensation' offered was just and equitable.[15] Of importance, however, was that the land was not expropriated, but was acquired, following an agreement to that effect. In this regard, the payment need not comply with the factors listed in section 25(3) of the Constitution, which include market value. It is important that expropriation is not conflated with acquisition. In any event, where valuations are concerned, various subjective factors enter into the picture, underlining that valuation is not an exact science. In this context the court also explored whether a 'forced sale' would qualify as an expropriation.[16] In the present instance the court had already found that there was no undue influence, misrepresentation or duress which forced the plaintiffs to conclude the final agreement and accept the amounts.[17] Accordingly, in this context it would be very difficult to argue that the agreement constituted a forced sale, resulting in expropriation.

9 ibid paras [27]–[35] generally.
10 ibid para [36] ff.
11 ibid para [39].
12 ibid paras [41]–[42].
13 ibid para [42].
14 ibid para [45].
15 ibid para [48] ff.
16 ibid paras [52]–[54].
17 ibid para [53].

The court finally highlighted that the state can acquire land, for purposes of land reform generally and restitution specifically, by various means, including purchase by agreement, as had occurred here: The court states as follows: 'A consensual sale agreement will be valid and enforceable, even if the purchase price is less than market value. The proviso being that there is no fraudulent misrepresentation or undue influence, which I have already found to be absent in this case.'[18]

It is important to note that market value is not the paramount factor in considering compensation. Had expropriation been resorted to, market value would be only one of the factors considered in the exercise of determining just and equitable compensation. It is thus quite possible that the compensation amount could be less than market value, taking into consideration all relevant factors. Furthermore, the Property Valuation Act 17 of 2014, provides specifically that market value is only *one* factor to be taken into consideration where land is acquired for land reform purposes. In this context acquisition of land includes consensual sale. Accordingly, where land reform objectives are pursued, market value is subject to the nation's commitment to land reform.

Mdumane Community Trust v Land Claims Commissioner[19] provides guidelines to assist courts in formalising settlement agreements and making them orders of court. The background is briefly the following: the applicants lodged a land claim which was validated and resolved by way of a section 42D agreement under the Restitution Act. Prior to the endorsement of the agreement the Commission consolidated the claim with a different community, despite repeated objections from the applicants. Following the agreement, substantial payments were made to the former landowners of the land, the land was subsequently registered in the name of the fifth respondent – the Ndwandwe Community Trust,[20] and a grant of R8.8 million was paid to the beneficiaries to develop the land. Accordingly, the original claimants, the applicants in the present proceedings, received no benefit at all. The applicants lodged an application to review the decision of the Commission, which application was initially opposed. However, when the main matter was heard all parties were in agreement that the consolidation was unlawful and that the Commission lacked the authority to consolidate the claim. To that end a settlement agreement was presented and the court, per Ngcukaitobi AJ, was requested to make the settlement an order of court.

The court emphasised that making a settlement agreement an order of court was not merely a process of rubberstamping for two main reasons: (a) as a custodian of the rule of law the court had to ensure that the agreement was consistent with the rule of law and (b) making it an order of court changed the status of the document in that it became an enforceable instrument.[21] It was within this context that the provisions of

18 ibid para [57].
19 LCC 60/2012, 19 November 2015.
20 ibid paras [3]–[10] generally.
21 ibid para [6].

the settlement agreement were considered. The key elements[22] of the agreement were that the decisions of both the Minister and the Commission to consolidate the claims were reviewed and set aside; the corresponding transfer of the land was invalid and set aside and the matter had to be remitted to the Commission for further and proper investigation into all claims by the appointment of an independent researcher. Pursuant thereto a structural interdict was furthermore included in that a working plan was to be submitted to the court on an ongoing basis and monthly reports had to be furnished as well. Once the Commission had completed its investigation, mediation was proposed. If mediation was unsuccessful, the matter was to be referred to the LCC for adjudication. In the meantime the Ndwandwe Community Trust was prohibited from disposing of any assets linked to the land.

In accordance with *Eke v Parsons*[23] an agreement can be made an order of court if three requirements are met, namely (a) the agreement must relate to an issue in dispute between parties, (b) the agreement must be in accordance with the Constitution and the law and (c) the agreement must hold some practical and legitimate advantage. With regard to the former, the court confirmed that two issues were in dispute between the parties. First, the lawfulness of the decision of the Minister and, second, the remedy, as funds were paid to the former owners and a grant was awarded to the Trust. As the settlement dealt with all these issues, it passed the first test.

The second requirement provides that the settlement agreement must be in line with the Constitution and the law. This is more pertinent with regard to restitution as section 25(7) of the Constitution provides specifically for the restitution programme, so too does the whole of the Restitution Act deal with the restitution programme. In this regard the broad process of lodging and finalising claims is set out in para 13 of the judgment.[24] Considering the requirements[25] and the procedure, it was clear that the Commission and the Minister failed to consider whether the fifth respondent was a community at the time the claim was lodged. The Trust came into existence only subsequent to the lodging of the claim. However, it would be possible to transfer land to a subsequently created entity, if the transfer was done with the knowledge and consent of the original claimants.[26] The decisions to consolidate the claims and to transfer the claims to a newly-created entity were therefore not authorised.[27] Also, in this regard the agreements aimed to set the record straight and therefore met the second requirement in that it was in line with the Constitution and the law.

The third stage of the *Parsons* test requires some practical and legitimate advantage. This would be achieved if the agreement can be brought into operation sensibly.[28] Within

22 ibid para [9].
23 2016 (3) SA 37 (CC).
24 See also Juanita M Pienaar, *Land Reform* (Juta 2014) 527–32.
25 ibid 356–64.
26 *Parsons* (n 23) para [15].
27 ibid para [16].
28 ibid para [17].

the constitutional domain this means that the agreement must be just and equitable. It is this dimension that the court found lacking, here the agreement as it currently stood required a fresh investigation of the claims. However, there was no justification for a new investigation as both claims had been scrutinised and validated already. The only issue to be dealt with was whether the land had been transferred to the correct entity upon the finalisation of the investigation. In this context the court had no grounds to prescribe that the Commission appoint an independent researcher. The agreement as it stood therefore interfered with the internal workings of the Commission.[29] The agreement was furthermore cumbersome as it provided for a three-stage process, namely (a) the appointment of an independent researcher, (b) the mediation process and (c) adjudication by the court. In light of the time that had already been lost and because the process is so cumbersome, the court found that imposing these requirements would simply perpetuate the delays in the resolution of the matter.[30]

The result was an amendment of the agreement to bring it more in line with the objectives of the Restitution Act. In the final amended order the decisions of the Minister and of the Commission remained invalid and therefore were set aside, so too was the registration of the land. The land was to be registered in the name of the Minister to be held on behalf of the State. The following questions were forthwith referred to oral evidence: (a) whether the land should be registered in the name of the applicants; (b) if the land is to be registered in the name of the applicants, the persons who were entitled to the land and the basis thereof, and (c) what steps, if any, should be taken in respect of the funds paid to the fifth respondent in the form of a grant.

The judgment will go a long way to streamline the process further, thereby expediting restitution claims overall. Concluding settlement agreements successfully is to be encouraged, nevertheless, it is important that the court plays an oversight role and that all agreements are scrutinised before being rubberstamped. Speeding up the process is certainly a valid objective, but it is also crucial that the agreement as a whole is above reproach and is in line with the Constitution and the relevant law. While this judgment dealt with settlement agreements within the restitution context, the broad framework is also useful in other contexts, like the ESTA context, as alluded to above with reference to the *Du Randt* case.

29 ibid para [18].
30 ibid para [19].

3. LAND REFORM

3.1. Land Titles Adjustment Act 111 of 1993

Land was designated in the district of Sekhukune in the Limpopo Province in terms of section 2(1) of the Land Titles Adjustment Act.[31]

3.2. KwaZulu-Natal Ingonyama Trust Act 3 of 1994

The KwaZulu-Natal Ingonyama Trust Act 3 of 1994 came to the fore in the case of *Gladys Phindile Ngubo NO v Allison Musa Ndlovu and Ithala Development Corporation Ltd*.[32] The case dealt with land situated in KwaZulu-Natal, registered in the name of the Ingonyama Trust, established under the KwaZulu-Natal Ingonyama Trust Act. The land in question was registered and occupied in terms of a permission to occupy (PTO) by the respondent since 1983. The respondent borrowed money from the intervening party and ceded his (the respondent's) right, title and interests in relation to the PTO to the intervening party as security. When the respondent failed to honour the debt default judgment was granted, resulting in the property being sold in execution and transferred to the intervening party. The intervening party sold the right, title and interest of the PTO to the joint estate of the present applicants after which applicants took occupation of the property in June 2004. The respondent applied for an eviction order which was granted but not executed. While the eviction order was stayed, the present application was lodged by the applicant in April 2012 requesting a *rule nisi,* with the following relief: (a) interdicting the respondent from entering the property; (b) confirming the applicant's right, title and interest under the PTO and; (c) suspending the eviction application for the duration of the proceedings aimed at clarifying the matter.[33]

Regarding the interdictory relief prayed for by applicant three requirements must be met, namely proving an infringement of a clear right, that injury was actually committed or was reasonably apprehended and that no other remedy was available. The court per Gorven J underlined that the first requirement was especially difficult since the respondent denied the cession of the PTO to the intervening party. Thus it was unclear whether the applicant or the respondent was the rightful holder of the PTO. Furthermore, as the notion of the ownership of property and the right to occupy was used interchangeably, confusion resulted.[34] When considering the conditions of paragraph 3 of the PTO conditions, the holder was prohibited from transferring, mortgaging, ceding, leasing, subletting or disposing of the PTO property without prior written approval.[35]

31 Gen Not 194 in GG 39110 of 2016-04-08.
32 Case no 3425/2012, 19 February 2016, KwaZulu-Natal High Court Division, Pietermaritzburg.
33 ibid paras [1]–[4].
34 ibid para [5].
35 ibid para [6].

According to the respondent no prior consent was granted to transfer the PTO at the time of launching this application, either to the intervening party or to the applicant. The respondent also alleged that the intervening party was not entitled to execute against this right of the PTO by relying on the conditions in paragraph 5 of the PTO. Paragraph 5 provides that 'the rights of the holder in or to an allotment shall not be liable to execution for any debt other than a debt due under a duly registered mortgage bond or a debt to the South African Development Trust or other statutory body which has been granted administrative control of the land'.[36] According to the respondent the intervening party was not capable of possessing the right to the PTO, as it was not a statutory body. This contention was based on the fact that the Act requires the Trust to administer land registered in its name, which should be held to the benefit, material welfare and social well-being of the tribes and communities and the residents referred to in the schedule to the Act. The intervening party did not comply as he was neither a statutory body nor a resident.[37]

There was also the matter of a settlement agreement that was entered into between the applicant and the respondent, which was never disclosed during the proceedings. Based on the settlement agreement which entailed that the applicant agreed to vacate the property in January 2012, the eviction was stayed. However, at that same time the applicant applied for cancellation of the eviction order. In light of this the applicant argued that the settlement agreement had fallen away due to the rescission of the eviction application. What was problematic was that the settlement agreement had not been dealt with during any of the previous proceedings. In fact, there was no mention at all of the settlement agreement. Because it was never dealt with, it was impossible to ascertain whether there was duress present when the settlement was agreed upon, as was claimed by the applicant.[38] Regarding the PTO it was clear that the applicant had not paid the purchase price and therefore the right, title and interest in relation to the PTO could not be transferred to the applicant. The respondent was thus still recognised to be the holder of the PTO by the Board of the Ingonyama Trust.[39]

Judgments dealing with so-called 'old order rights' are not often handed down. This judgment is interesting as it highlights the diverse measures regulating landholding in a particular area within South Africa, namely land within KwaZulu-Natal. In this regard the kind of right – a PTO – is impacted further by the fact that the land is held in trust by the Ingonyama Trust, regulated under statute. Apart from the fact that the level of complexity is increased, actually ascertaining how PTOs function, how they are enforced and ultimately transferred, can be very time-consuming and difficult. Within this context the rights of PTO-holders remain vulnerable, warranting further attention and upgrading. In the meantime, noting the provisions and conditions of the particular

36 ibid para [7].
37 ibid paras [6]–[8].
38 ibid paras [9]–[13].
39 ibid para [21].

PTO is the only way to protect their holders against unscrupulous persons. In this regard attention to detail, as set out in the relevant PTO, is critical.

King Goodwill Zwelithini announced that he is going to commence a process to give people on Ingonyama Trust land title deeds.[40] However, it will be the Ingonyama Trust who will have to decide on land alienation and division in terms of the KwaZulu-Natal Ingonyama Trust Act and all new developments will have to be dealt with by the municipality in terms of the Spatial Planning and Land Use Management Act 16 of 2013. Most of the individual land parcels in the rural areas in KwaZulu-Natal are not surveyed and the process of surveying the land and dealing with land disputes will take some time. It is also important to note that most of the land referred to is currently disputed in terms of land claims.

3.3. Communal Property Associations Act 28 of 1996

On 4 November 2015 the Communal Property Associations Annual Report 2014–2015 was presented to the Portfolio Committee on Rural Development and Land Reform.[41] On 31 March 2015, 1 428 communal property associations (CPAs) had been registered (of which forty-eight in the financial year 2014/15). CPAs were established in terms of the Restitution Programme and the Redistribution Programme, with the highest percentages of CPAs in KwaZulu-Natal (twenty-five); Mpumalanga (twenty-four) and Eastern Cape (fifteen). The report identified five challenges experienced by CPAs, namely persistent conflict amongst CPA members related to governance matters such as a lack of accountability and transparency, financial mismanagement and non-compliance with the CPA constitution concerned, insolvency, the abuse of legal proceedings to prevent CPA members from participation, alienation of immovable property registered in the name of the CPA and the fact that nine CPAs were subject to judicial administration. According to departmental records twenty CPAs had lost their land (through selling or being acquired by creditors). CPA compliance consists of five elements: (a) an updated membership list, (b) a valid CPA constitution, (c) the holding of regular annual general meetings, (d) elections to take place on a regular basis in accordance with the provisions of the Communal Property Associations Act and (e) the timeous submission of annual reports to the director-general of Department of Rural Development and Land Reform (DRDLR). 147 CPAs (involving 30 108 households and 104 583 beneficiaries, relating to 411 194.76 ha) had been referred for regularisation to the DRDLR's Land Rights Management Facility (LRMF) – forty of which were regularised. Within this context,

40 Amanda Khoza, 'Process to Give Zuma Title Deeds to Nkandla Land to Start Soon' *News24* (10 June 2016) <http://bit.ly/29VdzzC> accessed 3 July 2016.

41 DRDLR, 'Communal Property Associations Annual Report: 2014–2015' (4 November 2015) <http://pmg.org.za/files/151104CPA.ppt> accessed 2 July 2016;
<http://agbiz.co.za/uploads/AgbizNews/151119_CPAReport.pdf> accessed 2 July 2016.

regularisation denotes the provision of mediation and assistance to the CPA in order to ensure compliance.

The Communal Property Associations Amendment Bill, 2016 was published on 22 April 2016, and seeks, among others, to extend the application of the Communal Property Associations Act to labour tenants, to establish a Communal Property Associations Office and to provide for general plans in respect of all CPA land, improved protection of communities in respect of movable and immovable property, strengthened measures for the management of CPAs placed under administration and clarity relating to the content of annual reports to be submitted by CPAs to the director-general of DRDLR.[42]

3.4. Extension of Security of Tenure Act 62 of 1997

With regard to eviction applications under both ESTA and PIE (discussed in more detail below) a theme that emerges very clearly is that having *locus standi* to lodge eviction proceedings is by no means a guarantee that the application will be successful. That is the case because legislation regulates this area of law – not the common law – and further, that eviction applications will be successful only if the granting of the eviction order is just and equitable in the circumstances. All relevant circumstances have to be considered in order to reach that conclusion. Pre-constitutional or purely common law approaches are out of place in this context. To that end automatic review takes place under section 19(3) of ESTA so as to ensure that the statutory requirements have been met. The judgments discussed here show clearly that some courts still grant eviction applications in line with a pre-constitutional approach and/or in direct conflict with relevant statutory provisions.

Molusi v Voges[43] is an application for leave to appeal and an appeal from the Supreme Court of Appeal (SCA) to the Constitutional Court (CC) regarding an eviction application granted in the LCC and confirmed in the SCA. The SCA-judgment was discussed previously in 'Land matters 2015(1)'. In the previous discussion the continued reliance on the common law as a foundation for the granting of the eviction order under ESTA was specifically questioned. Essentially the CC confirmed that the common law cannot be utilised where persons fall within the ambit of ESTA, despite the averment that the initial basis for occupation was in terms of a lease agreement.

What the CC had to determine here was whether the termination of the right of residence and eviction of the applicants were in compliance with the relevant provisions of ESTA.[44] In answering the question the court, per Nkabinde J, highlights that the Constitution remains the point of departure, including issues pertaining to the common law.[45] In the present matter the respondents argued that the basis of occupation of the

42 Gen Not 243 in GG 39943 of 2016-04-22.
43 [2016] ZACC 6, 1 March 2016.
44 ibid para [2].
45 ibid para [6].

applicants was a lease agreement. The applicants were in breach of a material term of the lease agreement, namely the duty to pay rental, hence the cancellation of the lease. This averment was later expanded on twofold: that they had to demolish the homes as they wanted to develop that part of the farm and further, by relying on ownership it meant that a periodic lease could be terminated on reasonable notice. The applicants, however, alleged that they tendered payment and that they did not receive eviction notices. In the LCC the decision was reached that the right of residence was terminated in accordance with ESTA and that the requirements were also met. On appeal to the SCA the eviction order was confirmed on the basis that the lease had been terminated validly – either on the basis that the rental had not been paid or on the basis that the land owners were entitled, at common law, to terminate the lease as they had given reasonable notice of such termination.[46] The SCA furthermore found that there was compliance with ESTA and consequently reached the conclusion that the granting of the eviction order was just and equitable. In its approach the SCA relied on *Graham v Ridley*[47] and *Brisley v Drotsky*[48], thereby emphasising that the circumstances that were *legally* relevant had to be considered.[49]

The CC was satisfied that the application for leave to appeal concerned constitutional issues and proceeded to determine whether the reliance on the common law ground in the present matter was correct. Of importance was the fact that the SCA essentially relied on pre-Constitution authority. However, as Judge Nkabinde sets out very plainly, and in line with what was argued previously in 'Land matters 2015(1)' ESTA has very particular application, to particular, vulnerable categories of persons, for particular reasons.[50] Relying on a 'common law ground' cannot force the matter into the (pre-constitutional) common law paradigm. In this regard the finding of the SCA that the respondents were 'perfectly entitled to rely … on such common law grounds as availed them in support of the pleaded claim for eviction as a single cause of action' was clearly incorrect.[51] Section 9(1) of ESTA states specifically that: 'notwithstanding the provisions of any other law, an occupier may only be evicted in terms of an order of court under this Act'. Clearly, '[t]he phrase "any other law" includes the common law'.[52] Furthermore, the mere ground that the termination of the lease was lawful is not tantamount to granting the eviction application. The provisions of ESTA become relevant and all have to be complied with, including an exercise to determine whether the granting of the eviction order would be just and equitable. By relying on the common law ground only for termination of the lease and thereafter to grant the order on that basis, 'would make a

46 ibid paras [16]–[17].
47 1931 TPD 476.
48 2002 (4) SA 1 (SCA).
49 *Molusi* (n 43) para [19].
50 ibid para [39].
51 ibid para [29].
52 ibid.

mockery of the constitutional scheme regarding the regulation of eviction of vulnerable occupiers from land to achieve long-term security of land tenure in a fair manner'.[53]

With reference to case law dealing with PIE the CC furthermore highlighted that 'the criteria to be applied are not purely of a technical kind that flow ordinarily from the provisions of land law'.[54] While the references to case law relate to PIE, the remarks are equally valid in relation to ESTA.[55] Here, given the particular provisions of ESTA, the following factors and circumstances have to be considered specifically:[56] the fact that the probation officer's report stated that there was no alternative accommodation available and that the termination of their lease would have rendered them homeless. In this context section 8(1)(d) of ESTA ought to have been considered. That did not happen. Furthermore, if the applicants were offered the opportunity to make representations they could have placed additional facts before the court and would have had the opportunity to explain why the cancellation of their leases and right of residence was unjust. Again, this did not happen.[57] In this regard:[58]

> It follows that the respondents were not entitled to rely, as they did, on the common law principles as bases for eviction when the grounds were not set out in the notice and properly pleaded. The Supreme Court of Appeal may be correct that, at common law, the land owner 'would have been entitled to the relief sought'. But that common law claim is now subject to the provisions of ESTA. The provisions of sections 8, 9, 10 and 11 of ESTA have the result that the common law action based merely on ownership and possession, as in *Graham v Ridley*, is no longer applicable … the risk of repetition, reliance on the common law does not exonerate owners from compliance with the provisions of ESTA. The fairness of the eviction would still have to be considered having regard to all relevant circumstances. All such relevant factors were not considered. It follows that the reliance on the common law ground was, in the circumstances of this case, unfair to the applicants and impermissible.

Given that ESTA was indeed the relevant statutory measure, the next issue was whether the requirements of the Act had been complied with. Having regard to the provisions of ESTA in general, it is clear that fairness plays an important role in the process as a whole. While it is correct that the cancellation of a lease on the basis that rental had not been paid constituted a lawful ground for termination, the enquiry does not stop there. Instead, the termination must also be just and equitable, considering the factors listed in section 8(1)(a)–(e): the fairness of the ground on which the owner or person in charge relies; the conduct of the parties giving rise to the termination; the interests of the parties – including the comparable hardship to the parties; and the fairness of the procedure followed by the owner or person in charge, including whether the occupiers

53 ibid para [30].
54 ibid para [31].
55 ibid.
56 ibid paras [34]–[35].
57 ibid para [36].
58 ibid paras [37]–[38].

were given an effective opportunity to make representations before the failure by the occupiers to pay rental.[59] The SCA did not comply with section 8 – instead, the court relied on the common law principles of the *rei vindicatio* and the reasonableness of the notice of termination:[60]

> In other words, the Court did not strike a balance between the interests of the owner of the land and those of the occupiers as to infuse justice and equity or fairness into the enquiry. The Supreme Court of Appeal did not consider the fairness of the termination of the applicant's right of residence. Nor did it give sufficient weight to the hardship that would eventuate from the termination of the rights of residence and eviction.

Accordingly, the eviction application did not comply with ESTA. The SCA ought not to have dismissed the appeal. The CC granted leave to appeal and consequently upheld the appeal. This judgment underlines that common law evictions are things of the past. The capacity to lodge an eviction application – including on a lawful ground like the termination of a lease – supplies only a foundation for the lodgement. The eviction process entails much more than merely indicating standing or that there is a ground for the action. It involves considering all relevant circumstances, but within a particular paradigm, which had been adjusted considerably by way of legislation. In this regard both PIE and ESTA have changed the eviction landscape drastically where residential property, homes and shelters are at stake.

Rula Tecno Park (Pty) Ltd v Mahlangu[61] set aside an order granted by a magistrate during the automatic review process provided for under section 19(3) of ESTA. The starting point of the judgment of the lower court was that none of the confirmatory affidavits were signed by the respondents and twenty-five respondents failed to deliver confirmatory affidavits.[62] The decision of the magistrate to exclude the confirmatory affidavits, although the record of the proceedings included thirty-two signed confirmatory affidavits filed by the first to 32nd respondents, was of such a sufficiently serious nature that it entitled the LCC to set aside the whole of the judgment and to evaluate the case afresh.

The application was lodged on the grounds that the occupiers had no legal right to reside on the property, had committed certain acts of misconduct and the property was required for business purposes. At least four of the respondents had been in occupation when the Act commenced in 1997, thereby involving section 10 of ESTA, whereas the other occupiers settled at a later stage, involving section 11 of the Act. While considering the case afresh, it became clear that there was no meaningful enquiry into the allegations of misconduct by the occupiers. The result was that the evidence before the court did not support the magistrate's conclusions. Overall, the applicant did

59 ibid para [44].
60 ibid para [45].
61 [2015] ZALCC 10, 23 November 2015.
62 ibid para [25].

not meet the requirements of sections 10 and 11 of the Act. The right of residence of occupiers had not been properly cancelled or terminated either. Furthermore, the file did not contain a probation officer's report, as required under section 9(3) of ESTA. There was also no indication that a probation officer's report had ever been requested. The order of the magistrate was consequently substituted by an order of the LCC dismissing the eviction application.

In *Farm Goedgedacht 228 (Pty) Ltd v Illegal Invaders and/or Occupiers of Portion 4 (A portion of portion 1) of the Farm Goedgedacht 228*[63] the applicant applied for an eviction order against respondents, as well as an interdict on the basis that the property known as portion 4 of the farm Goedgedacht 288 had been invaded by unknown persons. While no opposition was filed, at the day of the hearing two of the land invaders attended court, stating they represented the illegal invaders and all other people residing on the farm who were likely to be affected. They averred there were two categories of people living on the farm: (a) those who have resided on the farm for long periods with consent and (b) recent occupiers who appeared to have been part of an orchestrated land invasion. Negotiations led to a draft order providing for the following:[64] an interdict against any further unlawful occupation of the property, an eviction order in relation to persons forming part of the orchestrated land invasion and an identification process for all unlawful occupiers and their family members.

Overall, Ngcukaitobi AJ was reluctant to issue an eviction order as it could also impact negatively on long term occupiers. To that end the execution of the interim order was suspended, pending the filing of answering affidavits. Inevitably a postponement resulted. Additional information was requested regarding the identities of the parties living on the land, their circumstances and the potential availability of alternative land in the event of an actual eviction. The DRDLR (Department) in Mpumalanga consequently drafted such a report, indicating that no alternative accommodation was available.[65] Due to the degree of outstanding information, the court conducted an inspection *in loco, inter alia,* to establish the identities and circumstances of those most likely to be affected by the order, in relation to both the long-term and more recent occupiers. Such an inspection was necessary as – at this stage – in the event of an actual eviction or demolition order, the sheriff would be unable to determine which structures should be demolished. The court furthermore required concrete details regarding the actual invasion as to when and how (overnight or gradual) it occurred. In this regard the court had to determine whether the requirements of ESTA had been met. ESTA draws a distinction between 'usual' and long-term occupiers, as well as between occupiers who settled before the Act commenced in 1997 and thereafter. In this context occupiers with consent could not be affected by the eviction order.[66] The applicant permitted persons

63 LCC 283/2015, 23 February 2016.
64 ibid paras [1]–[3].
65 ibid paras [4]–[5]].
66 ibid para [7].

employed on the farm to reside on the farm under a lease or rental agreement. However, upon retrenchment of farm workers from 2012 to 2013 in terms of the Labour Relations Act 66 of 1995, some employees remained in occupation on the farm. Since then the applicant has been involved in discussions with the Department concerning the sale of the land, although nothing has been finalised. Since 2013 further unlawful occupation occurred on the farm, *inter alia,* involving the allocation of stands in accordance with specific demarcations. From the inspection it was clear that a well-orchestrated land invasion took place, thereby necessitating a clear separation of the long-term occupiers from the unlawful invaders. In this regard an order was issued to remove the markings that demarcated individual stands, to demolish structures and to remove building material from stands where building had not commenced or was incomplete as on 1 March 2016. Fifteen households were identified as long-term occupiers on the farm who could remain in occupation. All other illegal invaders were ordered to vacate the property by 1 March 2016. The third respondent was further ordered to provide emergency housing to the identified long-term occupiers' households within sixty days of the granting of the order and to report back to court within a set period of time. In the case of the emergency housing being provided by the third respondent the fifteen households were ordered to vacate the property within fifteen days.[67] This case illustrated the necessity of an inspection in order to determine the correct facts. In this case it was integral to distinguish between the long-term occupiers under ESTA on the one hand and unlawful occupiers (land invaders) on the other.

As is usually the case, various reviews under section 19(3) of ESTA occurred during the report period. In the following automatic review proceedings judgments of the lower courts were set aside or remitted to the magistrates' court: *Enslin v Nel*[68] and *Cillie v Volmoer*[69]. In the *Enslin* case the occupiers had been in occupation of a house for more than two decades, with the consent of the land owner, albeit in the absence of a written, formal agreement. The land owner applied for an eviction order without setting out the specific grounds for eviction. While the service of documents was in order and a probation report was attached in line with section 9(3) of ESTA, the exact grounds for eviction and the implications of the eviction for the occupiers, remained unclear. Despite this shortcoming, the eviction order was granted in the magistrates' court. As was decided previously in the LCC, setting out the grounds for eviction was not only prescribed by ESTA, but was necessary so as to enable the occupier who stands to be evicted, to prepare sufficiently for the case against him or her. If the grounds for eviction are not set out clearly, the occupier has no idea what the case against him or her is about. Neither did the probation report assist the court as there was no indication of whether the eviction would render the occupiers homeless or whether there was alternative

67 ibid para [9].
68 [2016] ZALCC 4, 17 February 2016.
69 LCC 50R/2015, 15 February 2016.

accommodation available.[70] On the other hand, refusal by the occupiers to enter into a lease agreement and refusing to vacate the property thereafter could highlight matters of interest or to the benefit of the land owner. To that end the probation report ought to have been much more detailed so that the court was able to consider all relevant circumstances before granting the eviction order.[71] In this context there was insufficient information before the court to determine whether the granting of the order would be just and equitable in the circumstances.[72] In this light the judgment handed down by the magistrates' court was set aside and the applicant was granted leave to renew its application.

In the *Cillie* case the matter was remitted to the lower court following the review proceedings under section 19(3) of ESTA. The first and second respondents are husband and wife and have two dependent children. The husband was dismissed in 2010 following a disciplinary hearing. He was allowed to remain on in the dwelling with his wife on the basis of their spousal relationship. In 2012 the wife was also dismissed following a disciplinary hearing. On the basis that the residential housing policy of the farm provided housing for employees only, the second respondent's residence was terminated.[73] In the process of determining whether all the requirements for eviction had been complied with, the court, per Baloyi AJ, confirmed that the relevant provision was section 11 of ESTA as the respondents became occupiers after 4 February 1997, the date on which the Bill was published for comment.[74] In this regard the court was satisfied that the employment contract had been terminated, that the right of residence likewise had been terminated lawfully and that the ground for such termination was indeed fair. However, no section 9(3) probation report formed part of the documents.[75] While the submission of such a report is not a fixed requirement of ESTA, the CC had warned previously that a court should be reluctant to grant eviction orders unless it is satisfied that reasonable alternative accommodation is available, even if only on an interim basis. Therefore, a proper consideration should have been given to the issue of whether alternative accommodation was available. This is even more pertinent in light of the fact that two dependent children were involved.[76] How the rights of the children would have been affected and the possible hardship was therefore not considered. Accordingly, the absence of a probation report and the implications there of, had to be considered specifically. In this light the eviction application ought to have been refused. The order of the magistrates' court was accordingly set aside and the matter remitted to the lower court to obtain a probation report under section 9(3) of ESTA and to consider all relevant facts and factors, as required under section 9(2).

70 *Enslin* (n 68) paras [11], [22].
71 ibid paras [12]–[16].
72 ibid paras [16], [23].
73 *Cillie* (n 69) paras [2]–[5].
74 ibid para [13].
75 ibid para [16].
76 ibid.

Du Randt v Khaka and Others[77] entailed an application to make a settlement agreement an order of court. In light of *Eke v Parsons*,[78] discussed in more detail above within the restitution context, the LCC considered whether the settlement agreement reached between the parties could be confirmed. While the main considerations highlighted in the *Parsons* case were indeed complied with, the court, per Ngcukatobi AJ, took issue with particular practical matters inherent in the agreement. The land owners were generous and offered to pay for a house for the occupiers which would enable them to relocate. The relocation as such would also be funded by the land owners. However, the site on which the new property would be built had not been clarified and neither had the specifications of the new house been set out.[79] There was furthermore no date for the eviction (relocation) and a further date on which the eviction order would be executed if the relocation had not taken place as planned. The absence of a first date for relocation seemed sensible as the building of a new house was somewhat unpredictable and could take longer than anticipated. Although the absence of a first date was not fatal to the settlement agreement (fifteen days after the finalisation of the house), a second date was necessary or at least some kind of timeline in terms of which the execution of the order could take place. In this regard the settlement agreement was confirmed as meeting all the requirements and an additional clause was inserted stating that the order would be carried out within seven days after the failed vacation of the property.

These kinds of settlement agreements are not uncommon in relation to ESTA. While they are often seen as generous in that housing is provided by (former) employers, it is an effective way of negotiating eviction in that former occupiers are paid to vacate relevant land. In this way private land owners are taking up some governmental duties by supplying housing. On the other hand, evictions are being secured in this fashion. In this context setting out clear requirements before settlement agreements are routinely rubberstamped, is crucial. As long as livelihood issues remain integral in ESTA-related matters, these kinds of settlement agreements which simultaneously secure eviction and accommodation, will be part-and-parcel of administering ESTA.

Umbeco Properties (Pty) Ltd v Suhla Sprinkaan Masango[80] dealt with the number of cattle and goats the occupier was able to keep on property belonging to the land owner. The crux of the judgment is, though both the land owner and the occupier have rights in relation to the land being owned and occupied respectively, such rights have to be exercised in balance and in a reasonable fashion. In this case various contracts were entered into with varied numbers of livestock the occupier was able to have on the land.[81] Despite not having clarity regarding the exact numbers, it was clear that the occupier could not act unreasonably. Furthermore, there was no evidence that the occupier at

77 LCC 67R/2015, 16 November 2015.
78 *Parsons* (n 23).
79 *Du Randt* (n 77) para [11].
80 LCC 175/2014, 10 March 2016.
81 ibid paras [10]–[19].

any time had the right to use the entire southern portion of the land in question. At the time the application was lodged, the occupier had 105 head of cattle, which was much more than the land could carry sustainably, given that the land owner also utilised the pasture. Accordingly, acting reasonably and having regard to the numerous attempts of the land owners to curb the number of livestock, it was clear that the number of cattle and goats had to be restricted. Restricting the number of livestock furthermore was not constructive eviction, as was claimed by the respondent.[82]

Although a counter claim by the respondent that he could not be evicted as he had lodged a labour tenant claim was dismissed,[83] the court did not distinguish clearly between the categories of occupiers for purposes of ESTA and labour tenants under the Land Reform (Labour Tenant) Act 31 of 1996. In fact, the court concluded as follows:[84] 'Having found that the demand that the first respondent reduce his livestock to the permitted number does not constitute an eviction, it is not necessary that I express any views on the alleged claim in terms of the Labour Tenants Act. Accordingly, I do not say any more on this defence'.

However, by ascertaining the status of the respondent in the first instance by distinguishing between an occupier under ESTA and a labour tenant, would have secured a simpler and faster solution to the matter. That is the case because the respondent was a first generation occupier and does not fall within the category of labour tenants. In that regard the right to use pasture and cultivate the land does not automatically form part of the respondent's rights. Restricting the livestock would then form part of the balancing of rights under section 5 and 6 of ESTA specifically.

The brief discussion here highlights that it is still difficult to employ ESTA in practice and to realise the objectives of the Act on a daily basis. It is inconceivable that after almost two decades of being in operation eviction applications are still granted without following the correct procedures or considering all the relevant issues. In this context the exercise of automatic review under section 19(3) remains critical and will probably be part-and-parcel of ESTA's application for many years to come.

4. UNLAWFUL OCCUPATION

Interesting judgments were handed down during the period of report and various prominent themes emerged. Of importance is the following: although it is important to establish whether an applicant has standing to lodge eviction proceedings (eg, a person who has a right of *habitatio*), mere standing under PIE would not guarantee the granting of an eviction order. In this regard the process of considering the application and whether an eviction order has to be granted is an involved and intricate process. Under common law prior to the new constitutional dispensation having standing to lodge

82 ibid para [22].
83 ibid paras [23]–[24].
84 ibid para [25].

eviction applications (as owner or person in charge) often also guaranteed the granting of the order. Presently, having the capacity to lodge an eviction application is by no means a guarantee of success. Whether it is just and equitable to grant evictions can only be considered with regard to all relevant circumstances. To that end a more involved, investigative role is called for – passive application of legislative measures is not good enough post-Constitution. Apart from this theme, the importance of broadening access to land and housing and the administration and regulation connected therewith, often intertwined with unlawful occupation, are highlighted.

4.1. Standing to lodge eviction proceedings

As *A Hendricks v M Hendricks*[85] was discussed previously, all of the facts and issues will not be repeated here. The focus of this rather brief discussion is on the eviction dimension only. The issue before the SCA was whether the holder of a right of habitation could employ PIE against the owner of immovable property. In this regard the holder of the usufruct lodged an eviction application against her former daughter-in-law and co-owner of the house in question. Due to the souring of relationships between the relevant parties, including the applicant and her son (who has since then divorced his wife) and the former daughter-in-law alluded to above the applicant and holder of the usufruct vacated the house. She has in the meantime decided to return to the house and consequently lodged the eviction application on the basis that she was the person in charge of the property in question, as required by section 4 of PIE. Up to this point the applicant had been unsuccessful in the magistrates' court[86] and the full bench of the Western Cape High Court on the basis that the respondent was not an unlawful occupier for purposes of the Act.[87]

In the SCA the judgment was overturned on the grounds that (a) the holder of a right of habitation was indeed a person in charge of property for purposes of PIE; and (b) that the person occupying immovable property can be an unlawful occupier under section 1 of PIE if such occupation is without consent of the person holding the *habitatio*,[88] with reference to *October NO v Hendricks*.[89] However, complying with the definitions of 'person in charge' and 'unlawful occupier' is no guarantee that the eviction application would be successful. Under section 4(7) of PIE an eviction order may be granted only if it is just and equitable in the circumstances. While the factors listed in section 4(7) do not represent an exhaustive list because 'all relevant circumstances' have to be considered, they do include references to children, the elderly and female-headed households. In the present case the occupiers consisted of a female-headed family (the former daughter-in-

85 [2015] ZASCA 165, 25 November 2015.
86 ibid para [5].
87 ibid para [2].
88 ibid para [9].
89 [2013] ZAWCHC 12, 31 January 2013.

law) and at least one minor child. In this regard the SCA was not prepared to grant the eviction order without having considered all the relevant facts and circumstances. As insufficient information was before the court at this juncture, the case was remitted to the magistrates' court for a full enquiry under section 4(7).[90]

The judgment clarified the issue whether a person as holder of a right to habitation (which is a personal servitude) has standing to lodge an eviction application under PIE. For the purpose of PIE such a person is indeed 'in charge' of the relevant property. This is the case even if the application is lodged against the registered owner. In this regard the interplay between principles flowing from the Law of Things and the provisions of PIE is particularly interesting here. While the circumstances of the present occupiers were specifically alluded to in the SCA, it is critical that the circumstances of the applicant, a single, elderly lady, are also considered when the magistrates' court deals with the matter again. That is important, not only because of the property law dimension, but also in light of her right of access to adequate housing under section 26 of the Constitution.

4.2. Consideration of eviction applications

Pitje v Shibambo[91] dealt with various matters, including double sales and the implications thereof for the persons involved. However, this discussion focuses only on the particular approach that is required when PIE is involved. The facts are briefly the following: the applicant is a seventy-six-year old person who suffers from ill-heath who has been in occupation of the relevant property since birth.[92] The property was originally part of the applicant's late father's estate which was registered in the applicant's brother's name (also Mr Pitje) in 1992. However, when the brother experienced financial difficulty, the applicant took over the bond payments pursuant an agreement to purchase the property in 2001, at a purchase price of R63 000. The applicant averred that he made various payments to Nedcor until at some undisclosed point Nedcor inexplicably informed him that the bond had been closed. In 2001 the present respondents as the purchasers and the brother as the seller, entered into a sale agreement under the guidance of Bluegloo.co, estate agents. When the applicant heard about these developments his attorneys drafted a letter stating that the brother had ceded all his rights in relation to the property and that the sale was unlawful and wrongful. However, before that letter was sent, the property had been transferred into the names of the present respondents. The latter subsequently launched eviction applications against Mr Pitje, which were granted in the high court. The order was granted by default as Mr Pitje failed to file opposing papers despite having filed a notice of intention to oppose. Mr Pitje's defence against the eviction was that the sale between the two Pitje brothers was valid and that the present respondents were therefore not *bona fide* purchasers and that hence the transfer into their names was

90 *Hendricks* (n 85) para [13].
91 2016 (4) BCLR 460 (CC).
92 ibid paras [4]–[7].

assailable. In the alternative he alleged that Mr and Mrs Shibambo failed to comply with the requirements of section 4(2) of PIE.[93]

In the High Court the eviction order was granted on the strength of *Bowring v Vrededorp Properties CC*[94] on the basis of double sales. In this regard it was found that the present applicant bore the onus of showing that Mr and Mrs Shibambo had prior notice of the sale between himself and his brother. As Mr Pitje failed to discharge that onus, the present respondents were *bona fide* purchasers resulting in their acquiring unassailable rights to the property once it was transferred.[95]

Presently before the CC is an application for leave to appeal the high court order. The issue also impacts on two fundamental rights: the right to property [s 25] and the right to have access to adequate housing [s 26(1)] and not to be evicted from a home without a court order made after considering all relevant circumstances [s 26(3)[96]]. The court, per Nkabinde J, was satisfied, by reading the High Court judgment, that the requirements of section 4 of PIE were not considered fully.[97] It was emphasised that the application of PIE, where residential issues are relevant, is not discretionary.[98] Furthermore, of critical importance is the fact that all relevant circumstances have to be considered in order to determine whether the granting of an order would be just and equitable. Of importance is Mr Pitje's particular circumstances, he is seventy-six years of age and in ill-health. He has lived on the property his whole life and does not have alternative accommodation. Refusal of joinder meant that the court could not consider all relevant circumstances, including his disability and that an eviction order would render him homeless.[99] Exactly how courts are supposed to approach the application if PIE is critical:[100]

> Moreover, courts cannot necessarily restrict themselves to the passive application of PIE. Even if there had been no joinder application, courts are obliged to probe and investigate the surrounding circumstances when an eviction from a home is sought. This is particularly true when the prospective evictee is vulnerable. These considerations would have enabled the High Court to apply the requirements of PIE justly.

Accordingly, reliance on *Bowring* was displaced as the case did not concern eviction from property, but related to double sales only.[101] While it may have confirmed the standing of the purchasers to initiate eviction proceedings, it could not shed any light on whether the eviction order ought to be granted. That is the case because the granting of the order has to be just and equitable in the circumstances. As the circumstances were

93 ibid paras [8]–[10].
94 2007 (5) SA 391 (SCA).
95 *Pitje* (n 91) para [1].
96 ibid para [14].
97 ibid para [16].
98 ibid para [17].
99 ibid para [18].
100 ibid para [19].
101 ibid para [21].

not considered at all, the granting of the order could not have been just and equitable. On this basis the matter was remitted to the high court to proceed from the premise that the applicant's application to file an affidavit by way of joinder has been granted.

This is an important judgment that draws a very important distinction between the capacity to lodge eviction applications on the one hand (establishing standing) and the granting of an eviction application on the other. With regard to the first-mentioned, it is clear that owners or persons in charge of property have the standing to launch eviction applications. Where bona fide purchasers acquired ownership of immovable property they thus have the necessary standing, as was the case here. Eviction applications from residential property may be dealt with only by way of PIE. Being an owner of property is therefore no guarantee that an eviction application will be successful – based on ownership only. Clearly, a new approach to evictions generally and a new eviction paradigm have emerged since section 26(3) of the Constitution, coupled with PIE, became relevant.[102] This much is phrased specifically by Judge Nkabinde in the passage above: firstly, courts have to apply PIE and, secondly, courts cannot apply PIE passively. Engagement and investigation are required, which can only be done in light of all relevant circumstances.

4.3. Access to housing, unlawful occupation of land and section 78-execution orders

While *Mathale v Linda*[103] deals with a rather formalistic issue of whether a section 78 execution order issued under the Magistrates' Courts Act 32 of 1944 is appealable, it also has important implications for access to housing and the regulation of unlawful occupation of land. The background facts portray a struggle to access land and housing and extant administrative chaos in regulating the process.[104] The applicant, Mr Mathale, had been in occupation of the premises for more than twenty years after he took possession of a parcel of land in 1994. While the initial occupation was unlawful, the informal settlement was formalised and upgraded in around 1999, services were provided and numbers allocated to lots. This allotment resulted in the relevant parcel of land being allocated the number 8702. During the period of more than two decades the Mathale family built a home on the land and improved the land continuously. Following a further formalisation process a different number was allocated to Mr Mathale and the number 8702 was allocated to the first respondent, Mr Linda. The stand Mr Linda had been occupying was in turn allocated to someone else living in the township. In 2000, Mr Mathale was allocated a stand with an RDP house in another area, some seven kilometres away from the township. Mr Mathale refused to relocate as he had immersed himself in the community and built a home for himself and his family. That stand in the

102 Pienaar (n 24) 667–70, 805–06.
103 2015 JDR 2645 (CC.
104 ibid paras [7]–[18].

meantime had been allocated to another person. Apart from an unlawful eviction that occurred in 2004 and which had been dealt with sufficiently since then, Mr Mathale had been in occupation of the original stand since he occupied it in 1994. Although the applicant admitted to not being the registered owner, he submitted a utility bill with his name and the unit number 8702.

The first respondent, Mr Linda, had been allocated the same stand, namely number 8702, during one of the upgrading and formalisation processes. In 2012 an eviction order was granted against Mr Mathale in the magistrates' court on the basis that Mr Linda was the registered owner. Displeased, Mr Mathale appealed. A year later the eviction appeal remained unprosecuted and Mr Linda applied in terms of section 78 of the Magistrates' Courts Act for the eviction order to be implemented pending the finalisation of the eviction appeal. The section 78 order was granted and, once again, Mr Mathale appealed. In dismissing the appeal the high court found that a section 78 order could be appealed only if it was in the interest of justice and since it concluded it was not the appeal was unsuccessful. The SCA thereafter dismissed the application for special leave to appeal, resulting in the present application before the CC.

From the outset the CC, per Khampepe J, highlighted that constitutional rights were at issue here as section 26 of the Constitution provided everyone with the right of access to adequate housing and the protection against eviction without court supervision.[105] Hence, three matters were to be decided: (a) generally, whether section 78 orders, and those concerning an eviction from a home in particular, were appealable; (b) whether the high court erred in its approach to the appeal; and finally (c) whether there were grounds for the court to interfere with the discretion exercised by the lower court when it initially granted the execution order under section 78.[106]

Concerning the first matter, the court confirmed that generally it was not in the interests of justice for interlocutory relief to be subject to appeal as it would defeat the very purpose of that relief.[107] However, the exception would be where the interlocutory relief had the effect of a final judgment. In the present matter it was clear that Mr Mathale would lose his house if the eviction order was executed, leaving him homeless with no alternative accommodation. The house would have to be dismantled with the result, even if the order was not finally confirmed, that the house could not be reconstructed in the exact same manner at a later stage. The house that was constructed over the past twenty years would be gone. Accordingly, the impact of the interlocutory measure was clearly final.[108] In the high court the point of departure was that interlocutory orders were only appealable if it was in the interests of justice. However, in so doing the high court applied the incorrect standard. The correct standard was whether the order granted under section 78 was final in its impact and effect. That standard could be established

105 ibid para [22].
106 ibid para [23].
107 ibid para [25].
108 ibid paras [27]–[28].

only once the facts and circumstances were scrutinised, which never occurred.[109] Apart from the fact that the court did not investigate whether the order had the effect of a final order, it also refrained from considering that the loss of a home in the midst of litigation was in itself an indignity.[110] The human rights dimension was therefore not considered, leading Judge Khampepe to state the following:[111]

> It is prudent to restate the importance of the right of access to adequate housing, the purpose for its constitutional protection and the need for courts to be more sensitive to housing matters … Courts play a special adjudicative and oversight role in ensuring the execution of evictions in the most humane manner possible. This duty is accentuated when a court is dealing with individuals that are especially deserving of protection. This is not an act of judicial philanthropy, but a duty borne out of the Constitution's commitment to a life of dignity for all. For these reasons the High Court order must be set aside.

With regard to the second matter, namely whether the CC could interfere with the discretion exercised in the magistrates' court, Judge Khampepe listed the instances where such interference would be warranted: (a) where the discretion was exercised in a non-judicial manner, (b) where the wrong principles of law were applied; (c) where the court misdirected itself on the facts or (d) whether the court reached a decision that could not have been reasonably reached by a court that properly appraised itself with the relevant facts and legal principles.[112] Having regard to the fact that the magistrate considered the balance of convenience to favour Mr Linda, when that was not the case, as well as the fact that it was found that the harm suffered by Mr Mathala was reparable, when that was not the case, the CC was satisfied that the lower court failed to properly direct itself to the relevant facts and legal principles.[113] In this context interference was warranted, leading to an exposition of when granting an eviction order would be just and equitable as required.[114]

The question whether there was irreparable harm had to be considered with regard to both parties. Mr Mathale's position was already set out above. Mr Linda, on the other hand, was allocated a stand, but did not receive security of tenure. In the meantime he was also responsible for some of the expenses and service bills linked to the property.[115] The bungling of the allocation and administrative processes linked to the allocation of housing clearly impacted negatively on both parties. Both parties were further beneficiaries of housing subsidies, which required further protection. However, the harm suffered by the applicant, Mr Mathale, if the eviction was put into operation

109 ibid para [33].
110 ibid para [35].
111 ibid paras [35], [38].
112 ibid para [40].
113 ibid para [41].
114 ibid para [42].
115 ibid para [44].

pending his appeal, was irreparable. Whereas Mr Mathale would be homeless, Mr Linda still had a home.

Although Mr Linda was allocated a stand, he was not the registered owner of the plot, neither was he the person in charge of the property. To that end he did not meet the requirements for lodging an eviction application under PIE.[116] At the moment the eviction order was granted there furthermore was no suitable alternative accommodation for Mr Mathale. The stand that was offered to him more than a decade ago and which had in the meantime been allocated to another beneficiary could not be considered within this context.[117] Considering all the above facts and circumstances, the court was satisfied that ultimately the balance of convenience favoured Mr Mathale, resulting in a finding that the magistrates' court did not reach a conclusion which another court could reasonably have reached on a proper understanding of the facts and applicable legal principles. The execution order was consequently set aside.[118]

In light of the particular facts of this case, which may not be unique, the court also specifically commented on the untenable situation that prevailed in the jurisdictional area of the local authority with regard to the allocation of housing and the administration and regulation thereof.[119] The judgment is welcomed, not only because it confirmed principles of law and procedure regarding interlocutory orders, but because of its implications for the regulation of unlawful occupation and access to housing. Issuing a section 78 order where evictions from homes are at stake would be tantamount to orchestrating an eviction via the back door. It is crucial that the considerations listed here, especially the impact on human dignity and the right of access to housing, irrespective of the legality of occupation, are taken into account before an eviction order is granted. The situation prevalent in many local authorities where records are not up to date and information is incorrect or conflicting cannot be tolerated. This judgment illustrates very clearly how incorrect and bungled paperwork impact directly on persons' security of tenure on the one hand and dignity on the other.

4.4. Agreement of sale and eviction from immovable property

The case of *Eastern Cape Development Corporation v Sandlana*[120] deal with three issues, namely (a) contractual obligations (b) eviction and (c) the Alienation of Land Act 68 of 1981. For purposes of this discussion the focus is on eviction only. The applicant as the owner of immovable property in Umtata concluded a written agreement of sale in respect of the property with the respondent. According to the agreement the purchase price was payable and possession would occur upon the date of the registration of the property in

116 ibid para [49].
117 ibid para [50].
118 ibid para [52].
119 ibid paras [53]–[55].
120 [2016] ZAECMHC 2, 1 March 2016.

the name of the purchaser while occupational rent was also payable. The parties agreed that the property would be transferred either upon payment of the purchase price by the respondent or by providing a bank or building society guarantee for the payment of the purchase price within ninety days of the parties signing the agreement of sale. Failure to guarantee the payment of the purchase price would result in the nullity of the agreement, except if the seller chose to honour the agreement by paying the full balance of the purchase price. When the purchaser indeed failed to comply with paying the purchase price or by providing a bank or building society guarantee before the agreed period while still occupying the property, the plaintiff instituted eviction proceedings in Mthatha. The respondent instituted a counter application, which was opposed by the plaintiff.[121] In the counter application the respondent wanted an order which would compel the applicant to transfer the immovable property in question against payment by the respondent of the purchase price.

According to Brooks AJ it was evident that the respondent was of the view that the agreement of sale was still in existence and enforceable between the parties, despite the fact that clause 13 of the sale agreement contains a non-alteration or amendment clause. This clause embodied a suspensive condition and thus non-compliance resulted in the agreement of sale to be automatically of no force or effect, thereby rendering the counter application on this ground unsuccessful.[122] Brooks AJ also held that the respondent's right to make any claim against the applicant based upon what the agreement of sale has prescribed and that an obligation to effect transfer of immovable property was indeed a debt as provided for in section 10 of the Prescription Act 68 of 1969. Since the respondent was claiming for specific performance, namely the transfer of the immovable property, this also resulted in a reciprocal obligation to pay or to make provision for the payment of the purchase price. There was no merit in the respondent's claim that he was not obliged to provide the applicant with the full purchase price or bank or building society guarantees. As such there was no obligation on the applicant to ensure transfer of the property to the respondent.[123]

The respondent also alleged that the applicant could not evict him from the property, due to the applicant failing to comply with the procedures provided for in PIE. Brooks AJ confirmed that: '[P]IE is predominantly designed to protect the rights of persons who may have taken up occupation of land under somewhat precarious circumstances and who would otherwise be faced with eviction proceedings of which they have had no notice and which would take them by surprise to their substantial disadvantage'.[124] The respondent was described in the affidavits filed of record as a duly admitted attorney, and not a person to be protected in terms of PIE. As such Brooks AJ held that the rights of the respondent in relation to the immovable property were created and regulated by

121 ibid paras [1]–[3].
122 ibid paras [10]–[11].
123 ibid para [12].
124 ibid para [14].

the agreement between him and the applicant, thus his occupation was not precarious. This right included that the applicant could institute eviction proceedings against the respondent in certain circumstances, such as the particular circumstances before the court. In other words, the non-compliance of the respondent with the agreement meant that the applicant could institute eviction proceedings resulting in the eviction of the respondent. At no point during the proceedings did the respondent allege he was unaware of these rights or was misled into signing the original lease agreement or the agreement of sale. At all times during the proceedings the respondent was represented adequately.[125]

Lastly, the respondent alleged that section 19 of the Alienation of Land Act provided that there can be no termination of the respondent's right of occupation of the property without the prior written notification by the applicant calling upon the respondent to remedy his breach. This argument was also found to hold no merit, as the respondent did not comply with the suspensive condition provided for in clause 4 of the agreement. Therefore, section 19 of the Alienation of Land Act was not applicable to this matter.[126] Brooks AJ found in favour of the applicant and dismissed the counter application of the respondent.

4.5. Eviction and *mandament van spolie*

Nomkhitha Ntantana v Mhlontlo Local Municipality[127] concerns an appeal against a judgment of the same court sitting as a court of first instance. After being evicted from the Chris Hani Park informal settlement without a court order by the Municipality and the local municipal manager, the evictees approached the court *a quo* on an urgent basis for interim relief for a *mandament van spolie* in relation to the demolished structures, alternatively for constitutional relief provided for in section 38 of the Constitution. The respondents were requested to show cause the day after the destruction of the applicants' homes why the required interim relief should not be granted. As part of the interim relief the following were requested by the appellants: (a) interdicting the respondents to prevent the invading and/or undertaking the demolition of any structure and/or placing any material upon the applicants' immovable properties situated at Chris Hani Park, (b) interdicting the respondents from removing any material or movable property from Chris Hani Park, (c) the restoration of the property dismantled to its former *status quo* and (d) from destroying any immovable property which was re-erected. Where there was partial destruction of structures the respondents had to be interdicted from invading, pending the provision of alternative accommodation.[128] The appellants alleged that the demolition occurred without a court order and that they were entitled

125 ibid para [13].
126 ibid paras [15]–[16].
127 [2016] ZAECMHC 10, 5 April 2016.
128 ibid para [2].

to proper notice and alternative accommodation, since they were unable to provide it themselves. The interim interdict would result in short term relief pending the return date of the application in respect of the constitutional relief being sought, restraining the respondents from demolishing the homes further or evicting the appellants or removing their belongings without an order of court.[129] The court *a quo* in motion proceedings refused to grant the *mandament* because re-erection of the structures with the original material was impossible and stated that it was a pity that the current applications were brought before it in the form of the *mandament van spolie*. Accordingly, relief was refused by stating that the '*mandament van spolie* does not avail in these proceedings'.[130] This was the case as restoration was impossible.

It is against this order that the appellants are lodging this appeal, requesting an interim order which would prevent the respondents from demolishing the appellants' structures, including structures that were still standing. It is the contention of the appellants that the conduct of the respondents amounted to spoliation while they were in peaceful and undisturbed possession of their structures. The respondents deprived them of their homes in a violent or unlawful manner. The appellants were all impoverished residents of the informal settlement, whose homes were summarily destroyed by the respondents. Throughout the process, the appellants were represented on a pro bono basis. The following were furthermore averred: (a) they were all indigent persons, (b) who had settled in the area known as Chris Hani Park, (c) the municipality never had any issue with them settling there and (d) some occupiers and their families had been residing there for more than a decade.

The appellants were previously informed that the municipality intended to build subsidy houses in Chris Hani Park, thus amounting to *in situ* upgrading. An 'agreement' of understanding was reached that the residents would be accommodated in the meantime. Despite this agreement the residents were ordered to vacate their structures. On 21 November 2014 persons arrived at Chris Hani Park and started to demolish the appellants' homes without an order of court. Some residents demolished their own structures which allowed them to salvage some of their building materials.[131]

The respondents opposed the application on the following grounds: (a) that it stood to be dismissed due to the appellants' non-compliance with the provisions of section 35 of the General Law Amendment Act 62 of 1955 requiring no less than seventy-two hours' notice of an application against an organ of state for interim relief; (b) denying that the respondents had demolished or intended to demolish any of the applicants' structures; (c) denying that the first respondent's employees had taken possession of any of the appellants' property or threatened to dispossess them; (d) denying that it was possible to hold the first respondent vicariously liable for the acts of its mayor and speaker, not being its employees and (e) that the appellants had demolished their own

129 ibid para [5].
130 ibid para [13].
131 ibid paras [3]–[4].

homes or that the demolitions had already occurred and were not imminent, therefore the granting of a spoliation remedy was not competent.[132] It was clear that the appellants were evicted from their homes and that the respondents refused to take any responsibility for the eviction. On appeal the appellants contested the *a quo* decision with reference to *Tswelopele Non-Profit Organisation and 23 Others v City of Tshwane Metropolitan Municipality*[133] on the basis that the court *a quo* erred by not considering sections 1(c), 26(3) and 38 of the Constitution. In this regard the court ought to have applied section 38 of the Constitution and ordered the reconstruction of the houses where the appellants were arbitrarily deprived of their rights and left remediless due to the non-applicability of the spoliation remedy. The appellants also averred that the court *a quo* failed in respect of the immediate interim relief sought to distinguish one appellant's situation from another in the sense that some structures were completely demolished while others were still under threat of demolition.[134] In certain instances where there was partial demolition, the application of the *mandament* was not excluded. Thus the court erred in not finding that an order of reconstituted restoration in the case of complete destruction could be fashioned by the court as an effective constitutional remedy in these particular circumstances. As such the court had disregarded the infringement of the appellants' rights not to have their structures demolished or to be evicted without an order of court and had in effect condoned the illegality.[135] This contention was found by Hartle J to have merit who held that the court *a quo* had to decide the question of interim relief in the form of an interim interdict and the issue of constitutional relief in the long term. Instead, the court *a quo* did not pursue the issue of an effective constitutional remedy further but summarily dismissed the application.

In this context Hartle J considered a spectrum of important cases relating to restoration. In *Schubart Park Residents' Association v City of Tswane Metropolitan Municipality*[136] the CC focused on the interplay between the ordinary requirements of spoliation and the demands of section 26(3) of the Constitution. In *Schubart Park* the CC held that when an applicant seeks an order in the high court for restoration on the ground that he was despoiled of the possession of his home, the dimension of section 26(3) of the Constitution is added to what would have been a normal spoliation application. From this decision it was clear that the limited spoliation remedy is aimed only at restoration of possession.[137] In *Rikhotso v Northcliff Ceramics (Pty) Ltd*[138] the court reiterated that a spoliation order may not be granted if the property in question no longer existed, due to the remedy's limited nature. As such the remedy was meant only to restore possession and was not for making reparation. The express objective of this common law remedy

132 ibid para [7].
133 2007 (6) SA 511 (SCA).
134 *Ntantana* (n 127) para [16].
135 ibid.
136 2013 (1) SA 323 (CC).
137 ibid para [19].
138 1997 (1) SA 526 (WLD) 535A–B.

is the interim restoration of physical control and enjoyment of specified property and not its 'reconstituted equivalent.' In *Tswelopele* the court stated that an insistence that the *mandament* be extended to mandatory substitution of the property in question would be the creation of a different and wider remedy than the one received in South African law. This would result in the remedy losing its possessory focus in favour of different objectives. In the *Tswelopele* matter the SCA was forced to confront the issue of whether people whose homes had been destroyed would be left remediless since the *mandament* is inapplicable. As such the court had to decide whether the common law remedy had to be developed as the SCA did not want to leave the residents remediless. Accordingly, it opted to grant relief in terms of section 38 of the Constitution and distinguished between the requirements for spoliation and that of constitutional relief in this context. The court granted the constitutional relief even though the matter was a spoliation application.

In the current matter the appellants alleged the infringement of section 26 as a whole. Section 26(1) provides that 'everyone has the right to have access to adequate housing', while section 26(2) enjoins the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. Read with section 26(3) these sections provide context for the assertions of the appellants that the subsidy scheme was unreasonable in its implementation, in that they found themselves without homes or alternative accommodation while the construction of the subsidy houses was underway.[139] In the *Schubart Park* case the distinction between the *mandament* and constitutional relief under section 38 of the Constitution, entailed the following:[140]

> It is conducive to clarity to retain the 'possessory focus' of the remedy of spoliation and keep it distinct from constitutional relief under section 38 of the Constitution. This is because the order made in relation to factual possession in spoliation proceedings does not in itself directly determine constitutional rights, but merely sets the scene for a possible return to the *status quo*, in order for the subsequent determination of constitutional rights in relation to the property. The implication of this is that the spoliation proceedings, whether they result in restoration or not, should not serve as the judicial foundation for permanent dispossession – that is eviction – in terms of section 26(3) of the Constitution.

According to Hartle J the judgment of the court *a quo* reflected a misconception as to the true nature of the appellants' causes of action. In the main application it was not spelt out that an enquiry was necessary to grant a spoliation order where the circumstances justified this, but also in the long term into the illegality. In the other applications orders were expressly sought to declare the conduct of the respondents in interfering with or demolishing the property of the appellants unlawful. Since the respondents did not offer any justification for evicting the appellants, the court *a quo* had to consider whether there was an interference with the appellants' rights not to be arbitrarily deprived of their

139 *Ntantana* (n 127) paras [24]–[25].
140 ibid para [26].

homes, and constitutional relief had to be considered to remedy this. It was, however, unfortunate that the appellants' application was leaving them remediless. As such the appellants were denied the opportunity, on a return date and of the court redressing the hardship as a result of the violation of their constitutional rights by the patently illegal evictions without regard to the provisions of PIE. The outright dismissal of the applications by the court *a quo* therefore amounted to condoning the illegality.[141]

Hartle J held that the court *a quo* at least should have considered the interim relief, especially in the instances where it was still possible. The court *a quo* therefore erred when it failed to consider the distinct circumstances of the evictees. Since not all of the appellants' structures were totally demolished, it was indeed possible that some could be restored to the status *quo ante.* The occupiers whose structures were still standing and who faced imminent eviction or the destruction of their homes proved compliance with the interim relief.[142]

In determining the most appropriate and effective relief the Court held that regardless of who was responsible for the demolition of the appellants' structures, the respondent still had a duty to meaningfully engage with the appellants in trying to find a reasonable solution. Even if the land in question was handed over to the Department of Human Settlements for *in situ* upgrading, the first respondent was still 'the developer and responsible at its sphere of government on a co-operative basis with the national department to ensure reasonable implementation of the housing programme'.[143] According to the appellants they were not included at that stage as beneficiaries who would be allocated permanent RDP houses in the settlement. Hartle J held that given the circumstances the most reasonable solution would be to include the appellants, since the first respondents were in any event expected to prioritise the needs of indigent persons in housing development.[144] Accordingly, the appeal succeeded on the basis of section 38 and the order of the court *a quo* was set aside.

The importance of this decision lies in the obligations of local government to comply with its legislative and constitutional obligations in eviction matters, even though this is done to effect housing development in the form of *in situ* upgrading. Unlawful evictions of vulnerable and indigent occupiers cannot be justified by local government as a means to give effect to *in situ* upgrading and thus its housing obligations. In this case it was clear respondents wanted to avoid having to re-erect the informal structures of the occupiers in relying on the original application of the common law remedy of the *mandament van spolie,* which in this case could still be given effect to, even only partially.

141 ibid paras [27]–[28].
142 ibid paras [30]–[31].
143 ibid para [37].
144 ibid.

5. HOUSING

Melani v City of Johannesburg[145] dealt with the review and setting aside of the decision of the first respondent, the City of Johannesburg's failure or refusal to apply to the fifth respondent, the MEC for Human Settlements Gauteng, for funding to upgrade Slovo Park. Alternatively, the applicants wanted the court to order that the City of Johannesburg be compelled to commence with the process, the Urban Settlements Development Grant (USDG) and the Upgrading of Informal Settlement Policy (UISP), prescribed for upgrading of the Slovo Park settlement, by applying to the MEC for the funding to do so. This application was opposed by the first to fourth respondents in its capacity as the City of Johannesburg on the basis that the decision to relocate the residents to Unaville was a policy decision, which was not susceptible to review. The following facts were common cause: (a) the applicants were about 10 000 indigent people living in 3 700 households, (b) who had been residing in Slovo Park for a period of up to twenty-one years and (c) had no access to electricity, invariably resulting in shack fires. Throughout the process the residents were constantly informed by officials – at all levels of the state – that they would receive formal housing, that planning schemes had been developed, environmental impact assessment studies had been done and that steps had already been taken to declare the area a township. However, despite having issued documents to the residents of Slovo Park which confirmed their rights to subsidised state housing, nothing was realised in practice.[146]

Within this context it was clear that the City and the MEC had a constitutional obligation to realise the right of access to adequate housing for persons living in their areas of jurisdiction. The functionaries were bound by legislative and policy frameworks, set out in the National Housing Act 10 of 1997, the National Housing Code, adapted in terms of section 3(4)(g) and 4(1) of the Housing Act. This legislative framework set out the relevant procedures, plans and funding instruments, all designed to facilitate the delivery of adequate housing. In 2015 the City took a policy decision to relocate the residents to another site, Unaville, 11 km away from Slovo Park, provided that the residents qualified for housing.[147] Following this approach meant that some residents, depending on the particular circumstances, would be left homeless.

The applicants averred that one of the instruments by which the City could provide adequate housing, was employing the UISP, a fully-funded programme intended to ensure the upgrading of informal settlements in partnership with its residents. The applicants had consequently engaged with the terms of the UISP and drafted their own plans embodying the provision of housing and secure tenure in relation to the land they occupied at that stage, or land nearby. After the plans were presented to the City, the residents had attempted to engage with the City concerning its implementation.

145 [2016] ZAGPJHC 55, 22 March 2016.
146 ibid paras [1]–[3].
147 ibid para [6].

When this application was lodged the City had (a) neither refused nor denied the UISP, but instead (b) decided to relocate the applicants to Unaville. The applicants argued that the relocation to Unaville is in conflict with the UISP as upgrading *in situ* is preferred to relocation, wherever possible. Also, housing development under UISP had to include everyone living in a particular settlement, even individuals who would not normally qualify in terms of other housing programmes.[148] This meant that the decision to relocate was unlawful. This was the case because the UISP had force of delegated legislation; it was furthermore the main instrument through which the state provided housing to people living in informal settlements and it was a comprehensive flexible instrument that exhaustively regulated the upgrading of informal settlements. In this regard complying with the prescriptions of UISP was not optional.[149] Conversely, the City argued that the applicants had to show that an *in situ* development was feasible and that the City was obliged to apply for assistance under the UISP programme. The City further averred that it was providing housing by way of the Unaville development, since the land was already valued for acquisition by the City and the development had been budgeted for. Being part of the City's exercise of executive authority, the decision was therefore not subject to review under the Promotion of Administrative Justice Act 38 of 2008 (PAJA), was argued.[150]

In response the applicants argued that the City failed to implement legislation and, as it constituted administrative action, the Court had to decide whether the City's decision to continue with the Unaville development breached the principle of legality and whether it was rational and reasonable.[151] With reference to *Permanent Secretary Department of Education and Welfare, Eastern Cape v Edu Colllege PE*[152] Strauss AJ held that although the formulation of broad policy was not administrative action, the decision to implement the policy in a specific case in a manner that affected the rights and legitimate expectations of specific people, was indeed administrative action. In this regard the City relied on technical reports that stated that *in situ* upgrading would be unsuitable due to the dolomite in the area. Although the City later conceded that it was possible to develop the property *in situ* for at least 482 households, it did not confirm that it had considered the terms of the UISP. Instead, it opted rather to relocate qualified beneficiaries as opposed to applying the UISP policy. In this context the court made reference to the National Housing Act, section 3(4)(g), in terms of which the Minister for Human Settlements is obligated to institute and finance national housing programmes. A Code must be published by the Minister under section 4(1) of the Housing Act, containing national housing policy which is distributed to all provincial and local governments. This means that the City did not have a choice to not comply with it. Section 7(3) of the

148 ibid paras [9]–[12].
149 ibid para [13].
150 ibid paras [15]–[19].
151 ibid paras [20]–[22].
152 2001 (2) SA 1 (CC).

Housing Act requires the MEC to administer national housing programmes containing the Code in a manner which is consistent with the code. Furthermore, section 9(a)(i) of the Housing Act necessitates the City to take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis. According to Strauss AJ the UISP provides for a holistic approach to housing development, with minimum disruption or distortion of existing fragile community networks and support structures and encourages engagement between local authorities and residents living within informal settlements.[153] Furthermore, the UISP states that relocation of informal settlements should be the exception and not the rule. If relocation does take place, it must be close to the existing settlement and within the context of community approved relocation strategies.

In order to find that the respondents failed to consider the decision of *in situ* development instead of relocation, the court must establish whether this failure amounted to an administrative decision. In this regard the seven requirements for administrative action, as decided in *Chirwa v Transnet Ltd*[154] were referred to, namely: (a) there must be a decision taken or any failure to take a decision; (b) by an organ of State; (c) exercising a public power or performing a public function; (d) in terms of the Constitution (or legislation); (e) that adversely affects someone's rights or legitimate expectations; (f) which has a direct, external, legal effect and (g) that does not fall under any of the exclusions listed in section 1 of PAJA. Strauss AJ held that the City's failure to apply the UISP was unlawful, because the decision was taken outside the legislative and policy frameworks intended to apply to informal settlements such as Slovo Park. The decision of the respondents was unreasonable and in breach of the residents' right to just administrative action, as well as their right of access to adequate housing under section 26(1) of the Constitution. The City should have considered whether the UISP was applicable to Slovo Park and not just have ignored the *in situ* upgrading possibility in favour of relocation. As such the City was required and obliged to act within the confines of the Housing Act and the Code, which lay down the framework intended to apply to informal settlements. The City's conduct was thus subject to reasonableness criteria as held in *Government of Republic of South Africa v Grootboom*.[155] In this regard the following considerations emerge: the measure it adopts must be comprehensive, coherent, inclusive, balanced, flexible and transparent and must be properly conceived and properly implemented. Since the City's decision to relocate the applicants would result in the exclusion of an unknown number of people, Strauss AJ held it to be unreasonable and not inclusive. The unilateral decision of the City to relocate the inhabitants took place without proper consultation and engagement with the residents. The residents have been told for more than twenty years they will be upgraded *in situ*,

153 ibid para [34].
154 2008 (4) SA 367 (CC).
155 2001 (1) SA 46 (CC).

which created a legitimate expectation. Thus, the City's failure or refusal to apply the UISP Code and Practice must be reviewed and set aside. Effective relief here entailed compelling the City to commence the process prescribed by the UISP for the upgrading of Slovo Park settlement.[156]

This case confirms that local government has to follow policy and legislative frameworks when trying to give effect to their housing obligations. In this instance the UISP was indeed the first option to consider as opposed to relocation of vulnerable occupiers. Apart from the uprooting of residents when relocation occurs, it would furthermore result in some members of the community – often the most vulnerable − being excluded and remaining homeless.

In *Ruiters v Minister of Human Settlements*[157] the owner, as the unregistered builder of property in Kuilsriver, brought an application against the first respondent, the Minister of Human Settlements, who refused to grant the applicant an exemption certificate for the registration and enrolment as a registered builder in terms of certain sections of the Housing Consumer Protection Act 95 of 1998. The main aim of the Act is to make provision for the protection of housing consumers and to provide for the establishment and functions of the National Home Builders Registration Council (the Council).

The facts are briefly the following: The City of Cape Town approved building plans for a new house in terms of section 4 of the National Building Regulations and Building Standards Act 103 of 1997 (NBRBSA). Upon approval of the plans the applicant started with the construction of his home without being enrolled as a registered builder with the Council, thus contradictory to section 10 of the Act. This section prohibits a builder from commencing with building unless that person is a registered home builder with the Council. A notice of non-compliance with sections 14(1) of the Act was served on the applicant, which stated that the applicant had started with the construction of his home prior to enrolment by the Council. The applicant had to comply by 8 August 2012. The applicant claimed he was the owner builder as defined in section 1 of the Act, namely 'a person who builds a home for occupation by himself.' It was contested by the Minister that the applicant was a home builder until such time as he brought an application for an exemption based on the fact that he is an owner builder. In an attempt to qualify as an owner builder, so as to comply with the provisions of sections 10 and 14 of the Act, the applicant submitted an exemption application to the Council on 12 September 2012 under sections 10A and 29 of the Act. Section 10 of the Act provides that no person shall carry on business of a home builder unless that person is a registered home builder with the National Home Builders Registration Council, while section 14 states that a home builder shall not commence the construction of a home unless the Council has issued a certificate of enrolment to the home builder. However, section 10A provides that an owner builder in terms of section 29 may apply to the Council for exemption from sections 10 and 14. In other words: in instances where a builder is an owner builder, that

156 *Chirwa* (n 154) paras [38]–[50].
157 2016 (1) SA 239 (WCC).

person can apply for an exemption. In terms of section 29(1)(a)–(c) the Council could exempt a person from any provisions in the Act if satisfied that the (a) granting of the exemption would be in the public interest and (b) would not undermine the objectives of the Act or the effectiveness of the Council or (c) in cases where the exemption is not granted, the effect would be extremely prejudicial to the interest of the applicant and housing consumers. In his covering letter accompanying the exemption application, the applicant stated that he planned to build the house in stages according to his financial position and would be residing in the house himself and was not planning on selling the house within five years. The applicant stated that he indemnified the Council from any blame against the granting of the exemption certificate.[158]

The key issue the court had to decide was whether the Council could refuse a *bona fide* owner builder's application for a section 10A exemption on the basis that construction of the home in respect of which exemption was sought had already commenced at the time of such application.[159] On 18 September 2014 the applicant was informed in writing that his exemption application had been rejected. It was common cause that the Minister's decision in confirming the decision of the Council constituted administrative action in terms of section 6 of PAJA, thereby warranting the possibility of a review. Essentially the applicant requested the setting aside of the Minister's decision as part of the review, and also a direction that he should be allowed to make an application for late enrolment in terms of section 14A of the Act. Donen AJ confirmed, when considering the definition of home builder read with section 10A of the Act (which must be read with section 29 of the Act), it was mandatory for the Council, when receiving an application for exemption, to investigate and establish the jurisdictional fact for an exemption, namely that the owner was in fact an owner builder. If the applicant satisfied the Council that he or she was a *bona fide* owner builder, the duties that rest upon the home builders and consequences of breach of those duties ceased to exist from the time that the owner builder applied for exemption. According to Donen AJ, despite the peremptory provisions in subsections 10(2) and 14(1) of the Act (which required a home builder to comply prior to commencement of construction), no provision of the Act specifically provided that the application must be brought prior to commencement of construction or that exemption may not be granted to an owner builder who had commenced building before applying for exemption. It would be arbitrary to deprive a *bona fide* owner builder of his or her right to continue to build on his or her property. Prohibiting a *bona fide* owner builder from commencing to build would be irrelevant to the purpose of the Act, namely to protect housing consumers. The purpose of the Act would not be undermined according to Donen AJ, if owner builders were allowed to build before applying for the said exemption, because consumers do not need protection from an owner builder as they would need from a home builder.[160] An owner builder

158 ibid para [9].
159 ibid paras [1]–[8].
160 ibid paras [58]–[59].

is required in terms of the Act to remain in occupation of the newly-built property for a period of five years and is also prohibited from selling the property. The order of the Minister dated 22 May 2014, refusing to register the applicant as an owner builder and the refusal to grant the exemption application was therefore set aside and the matter was referred back to the Council for determination as to whether the applicant was entitled to exemption in terms of sections 10A and 29 of the Act.

6. DEEDS

A Deeds Registries Amendment Bill, 2016 was published for comment.[161] According to the Memorandum to the Bill the objectives of the Bill are to '(a) facilitate the enactment of electronic deeds registration provisions in order to effect the registration of large volumes of deeds as necessitated by the government's land reform initiatives; and to (b) expedite the registration of deeds by decreasing the time required for the deeds registration process'. Clause 1A is inserted to make provision for an electronic deeds registration system. The Bill then amends the Deeds Registries Act accordingly to make provision for electronic seals (s 2 to be amended) and the electronic keeping and maintenance of records (s 3 to be amended). Section 4 is to be amended to allow for electronic proof of records. Section 10 will be amended to allow for regulations to further regulate the electronic deeds registration system. Several sections will be amended to delete the words 'attestation of deeds'. Section 20 will provide 'for the electronic execution of a deed of transfer by a conveyancer upon authorization of the owner of the land' (memorandum). In certain circumstances it would no longer be necessary to lodge diagrams and general plans that have been approved under Land Survey Act 8 of 1997 (ss 18, 22, 40, 43A, 44, 46, 46A and 47 to be amended).

7. EXPROPRIATION

The Expropriation Bill[162] provides for 'the expropriation of property for a public purpose or in the public interest' (long title). Expropriation is defined in clause 1 as 'the compulsory acquisition of property by an expropriating authority or an organ of state upon request to an expropriating authority', while the definition of 'public interest' corresponds with the definition of 'public interest' in section 25 of the Constitution of the Republic of South Africa, 1996 and 'includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources in order to redress the results of past racial discriminatory laws or practices'. 'Public purpose' is defined as 'any purposes connected with the administration of the provisions of any law by an organ of state'. The Bill does not define 'property' but only states that it has a meaning that corresponds with section 25 of the Constitution. The expropriating

161 Gen Not 92 in GG 39781 of 2016-03-04; Gen Not 101 in GG 39793 of 2016-03-09.
162 B4D-2015.

authority (any organ of state 'empowered by this Act or any other legislation to acquire property through expropriation'[163]) may expropriate both registered and unregistered rights in land.[164] The Bill describes the procedure that needs to be followed before any expropriation can take place[165] as well as how the compensation should be determined;[166] the expropriation notice may also be withdrawn.[167] Chapter 6 deals with mediation of disputes and determinations that the court can make.

The Bill also provides for urgent expropriation.[168] This may take place only if the property will be used on a temporary basis for a period not exceeding twelve months. The expropriating authority may only exercise their rights in terms of clause 22 if there is no national, provincial or local land available in the case of a disaster (as defined in terms of the Disaster Management Act 57 of 2002). In this regard the court grants an order 'that an expropriating authority is entitled to use the provisions of this section due to (i) urgent and exceptional circumstances that justify action under subsection (1); (ii) real and imminent danger to human life or substantial injury or damage to property; or (iii) any other ground which in the view of the court justifies action under subsection (1). In terms of clause 26 the Director-General of Public Works must maintain a register of all intended, effected and withdrawn expropriations, as well as decisions not to proceed with an expropriation. These registers will be open to the public.

The critique against the Bill includes that 'property' is not limited to land and that compensation does not include outstanding bank payments of the property owner. AgriSA is concerned that market value will not be taken into account. Some people are concerned that the Bill may lead to a Zimbabwe-like land-grabbing process. On the other hand government indicated that the land redistribution process needs to be expedited. Government has transferred eight million hectares of land to Black ownership since 1994, which constitutes only a third of its thirty per cent original target.[169] The South African Institute of Race Relations is of the opinion that the Bill is unconstitutional as there was not proper public participation.[170] Given the formulation of section 25(3) of the Constitution, as well as the provision in the Bill dealing with compensation, it is clear that market value will indeed be taken into account. What is important, however, is that

163 Cl 1 of the Bill.
164 Cl 9–11.
165 Ch 3 and 4, read with cl 24–25.
166 Ch 5.
167 Cl 23.
168 Cl 22.
169 See in this regard Anon (n 1); Emsie Ferreira, 'Agri SA Wants Market Value for Expropriated Land' *Mail & Guardian* (29 July 2015) <https://mg.co.za/article/2015-07-29-agri-sa-wants-market-value-for-expropriated-land> accessed 17 June 2017. See also EJ Marais and BV Slade, 'Expropriation Bill will Boost Land Reform' *Mail & Guardian* (29 April 2016) <https://mg.co.za/article/2016-05-20-expropriation-bill-will-boost-land-reform> accessed 17 June 2017, who indicate that these criticisms are unfounded.
170 Philda Essop, 'Cronin Hits Back at Critics of Expropriation Bill' *City Press* (31 May 2016) <http://bit.ly/29Irq7g> accessed 3 July 2016.

market value will not be the only or the most important factor but will be considered in light of all of the factors so listed. In this regard the new Bill is directly aligned with the Constitution. Possibly more problematic is the precise working relationship of the new Expropriation Act and the Property Valuation Act 17 of 2014, which commenced on 1 July 2015. In this regard two different functionaries are responsible for its operation, namely the DRDLR regarding the Property Valuation Act and Public Works regarding the Expropriation Act. In light of the procedure and processes involved, it is furthermore highly unlikely that the Expropriation Act will speed up land reform, which was one, if not the most important, motivation for drafting the Act.

Apart from the issues mentioned above, the application of the new Expropriation Act in relation to communal land and land where customary law land rights prevail is highly contentious. This remains a reality despite the Memorandum to the Bill indicating that the new Expropriation Act holds no implications for customary law. In this regard questions emerge concerning the definition of 'expropriator' and 'expropriatee' and who or what represents the relevant community where expropriation negotiations take place. At an overarching level, the fact that communal land is largely registered in the name of the state, is also critical for the potential and actual application of the Act in these areas. Despite objections and criticisms, the new Act seems generally to be aligned with section 25 of the Constitution. However, the actual operation of the Act, its scope and alignment with other relevant legislation, may pose problems at various levels and at different stages in the expropriation process.

8. RURAL DEVELOPMENT AND AGRICULTURE

The Department of Agriculture, Forestry and Fisheries (DAFF) submitted its 2016/17 Annual Performance Plan (APP) to Parliament on 10 March 2016.[171] DAFF's policy mandate consists of the National Development Plan (NDP); the Medium Term Strategic Framework (MTSF); the Industrial Policy Action Plan (IPAP); the State of the Nation Address (SONA); the Budget Speech presented by the Minister of Finance; the Agriculture, Forestry and Fisheries Strategic Framework; and the Agricultural Policy Action Plan (APAP). In the APP's Situational Analysis twelve key challenges were identified; these include the 'thousands of hectares of underutilised arable land in homelands'; the increase in the cross-border movement of people and goods (with the resultant increased risks as regards animal diseases, plant pests, and unsafe animal feed and food); the increase in food insecurity in Southern Africa; insufficient market access for developing (emerging) agricultural producers; challenges relating to the need to grow the smallholder sector (of which more than fifty per cent live currently below the poverty line); the over-exploitation of marine and inland fish stocks; the

171 DAFF, '2016/17 Annual Performance Plan' (10 March 2016) <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/160407app.pdf> accessed 7 July 2016; <http://bit.ly/29MdoFi> accessed 7 July 2016.

decline in softwood and hardwood plantation areas since the mid-1990s and the related shortages of timber products; the negative impact of high and rising input costs on the competitiveness of the agricultural sector and 'unsustainable land-use practices are intensifying and this has contributed to the deterioration of soils'. Six programmes will be implemented in the 2016/17 financial year, including the provision of funding modalities for and the implementation of the Integrated Development Finance Policy Framework; agricultural production, health and food safety; food security and agrarian reform, trade promotion and market access; forestry and natural resources management (including the enactment of the Preservation and Development of Agricultural Land Framework Bill) and fisheries management. The approved National Policy on Food and Nutrition Security will be institutionalised by 2019/20 by an increase of 200 000 in the number of households that benefit from food production initiatives, the provision of support to 80 000 smallholder producers by 2019/20, and the cultivation for agricultural production of 600 000 underutilised land in communal areas.

DRDLR[172] indicated that nine Bills will be submitted to parliament during the financial year 2016/17, including a Communal Property Associations Amendment Bill; a Deeds Registries First Amendment Bill; a Communal Land Tenure Bill; a Regulation of Land Holdings Bill; a Sectional Titles First Amendment Bill; a Sectional Titles Second Amendment Bill; a Deeds Registries Second Amendment Bill; a Planning Professions Amendment Bill and a Land Surveys Amendment Bill.

Also, the Department will finalise policies relating to communal land tenure, communal property associations, regulation of land holdings policy, electronic deeds registration policy, policy framework for the strengthening of relative rights for persons working the land and policy on exceptions to pre-1913 claims and on access to heritage sites and historic landmarks during the period 2016 to 2019.

DLDLR implemented various land reforms measures, namely 3.4 million ha of land in the former homelands were surveyed and the state land register was verified. The Office of the Valuer-General was established, and the Valuer-general was appointed in August 2015. Nine-hundred and forty-seven rural enterprises (including ninety-two agricultural enterprises) were supported. 1.49 million ha of strategically-located land were acquired for purposes of the promotion of equitable land redistribution and agricultural development. Comprehensive farm development support was provided to 1 496 farms (smallholder farmers and land reform beneficiaries for agrarian transformation) in accordance with the Recapitalisation and Development Programme. Based on the implementation of the Spatial Planning and Land Use Management Act 16 of 2013, Spatial Development Frameworks are being finalised by the national and provincial spheres of government as well as by the local sphere (metropolitan, district and local municipalities). By 2019 rural development plans will be implemented in all forty-five district municipalities. Furthermore, Agri-parks will be established in all

172 DRDLR, 'Strategic Planning Session of the Portfolio Committee on Rural Development and Land Reform' (2 February 2016) <http://pmg.org.za/files/160202Strategic.ppt> accessed 9 July 2016.

forty-five district municipalities, and at least 1 000 enterprises will receive government support. Through this programme 330 000 small producers will be assisted and provided with market access, credit facilities as well as other strategic logistical support, simultaneously, both household and local food and nutrition security will be enhanced.

According to the Annual Performance Plan 2016/17 of DRDLR,[173] four key performance areas are to be realised in the financial year 2016/1: (a) further rollout of the Agri-parks Programme (focusing on both food production and the design and construction of new infrastructure); (b) the expedition of applications submitted by labour tenants; (c) land acquisition and allocation for the benefit of smallholder farmers (which includes the implementation of the 'one household, one hectare' policy) and (d) the enhanced implementation of the Strengthening of Relative Rights of People Working the Land Programme (also known as the 50/50 Policy Framework). The Rural Economy Transformation Model (to be implemented by means of the Agrarian Transformation System) forms a centrepiece to the Department's activities; this consists of four phased developmental deliverables (as outlined in the 2009 Comprehensive Rural Development Programme (CRDP)): '(a) Meeting basic human needs; (b) Rural enterprise development; (c) Agro-village industries, sustained by credit facilities and value-chain markets; and (d) Improved land tenure systems (embedded in meeting basic human needs)'. Despite criticism against the DRDLR it seems that government has several plans and programmes in place to effect land reform – the execution may be a challenge in light of human and budget constraints.

173 DRDLR, 'Annual Performance Plan 2016/17' (7 April 2016) <http://pmg.org.za/files/1/160406annplan.pptx> accessed 10 July 2016; <http://bit.ly/29GRaAh> accessed 10 July 2016.