Land matters and rural development: 2012*

1 General

The Deputy Minister of Rural Development and Land Reform announced in April 2012 that land reform changes will be implemented relating to the 'commercial willing-buyer, willing-seller and traditional land tenure property ownership systems.' He indicated that 'a comprehensive database of land ownership, use and control and was ready to move in a "fast-paced" and "aggressive" direction' (*Legalbrief Today* (2012-04-05)). In spite of the Deputy Minister's optimism, a report published by the Department of Rural Development and Land Reform (DRDLR) revealed that the redistribution target of 30% will only be reached in 54 years (Joubert 'Grondplan eers oor 54 jaar bereik' *Beeld* (2012-05-24) 8).

The Deputy Minister for Agriculture, Forestry and Fisheries pointed out that the land ownership targets are to blame for the failure of South Africa's land reform programme. Approximately 95% of the Department's budget went to the assistance of failed land reform programmes. In his opinion, consideration of food security must play a vital role (*Legalbrief Today* (2012-08-31)) and Deputy President Mothlanthe likewise stressed the importance of productive land use. The Minister of Rural Development and Land Affairs added that land claims in process will be expedited (Joubert 'Grondeise: "lang wagtye is verby"' *Beeld* (2012-05-19) 8). However, due to the Department's failure to act, money is wasted on the resultant cost orders and the payment of unnecessary interest (De Bruin 'Grond: Hof sê R30m vermors' *Beeld* (2012-09-24) 4).

2 Land restitution

By February 2014, 1060 claimants will have returned to District Six and each will a three-bedroomed house worth R1 million. Each claimant has to contribute R225 000 for a house, and 5 000 additional houses will be available for rent, at a cost of R7 billion to the state (*Legalbrief Today* (2012-01-27)).

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*In this note the most important literature, legislation and court decisions are discussed for the period 2011-11-30 to 2012-09-01.

There are 19 land claims within the national parks, of which 11 are in the Kruger National Park (*Legalbrief Today* (2012-07-01)). The complexity of the claims is the most likely reason for the prolonged delay in the finalisation of these claims.

2.1 Notices

It seems that the land claims process is being finalised. Only a few restitution notices in terms of the Restitution of Land Rights Act 22 of 1994 (Restitution Act) have been published during the reporting period (Eastern Cape (Amathole 3; Chris Hani 4; Mount Fletcher 2; Lady Grey, Peddie and Libode 1 each); Gauteng and North West (Tshwane 9; Potchefstroom 1; Bojanala 1; Bophirima 2; Ekurhuleni 2; Rustenburg 1; Johannesburg 1); Limpopo (Mopani 1; No district 1; Sekhukhune 2; Polokwane 2; Vhembe 2); Free State and Northern Cape (Thabo Mofotsanyana 2; Harrismith 1); Mpumalanga (Gert Sibande 1). Several amendment notices were published where land was added or omitted (Limpopo 7; Mpumalanga 1; KwaZulu-Natal 6; Gauteng and North-West 2). Several notices were withdrawn (KwaZulu-Natal 7; Free State and Northern Cape 1; Gauteng and North West 2).

2.2 Case law

In *May v The Minister of Land Affairs, the Chief Land Claims Commissioner and the Amathole District Municipality* (LCC146/2007 [2012] ZALCC 9 (2012-04-13)), the review and setting aside of settlement agreements concluded under section 42D of the Restitution Act, was prayed for. Over a thousand claims were lodged relating to different locations in and around Keiskammahoek. The Commission on the Restitution of Land Rights (Commission) accepted and validated the claims. On agreement, the numerous claims were dealt with as one, on the basis that the individuals involved would be treated similarly and that a section 42D-settlement agreement would be concluded to settle all the claims (paras 1-4). Essentially the agreements confirmed that all claimants would forego actual physical restoration and would accept instead equitable redress to an amount of R55 564 each. Each claimant would receive half the amount in cash and the remaining R27 782 would be paid into a development fund specific to each of their localities for the use of development projects. The overall agreement was signed on 16 June 2002 and consisted of individual agreements with each claimant. Later an amended section 42D settlement agreement was signed primarily to appoint the new implementing agent, the third respondent, and following these developments a Transfer of Payment and Administration of Funds agreement was concluded in 2005.

Among the grounds the eight applicants listed for the review and for the settlement agreement to be set aside (para 23.2), were the following: they had not agreed to the settlement agreement; the signatories lacked the lawful

mandate to sign on their behalf, and their individual agreements were signed under duress (para 8). By turn, the respondents listed their grounds in the opposing documents, which included that the claim had prescribed; that the applicants delayed too long in the submission of the application; that the applicants had no legal standing to bring the application; and that the agreements were entered into lawfully (para 9).

It would seem the underlying application for the review and setting aside of the agreements was that the applicants did not want the remaining half of the money to be paid into the development fund, but rather to be paid out to them in cash (para 23). In this regard, the respondents averred that the claim of each of the claimants for the payment of the outstanding R27 782 had prescribed (paras 13-19). The exact date on which the prescription starting running was disputed, as were the dates involved, and the period of the prescription was contested. The court found that the defence of prescription was not properly alleged (para 19.) Having disposed of the prescription matter, the court proceeded to deal with the plea to rescind the settlement agreement. As described above, various agreements were involved, namely: the overall agreement, the individual agreements in terms of which each beneficiary acknowledged the overarching framework agreements, the amended agreement that brought the third respondent into the picture as the implementing local authority and the financial arrangement agreements. On the basis of the papers before the court, it was unclear which of these agreements in particular was to be rescinded. The formulation was vague and conflicting (para 22). The individual agreements concluded with every claimant family specifically set out the conditions of the overall agreement. Each claimant agreed to those conditions. Affidavits of witnesses, both from the government and non-governmental organisations present at the signing ceremonies indicated that the contents of the agreements were explained and that the beneficiaries concluded these agreements on their own accord. With reference to the *Placon Evans* rule (para 23.3), the court was satisfied that the applicants failed to make out a case for duress. Thus, the application relating to the individual agreements was dismissed (para 23.3).

From the evidence it became clear that the applicants misunderstood the agreements they wished to set aside (para 23.5). The applicants were under the impression that, once the agreements were set aside, the residual amounts would be paid out to them individually. The court explained that compensation forming the object of a restitution award could only be acquired *via* one of two routes:
after a hearing as determined by a court of law, usually the Land Claims Court (LCC); or by way of a settlement agreement such as those provided for under section 42D of the Restitution Act.

If, after negotiations, such an agreement could not be concluded, the Commission would then refer the matter to court, thereby merging with option (a) above. If the section 42D-settlement agreement was to be set aside, no basis for the restitution award would then exist. In fact, the beneficiaries would have to

return the money already received and the claim would be referred in its entirety to the court as an unresolved dispute under section 14 of the Act (para 23.5).

The amended agreement of 2005 was entered into in order to bring in the third respondent as the relevant implementing local authority. The applicants suffered no prejudice when that agreement was concluded (para 23.6). The application relating to all of the agreements was accordingly dismissed. In this regard the court highlighted that the whole process of concluding and implementing the agreements had been rather unsatisfactory – for all parties included. The implementation was exceptionally slow and the claimants have been frustrated. However, the enormous prejudice that would result to all the beneficiaries who had not been part of this application should the agreements be set aside needed to be considered (para 23.6). No order as to costs was made.

Mangageni Emmaus Westmead Returners Community Trust v Minister of Rural Development and Land Reform (case number 361/2011 [2012] ZASCA 89 (2012-05-31)) concerned an appeal against an order handed down by the KwaZulu Natal High Court regarding, *inter alia*, the jurisdiction of the court to hear matters resulting from a section 42D-agreement. The appeal centred on the right to control two amounts – a capital award for restitution and a discretionary award respectively – paid by the first respondent to the third respondent. The latter was tasked with managing said amounts on behalf of the appellants, flowing from a section 42D-settlement agreement which resulted from a successful land claim. That issue was intrinsically linked to the question of whether the court *a quo* had the necessary jurisdiction to hear the matter and if so, whether it should have granted the relief that was sought. If the issue at hand involved the interpretation of the Restitution Act or was a matter that should be determined in terms of the Restitution Act, then it ought to have been handled by the LCC, a specialised court (see para 5).

Over a period of time, various negotiations took place which resulted in various written agreements being entered into by the relevant parties (paras 9-16). The respondents raised the point *in limine* that the High Court did not have the jurisdiction to hear the matters raised in the affidavits. The court *a quo* upheld the point *in limine* on the simple basis that the respondents had not signed the section 42D-agreement and by implication, did not enter into such agreement (para 18). That finding, however, was contrary to the respondents' concession in their heads of argument and the other undisputed facts. The Supreme Court of Appeal (SCA) accordingly found that the special plea on jurisdiction should therefore not have been decided on the basis that no section 42D-agreement had been entered into, but that the SCA, *per* Southwood AJA, should rather have found that it was clear that the agreement had been reached, that the restitution capital award and the discretionary award would be paid and the court had to decide whether the two transfer of funds agreements entered into were invalid, or if valid, had lapsed and whether, in light of the section 42D agreement and the transfer of funds agreements, the first appellant was entitled to payment of the balances owing in the

two accounts managed and controlled by the third respondent (para 19). This judgment points out that everything contained in a settlement agreement need not necessarily be dealt with under the Restitution Act. Accordingly, contractual matters flowing from agreements in general need not in all instances be dealt with by the LCC. In the present instance, the court *a quo* had jurisdiction to deal with the contractual matters flowing from the agreements entered into, if it had found that an agreement was concluded, and indeed as it ought to have found.

The Mhlanganisweni Community v The Minister of Rural Development and Land Reform (LCC 156/2009) [2012] ZALCC 7 (2012-04-19)) concerned the feasibility of restoring land comprising the contemporary MalaMala Game Reserve to the claimant community. Several parties lodged claims relating to the area concerned under section 14 of the Restitution Act. By agreements the parties and the Regional Land Claims Commissioner of Mpumalanga consolidated the various claims into a single claim in the name of the Mhlanganisweni Community, not a traditional, indigenous tribal community, but a community constituted for purposes of the land claim only. When the claim was initially lodged, the Regional Land Claims Commissioner attempted to settle it by making an offer to purchase for the amount of R741 056 992 in May 2008. When the Minister refused approval, the settlement fell away, leading to the claim's referral to the court in 2009. Though the initial referral by the Commission recommended that the land be restored to the claimants, an amended referral in 2010 submitted that, should the court find that the state be required to pay compensation to the landowners exceeding R30 000 per hectare, it would not be feasible to restore the land and equitable redress should be awarded instead (para 6). Following a pre-trial conference, issues were separated under Rule 57 of the LCC Rules, resulting in the present hearing focussing only on whether actual restoration of the MalaMala land would be feasible under section 33(cA) of the Act (paras 14, 17). Under section 33, the following considerations were specifically relevant: the amount of compensation or other compensation received in respect of dispossession and the circumstances prevailing at the time of dispossession; the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land under section 33(eA) and (eB) respectively (see para 18). Section 33(f) also permitted the consideration of any other relevant factor. With reference to case law, Gildenhuys J confirmed that the factors listed in various judgments did not constitute a *numerus clausus*; for example, earlier case law had considered whether overcompensation would not result following specific restoration and that the state's finite resources, the disruption of lives and the ability of the claimants to use the land productively, should also be taken into account (para 22). It is interesting to note that the factors considered and the case law referred to here, relate to applications made under sections 33 and 34. The latter is an application of non-restoration in terms of which a parcel of land is taken out of the restoration paradigm completely because non-restoration is in the public interest. Although

some of the factors overlap and the considerations may influence applications made in terms of sections 33 and 34, the two issues are intrinsically different, as explained in more detail in the *King Sabata Dalindyabo Municipality* case below.

A large part of the judgment deals with the reports made by witnesses (paras 25-37). It is important to note, however, that the restitution claim as such was not disputed. Therefore, in providing the historical background to the issue, this was not for purposes of validating the claim or for setting out the requirements under section 2 of the Act, but instead, contributed to the consideration of factors allowed under section 33, as listed above. In short, the testimony of the applicants' witnesses was unsatisfactory and generally not accepted by the court (para 36). The testimony provided by the historical expert, on the other hand, was found to be well researched and lucidly presented (paras 38-46). Apart from the history of the MalaMala Game Reserve, the judgment also provided an overview of the many accolades and awards the Reserve, a world-class destination, had received since its establishment (para 46). Having set out the historical background of the area, the court proceeded to determine a 'ball park' amount for compensation which could be payable to the landowners if the land had to be acquired or expropriated. Coupled herewith was the question of whether the state could fairly be required to pay such an amount. These issues are important as they contributed to the overall question of whether the actual restoration of the land to the claimants would be feasible (paras 47-53). After considering and analysing the other reports (para 54-58, 61-68), the court concluded that the market value of the land in question plus the improvements thereon was not likely to be determined at less than R791 289 492 in the event of it being expropriated (para 59). In light of section 25(3), the court had to consider whether the amount mentioned could be fixed or whether it had to be adjusted upwards or downwards. The current use of the land was eco-tourism. The court expressly rejected a differentiation between rich and other landowners in determining compensation which would result in 'rich' land owners requiring less compensation (para 61). The purpose of the expropriation was a further factor to be considered (paras 71-73). In this regard, different academic opinions existed: on the one hand, it was stated that if the purpose of expropriation was to effect land reform, then the amount had to be lessened by relying on section 25(8). On the other hand, it was argued that the purpose of expropriation (or land reform) was already taken into account in justifying the expropriation. Therefore it should not be enough to override other factors in determining the amount of compensation (para 72-73). After careful consideration the court concluded that none of the relevant factors required compensation to be determined significantly less that the market value, should the MalaMala land be expropriated (para 77). That amounted to R55 000 per hectare, plus the contributory value of improvements, finally amounting to R791 289 492.

In light of the finding on compensation, the court next had to determine, *inter alia*, whether actual restoration would be feasible. The court recognised (a) that

actual restoration was usually preferable; and (b) that ancestral lands are joined to their descendent communities as closely as the umbilical cord joins mother and child. However, in the particular case of the MalaMala Game Reserve, the other factors to consider as detailed above, would effectively trump actual restoration. Essentially, the overriding factors were that it would not be in the public interest to pay over R791 million to restore MalaMala to a community that did not have the capacity to take care of the land. The amount would result in immense overcompensation of the claimants (para 94). The court therefore found that the actual restoration of MalaMala to the claimants would not be feasible.

King Sabata Dalindyebo Municipality v Kwalindile Community ((537/2011) [2012] ZASCA 96 (2012-06-01)) concerned an appeal against a section 34-order granted in the LCC, and matters connected thereto. On authority to dispose of certain state-owned land (subject to certain conditions), land that was vested in the Province of the Eastern Cape was transferred to the Umtata Town commonage. The conditions entailed that, in the event that the transfer affected peoples' rights, it was a prerequisite that a social compact agreement be concluded with the affected community (paras 18-20). Such donation of a series of properties in the Umtata area resulted in a transfer in 1999 to Mthatha municipality. However, the title deed did not reflect the conditions. In the meantime, in 1998, a number of land claims were lodged by three communities, comprising the first three respondents, namely: the KwaLindile, Zimbane and Bathembu communities (paras 24-26). Whilst still in the process of investigation, two of the claims were published in accordance with section 11 of the Restitution Act. This led to a response by the municipality that, according to their history and information, none of the three respondents had previously been dispossessed of land which fell within the boundaries of the town of Mthatha (para 26). The land that was donated to the municipality by the Eastern Cape Province formed part of the land claimed by the communities. During 2002-2006 the municipality entered into various development agreements, *inter alia*, with the second and third appellants and some of the respondents, and this impacted directly on the land in question. The development agreements had taken place despite the municipality being alerted, by the Land Claims Commissioner, to the claims so lodged (para 29). Such conduct violated the Act (section 11 required one month's notice to the Commissioner prior to development, etc.) and the conditions linked to the donation and transfer of the land, as explained above. Consequently an interdict was sought and granted by the LCC against any developments in progress pending consultative negotiations. However, in the event of an impasse being reached, the municipality was granted leave to launch a section 34 application. The municipality went on to lodge a section 34 application in 2008 which was opposed by the communities on reliance of the report submitted by the Regional Land Claims Commissioner. Said report was opposed to the section 34 application and favoured actual restoration (paras 33). The application for non-restoration was granted, but linked to various conditions. In the LCC order the

reference to the land in question was erroneously restricted to a smaller parcel of the overall land. That issue was briefly dealt with and resolved by correcting the formal identification to include the whole of the relevant land (paras 41-42). The SCA thereafter focused on the section 34 application and its requirements. Essentially, the question was whether it was in the public interest that the rights in question should not be restored to any claimant and whether the public or any substantial part thereof would suffer prejudice unless an order in terms of section 34(5)(b) was issued. A successful section 34 application therefore meant that a parcel of land could, effectively, be taken out of the specific restoration equation even before determining the requirements for valid restitution. If, at trial, the restitution claim was later accepted, then restitution would still be possible, albeit not specific restoration.

The format in which the development agreements were couched, resulted in the court *a quo* finding that the developments were designed to promote entrepreneurial pursuits of a few only, with minimum or peripheral outcomes to the communities. The public interest test was thus not satisfied (para 46). Furthermore, the developments were not 'significantly' in the public interest. On the other hand, it was held that a strong argument in favour of the public interest test was reflected in what was referred to as the 'reality' recognised in the *Nkomazi* case, handed down earlier by the LCC (*Nkomzi Municipality v Ngomane of Lugedlane Community* [2010] 3 All SA 563 (LCC) para 29). The 'reality' referred to the fact that the whole of the town of Mthatha was built-up and in the process of development and that the expropriation of buildings, schools, parks and other facilities would result in major social disruption. Section 34 was formulated precisely to avoid such disruption (paras 47-48). That led the court *a quo* to find that the public interest test was indeed satisfied (para 52). The Minister and the Regional Land Claims Commissioner opposed the granting of a section 34 order. The Report submitted that 'feasibility' was not a bar to the restoration of land and that the primacy of restitution was required to be recognised, notwithstanding that other forms of equitable redress were available (para 53). The LCC found that restoration could lead to chaos and possible upheaval resulting from competing claims, resulting in serious inter-community tensions and strife (para 55). As to the second threshold that substantial prejudice would result to the public, or a substantial part thereof, should an order not be made before the final determination of the claim, the LCC underlined that failure to grant such an order would stifle and slow down development and that financial institutions would be reluctant to invest or provide financial assistance. Accordingly, the section 34 application was granted, but subject to particular co

nditions linked to the prevention of corruption, factionalism and greed (para 57). On appeal, the SCA disagreed that the findings of the court *a quo* in relation to entrepreneurial benefit on the one hand and the levels of corruption on the other, enjoyed persuasive foundation in the evidence (para 60). Though emphasis

was placed on 'shareholding', the SCA emphasised that the claimants had no vested rights as yet. For the development of a city to come to standstill in order to await the determination of which persons would have valid claims, would be of great disadvantage to the community as a whole (para 61). The SCA drew a clear distinction between existing land rights and claimed rights. Until the restitution process had been completed, the claimants had no land rights in relation to the subject land (para 63).

Concerning the section 34 application, the SCA applied the following principles (para 67): (a) once the court was satisfied that the two jurisdictional requirements had been met, the court did not have a further overriding discretion in terms of section 34 not to grant the order; (b) the decision involved the exercise of a value judgement, based on the facts to be proven, resulting in a wide discretion; and (c) on appeal, the SCA was obliged to accord deference to the findings of the lower court, especially as that Court was a specialised court. The SCA aligned itself with the approach followed by the Court *a quo* in relation to both jurisdictional requirements (paras 68-69). To risk social disruption and upheaval and to have trials which have no realistic prospects of success, hampering development and risking social welfare, would substantially prejudice the public. The section 34 application was thus confirmed. A costs order was made against the Regional Land Claims Commissioner on the basis that her report continuously supported restoration, notwithstanding its feasibility.

Florence v Broadbent Investments (Pty) Ltd, Government of RSA and City of Cape Town ((LCC 148/08) [2012] ZALCC 11 (2012-06-05)) is an important judgment as it highlights the overall aim of restitution – equitable restoration, in particular – and explores the different approaches towards determining equitable restoration in relation to monetary values. The relevant claim related to residential property in Rondebosch, Cape Town. The family took occupation of said property in 1952 under a lease agreement with the landowner, Dr Yeller, which was converted into a sale agreement in 1957, in the form of a written instalment sale agreement (see para 3 for historical background). Despite the agreement and the payment of instalments for many years, registration in the name of the purchasers never occurred because racially discriminatory legislation prevented that. The purchasers (present claimants), were members of the so-called Coloured community. The purchase agreement was subsequently cancelled in 1970 and the Florence family received R1 350 compensation. At that stage an amount of R14 896 was paid towards the purchase price of the land. The Florence family subsequently vacated the property. By agreement between the parties *in lieu* of the hearing, it was fixed that the market value of the property in 1957 was R8 131 and in 1970 was R31 778. The court had to determine the following: (a) the loss suffered by the Florence family in 1970 and whether such loss would equate to just and equitable compensation, calculated at the time of dispossession; (b) the appropriate method to be used when converting the 1970 loss into present day

monetary value; (c) the amount of financial compensation the Florence family should receive as *solatium* for the hardship and suffering they experienced; and (d) whether the second respondent should be ordered to pay the costs of erecting the memorial plaque on the site to which the plaintiff and the first defendant agreed.

Regarding the loss in the 1970s, the issue was whether the Florence family had paid the full purchase price at the date of dispossession. The plaintiffs argued that they were *de facto* owners of the property and had to be compensated as such. The second respondents argued that the loss suffered by the plaintiff was the under-compensation for the cancellation of the agreement, alternatively for the proportional interest gained in the property (para 5). With reference to correspondence the court per Carelse J was satisfied that the full purchase price had been paid by 1970 (paras 8-10). The court underlined that restitution also included equitable redress. The court consequently determined whether certain factors to be determined in the process of establishing equitable redress, required an amount to be subtracted from or added to the actual financial loss suffered by the Florence family – the actual financial loss being R30 513 in 1970 (para 13). The latter was calculated as follows: agreed market value R31 778, plus agreed removal costs R85, less the agreed upon compensation received at the time of the cancellation of the agreement – R1 350 (para 5). In the process of determining an award of compensation, the court is guided by section 33. However, the starting point for courts was to determine the purpose of restitution (para 15). Both the Constitution and the Restitution Act had to be interpreted purposively, and interpretation should be generous rather than legalistic. The aim of monetary compensation, as mentioned above in the *MalaMala* decision, was to put the dispossessed in the same position as if the land had not been taken (para 17). It was beyond question that the plaintiffs had a 'right in land' as required under section 2 of the Act: they were in occupation of the property for 18 years and in beneficial occupation of the property for a period of at least 10 years prior to dispossession. Keeping in mind the purpose of the Restitution Act, the aim of equitable restoration and the circumstances surrounding the dispossession, it was concluded that equitable redress should be the amount of their 1970 financial loss, escalated to its present day value in order to accommodate changes over time in the value of money (para 19). The court therefore proceeded in identifying and analysing different approaches as to how that could be done.

In a former judgment handed down in the LCC, *Farjas (Pty) Ltd v Minister of Agriculture and Land Affairs* ((LCC 57/2007) 2011-06-23 [2011] ZALCC para 27) the Consumer Protection Index (CPI) was employed as the appropriate method that would cater for changes in the value of money when determining compensation. Carelse J followed suit (para 21). The plaintiff argued that the CPI was inappropriate because it measured consumption, whereas what was dispossessed was an investment. Therefore, the plaintiff had to be compensated for the loss of an investment (para 24). In this regard the court emphasised that the Restitution Act

did not distinguish between different kinds of landowners or different purposes for which dispossessed properties were held and thus did not provide for different categories, for example, for investors or for homeowners (para 27). Reference was also made to international law (paras 28-32), in particular to Polish law, where rules were laid down relating to unlawful dispossession and how to calculate compensation in those instances. In such cases the purpose of compensation was to wipe out all the consequences of the illegal act. While taking note of these publications, the court discarded them on the basis that dispossession in the present instance occurred *lawfully,* though discriminatory and racially based (para 30). Thus, the approach followed by Polish law could not be transplanted identically to the South African situation. On the basis that persons who have already received just and equitable compensation, calculated at the time of the dispossession, could not again qualify for restitution, and the court found that just and equitable compensation did not include recompense for lost investment opportunities (para 35). Changes in value of money over time thus referred to the loss of purchasing power, thereby invoking the CPI as it had been the measuring tool (para 33).

Regarding *solatium*, the court confirmed that the purpose thereof was symbolic in that it appreciated the hardship suffered by the plaintiffs (para 4). Though the plaintiff and the first respondent, the landowner, agreed that a memorial plaque could be erected on the site, the second respondent, the state, was not a party to that agreement. It was thus a private matter between the parties, which resulted in the court not having the jurisdiction to order government to pay for the costs involved (para 43). Finally, the CPI was adjusted to reflect the index at the time the hearing took place and the CPI factor was fixed at 4 879 528. Having found that the under-compensation was R30 513, that amount escalated to the end of March 2012 and, using the CPI factor agreed upon by the parties, the under-compensation amounted to R1 488 890. Equitable redress was thus fixed at R1 488 890, plus R10 000 *solatium*.

3 Land reform

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

Under ESTA either the LCC or the relevant magistrate's court in the jurisdictional area has jurisdiction to hear eviction applications concerning rural dwellers in general and occupiers in particular. Once an eviction order has been granted, the complete case file and court record have to be submitted to the LCC in Randburg under section 19(3) of ESTA for automatic review proceedings. Conversely, an appeal can be raised immediately against an order granted by the lower court in which case the LCC acts as the court of appeal. In instances of automatic proceedings the eviction order is suspended for the duration of the review. The underlying purpose of the review process is to ascertain that all the substantial and procedural requirements contained in ESTA had been complied with before an eviction order is confirmed. This additional

protection for rural dwellers is crucial in light of the historical and continued vulnerability of rural dwellers and farmworkers. In the course of 2012 various automatic reviews occurred in the LCC. In most cases the review proceedings resulted in the setting aside of the eviction orders granted at lower level.

In the first review, *Jacoba Nel v Mohau Beleng* (unreported, (LCC77R/2011) [2012] ZALCC 1 (2012-02-14)) an eviction order for the respondent and five other persons who gained occupation via him, was granted by the magistrate's court of Lindley. Though an eviction order (in an unopposed matter) was granted, the magistrate refrained from stating reasons (para 1). In its review the LCC, per Kahanowitz AJ, set the whole of the eviction order aside. Not only were no reasons for the order given by the magistrate, no probation report, as required by section 9(3) of ESTA, was considered. Though the LCC had previously found that a hearing could proceed within a reasonable time after a probation report had been requested, no such report had even been requested (para 5.1). There were also other difficulties relating to contradicting dates in the documents before the LCC (para 5.2), non-compliance with section 8 of ESTA (para 5.2) and no termination of the right of residence or notice to vacate in terms of ESTA (para 5.3). There was furthermore no proof of service of notice on the local authority and the relevant DRDLR as required under ESTA (para 5.4).

Hexos Plase (Edms) Bpk v Janwell Vermeulen (unreported, (LCC31R/2011) [2012] ZALCC 3 (2012-03-05)) involved an eviction order in terms of which the respondent and everyone who had occupation though him, were evicted. An eviction application was lodged on the basis that the respondent was no longer working for the applicant (para 2). Initially there was no probation report, but it had in the meantime been requested by the LCC. Part of the delay in finalising the review was in fact caused by requesting and finally receiving, the report. Such was the delay that the respondents had already voluntarily vacated the property at the time the report was finally submitted. Accordingly, the review proceeding and the corresponding judgment was of academic value only. The respondent was charged with misconduct and later dismissed from his employment. Before the matter could proceed any further, a settlement agreement was concluded, and this agreement was made an order of court. Throughout the whole process the respondent had been unrepresented (para 5). After considering all matters, the LCC per Mpshe AJ set aside the eviction order in its entirety, for the following reasons: (a) the respondent's right of residence was never terminated (the applicant argued that termination of the respondent's employment automatically terminated his right of residence) (para 6); (b) the termination of the respondent's employment was not proven to be lawful under sections 8(1) and (2) of ESTA (para 7); (c) it was not clear whether two months' written notice to the occupier and other role players, as required under section 9(2) had taken place (paras 8-9); and (d) the fairness of the magistrate as the presiding official was questioned as there was no enquiry into legal representation and legal aid (para 12).

Coetzee en Seuns (EDMS) Bpk v Salmon Dees (unreported, (LCC61R/2011) [2012] ZALCC 5 (2012-03-14)) concerned an eviction order that was granted under section 10(1)(c) of ESTA on the basis that the occupier had committed such a fundamental breach of the relationship between him and the owner or person in charge that it was not practically possible to remedy it, either at all or in a manner that could reasonably restore the relationship (para 3). The respondent was absent from work without leave for seven days and on his return on the eighth day, he was informed that he had already been dismissed. Being illiterate, he acknowledged that he had signed his name to the relevant employment contract, but denied that (a) the terms had been explained to him in that his occupation was linked to his employment; and (b) his dismissal had been in accordance with labour law measures (see paras 5-7 for background). The respondent was 40 years of age and had been born on the farm, and he entered into a formal labour contract in around 2008. Excluding the matter at hand, no other labour-related problems had been experienced in relation to the respondent before. Loots AJ started the review process by accepting that the LCC did not have jurisdiction to consider and/or find on labour-related matters (para 8). Accordingly, for purposes of the review it was accepted that the dismissal had been lawful. Instead, the review exercise focused on whether the requirements of ESTA had in fact been complied with (para 9). The respondent was a section 10 occupier (para 10). This meant that he had been on the land at the time ESTA commenced in 1997. The eviction application was lodged and granted under section 10(1)(c) on the basis that the respondent's absence from work without leave constituted a fundamental breach. The court had difficulties with this approach as it would seem as if any breach of the employment contract which warranted a dismissal would also be regarded as a fundamental breach of the relationship (para 13). That could not have been the intention of the Legislature. Being a section 10 occupier resulted in more protection that would generally be the case in relation to a section 11 occupier. This entailed that an occupier, such as the respondent, could only be evicted if there was suitable alternative accommodation for him and his family, as envisaged in section 10(2) or (3) (para 15). Allegations relating to alternative accommodation were made by both the landowner and the occupier. In this regard the court emphasised that the responsibility for finding alternative accommodation was a 'shared responsibility' and that '(t)he purpose of this [notice] is to warn them [local authority] that they should become involved in giving effect to the constitutional rights of occupiers to have access to adequate housing ... (t)he landowner, the occupier and these organs of state share the responsibility to find alternative accommodation and all are expected to be pro-active about the issue' (para 16).

The eviction order was furthermore granted in the absence of a probation report (para 19). Though, as mentioned above, the court could proceed within a reasonable time after a report had been requested, the court would have to consider all circumstances of the case before deciding whether to proceed in the absence of a report (para 19). This had not occurred in the present case. Finally,

the court emphasised that the respondent had been living on the farm since his birth and that being illiterate made him vulnerable. In the present circumstances the probation report would have been important to the court (para 20). This led to the court setting aside certain portions of the eviction order and remitting it to the magistrate's court in order to determine whether (a) section 10(2) of ESTA was applicable or not; (b) whether the requirements of section 10(3)(a), (b) and (c) of ESTA had been complied with and if so, (c) whether the granting of an eviction order was just and equitable, having regard to section 10(3)(c)(i) and (ii). The court furthermore strongly recommended that the magistrate convene a conference under section 54 of the Magistrates' Courts Act 32 of 1944 and invite all of the role players to attend in order to determine the need of the respondent and his family for long-term security of tenure.

In *Remhoogte Boerdery Grabouw (Pty) Ltd v Booysen* ((LCC 27R/2012) [2012] ZALCC 8 of 2012-05-08) the eviction order was set aside *inter alia* due to the fact that the relevant magistrate handed down an order but gave no reasons for the decision. This was in contravention of LCC rule 35A(1)(b) (para 7). Apart from the absence of reasons, the court file was incomplete. Though reference was made of a housing contract, it was not annexed to the affidavit. The LCC was therefore not fully informed of the terms and conditions of the right of residence (para 7.2). The allegations attested to in the founding affidavit were not supported by the 'rather confusing state of affairs as appeared in the annexures' (para 7.3). Furthermore, though a probation report was requested, the court did not wait unreasonably long for it (just more than a month) and never required as to its submission (para 7.5). There was also no evidence of any engagement with the local authority in the matter prior to the granting of the eviction order. In light of the above, it was impossible to consider 'all relevant circumstances' before an eviction order could be granted, hence the setting aside of the eviction order. In *Oudepont (Edms) Bpk v Coetzee* ((LCC 26R/2012) [2012] ZALCC 10 (2012-05-30)) the eviction order was similarly set aside on review.

De Kromme River (Pty) Ltd v Dampies ((LCC 07R/2012) 2012-08-24) also entailed an automatic review regarding an eviction order granted by the magistrate's court in Wellington. The first applicant was the owner of the property, represented by its director, whereas the second applicant was the former husband of the respondent that was evicted in terms of the order. The motivation for granting the eviction order was mainly twofold: (a) the respondent's occupation arose from her employment relationship with the first applicant and since the employment had been terminated, the respondent had to be evicted; and (b) a housing agreement had been entered into in terms of which the respondent had to vacate the house when her marriage with the first applicant ended (see paras 2-3). These allegations were denied by the respondent as she averred that her occupation was based solely on consent granted by the previous landowner, and was not based at all on any form of employment. She also denied any condition that she had to vacate the

house on the breakdown of her marriage. Apart from these denials, she also raised the *locus standi* of the two applicants to bring the eviction application as a point *in limine.* In this regard her counsel pointed out that the application to evict lodged by the first applicant did not have a signed resolution of its members and that the second applicant, not being the landowner or person in charge, did not have the necessary *locus standi* to lodge the application. Both these issues were dismissed by the court *a quo* (para 9), resulting finally in the granting of the eviction order. It is this eviction order that was being reviewed automatically under section 19(3) of ESTA. The court per Sidlova AJ began the review first by analysing what 'occupier' under ESTA entailed. In this regard emphasis was placed on the fact that the respondent had consent to occupy, which consent was granted by the previous owner. Until the lodging of the eviction application, no attempt had been made to question or to revoke the respondent's consent (para 5-7). On the basis that consent had been granted, including consent granted by a former owner, it had to be withdrawn or revoked, under the provisions set out in ESTA, before eviction proceedings can be initiated. Section 8 set out the grounds and requirements for such revocation or termination of consent, followed by the provisions in section 9 that guided the lodging of the actual eviction application itself (para 11).

On the documents before the court, the court was unable to establish whether consent had been terminated properly. The reason being that the record and file sent to the LCC in Randburg were incomplete. In fact, material and documents referred to by the magistrate, and relied on for purposes of his judgment, were absent in the file that was sent to Randburg. This led the review judge to question whether the magistrate and the LCC had the same file (and case) in mind (para 12). As the formal requirements had not been complied with, the eviction order could not have been granted and could therefore not be confirmed. However, the court did not only rely on the 'formal' requirements, but also investigated whether the matter of suitable alternative accommodation had been dealt with sufficiently at the lower level. The court highlighted the difficulty of balancing all relevant rights equally as both the rights and interests of the occupier and those of the landowner had to be taken into account (paras 13-14). Of especial importance, however, were the interests of those in desperate need of housing (para 14). In this instance the ex-wife (respondent) would be left homeless with her three children, two of whom were still minors and attending school in the area. The impact of the eviction on their circumstances was never fully considered in the court *a quo*. On the other hand, continued occupation in the house would have no detrimental impact on the enterprises of the landowner (para 14). Overall, the LCC was not satisfied that the applicants had shown that there was suitable accommodation available to the respondent, as required by section 10(3) of ESTA. As a result the eviction order was set aside in its entirety by the LCC.

The above reviews underline that the court files to be sent to the LCC in Randburg have to be complete and in order. For the LCC to review the proceedings

successfully, it must have all the necessary information at hand. No review can be undertaken if the file is incomplete and in disarray as the LCC would not be able to consider all the relevant circumstances to determine whether the granting of the eviction order (or the confirmation thereof) would indeed be just and equitable. Continued missing probation reports, non-compliance with serve of notice requirements and the granting of eviction orders when all circumstances have not been taken into account should not still be prevalent after the Act had been in operation for more than a decade.

Ngidi Sibanyoni and Brananza Suahatsi v Umbeco Mining (Pty) Ltd and Three Other Respondents (unreported, (LCC03R/2012) [2012] ZALCC 4 (2012-03-06)) entailed an urgent application for an interdict and a counter application for an urgent eviction under section 15 of ESTA. The interdict application was lodged against the first and second respondents to stop them from carrying out any mining activities on the property concerned. The applicants had been in occupation of the land for 20 years, had been employed by the previous landowner and had occupied residences as part of their employment agreements (see paras 2-4). When the land was sold to the present respondents, the occupiers were informed that they would be relocated and that their needs would be taken care of. Though the applicants denied that they had agreed to the terms of the relocation agreement (para 4), the relocation specifications provided for brick houses with full amenities (water, electricity, flushing toilets and a windmill) while the relocation and transfer costs would also be taken care of by the respondents (para 4). All of the other occupiers present on the land at the time it was sold had, since the negotiations started, relocated to Grootpan, except for the two applicants in the present proceedings. In the meantime the mining activities, including amongst other things, blasting activities for coal mining, continued on the farm. Essentially the applicants refused to move because they were dissatisfied with the quality and size of the alternative accommodation that was made available to them. They also demanded a sum of R50 000, which demand later increased to R500 000 per household, for the relocation (para 6). Further room for storing furniture was also demanded. In response, the respondents offered additional containers to be used as storage facilities. The interdict being sought was on the basis that the continued mining activities posed grave danger to the occupiers, their property and their livestock (para 7). In response the respondents emphasised that stopping mining was out of the question and that, instead, an urgent eviction of the respondents was necessary (para 7). The dispute centred on the conditions of relocation and the particular suitability of the alternative accommodation and were consequently investigated in detail by the court (paras 9-12). The court was satisfied that there was real and imminent danger of substantial injury or damage to the applicants and their property if they continued to remain on the land in question (para 10). The applicants conceded that they were not opposed to relocation as long as their concerns were taken care of. Given the undertakings concerning interim safety and the fact that

there was indeed alternative accommodation available to which the occupiers could be relocated, there was an alternative remedy available to the applicants. An interdict was thus not the only option available to the applicants (para 10). Keeping in mind the existing danger, the court considered the provisions of section 15 of ESTA and was satisfied that all of the requirements had been met and that an urgent eviction order would be suitable in the present circumstances (para 12). The respondents required a recordal that the applicants had indeed agreed to relocate to the accommodation provided. Such a recordal would, however, suggest a final eviction order. In this regard the court emphasised that the requirements for a final eviction order, for example section 9(2) and (3), had not been tested in court. Accordingly, it found that the disputes linked to the terms and conditions of the agreement to relocate, as well as the issue of suitable alternative accommodation, were aspects which had to be determined at the final eviction proceedings (para 13). The judgment scrutinises the requirements for an interdict and an urgent eviction application respectively. In this regard the difference between an urgent eviction order, which has a particular set of requirements and which can only provide interim relief and a final eviction order, is underlined.

Sterklewies (Pty) Ltd t/a Harrismith Feedlots v Msimanga ((456/2011) [2012] ZASCA 77 (2012-05-25)) dealt with an appeal against the setting aside on automatic review of an eviction order that was granted under ESTA. The respondents were all formerly employed by the appellant and occupied a hostel on the premises comprising a feeding lot for cattle. Following internal disciplinary hearings and a dismissal from their employment, the respondents were requested to vacate the premises. Upon their failing to vacate, eviction proceedings were lodged against them and an eviction order was granted by the magistrate's court. Of particular importance was the question as to whether the respondents were only allowed to stay on the farm as long as they were employed by the appellant. In this regard the court first ascertained the basis of the occupation (para 3). In order to qualify as an occupier for purposes of ESTA, consent must be in place. Usually consent arose from some agreement between the owner and the occupier. However, the Act did not define an occupier as a person who occupied in terms of an agreement or contract. In many instances, especially in rural areas, people resided on land without explicit consent, after which time the landowner allowed the occupation to continue. The latter instances constituted tacit consent. The SCA alluded to the fact that the *Landbounavorsingsraad v Klaasen* (2005 5 SA 410 (LCC) para 35) in this regard, may be incorrect. Of importance however, was that, irrespective of the origin of the consent, the right of residence flowing from the consent had to be terminated in terms of section 8 before an eviction order could be obtained (para 3). Presently, after the conclusion of the proceedings in the CCMA following the disciplinary hearing and dismissal, Sterklewies gave the former employees notice terminating their right of residence in their rooms in the hostel. The issue to be determined by the SCA was whether

the defendants' occupation of the rooms in the hostel flowed solely from their employment agreements that had previously subsisted between them and Sterklewies (para 5).

Under section 8 the termination of a right of residence had to be both lawful and just and equitable, having regard to the specified factors. According to Wallis JA, section 8(2) was inserted to deal with situations that arose frequently under the labour law dispensation in operation prior to the Labour Relations Act (see para 10). In the days where an industrial court still operated, workers would dispute their dismissal while occupying hostels. Their presence would prevent employers from hiring a new workforce. Therefore the eviction of workers was sought while the dispute was still ongoing. Often this was used to put pressure on workers to reach a settlement before they were deprived of accommodation. The court then proceeded to provide some examples in case law of how that (old) process worked. The case law so cited and discussed related to strikes and mining companies and pre-dated land reform initiatives (see paras 11-12). Section 8(2) and (3) were thus necessary to ensure that eviction orders could not be obtained against dismissed workers until all disputes about the validity of termination of employment had been resolved (para 13). The court pointed out that there could be instances, however, where the right of residence flowed from the employment contract and the agreement had been lawfully and fairly terminated, it could nonetheless still not be just and equitable to terminate the right of residence. Factors that may contribute to such an instance could be lengthy residence, old age, ill health, etc (para 14). (It is not clear how this exposition would fit into the provisions for long-term occupation under section 8(54) of the Act and whether it was effectively paraphrasing a section 8(4) situation.)

The manner in which termination was to take place was set out next in paras 16-17. Two stages were envisaged: first the occupier's right of residence had to be terminated and once that had been done, eviction proceedings would commence. The second stage would begin with the notice of intention to seek an eviction against the occupier, with the concomitant services to take place, as prescribed (para 18).

Concerning the case at hand, the court was satisfied that, right from the outset, it was made clear to the former employees that their right of residence had derived from their employment contracts and that it had terminated when those agreements were terminated (para 21). Therefore, the obligation to vacate the hostel on termination of the employment contracts was one that was explicitly embodied in the obligations of former employees under those contracts (para 22). That was also in line with the clear policy of Sterklewies that the employees could reside, free of charge, for as long as they were employed, but on termination of employment the right to reside ended (para 23). Concerning the automatic review conducted by the LCC under section 19(3) in terms of which the eviction order was set aside, the SCA emphasised that the court had to deal with issues that

parties in the litigation had formulated only and that it was not open to them to deal with and determine cases on a different basis (para 26). The court proceeded to set out the role of a review court, namely, that it was limited to deciding issues that were raised in the review proceedings only, except if a pure point of law arose that had to be dealt with. The appeal was thus successful and the eviction order re-instated, but adjusted with regard to one respondent who would be allowed to stay with his wife in her lodgings on the basis of her employment agreement.

AJB Trust v Boiyane and Segone ((LCC102/2011), (LCC 103/2011) [2012] ZALCC 6 (2012-04-02)) dealt with two matters on appeal, following proceedings in the Rustenburg magistrate's court. The grounds for appeal related to the application of sections 8 and 9 of ESTA respectively (see paras 3-4). Issues that were common to both appeals were first dealt with by the LCC per Mpishe AJ and Kahanovitz AJ, namely the *locus standi* of the appellant and the absence of a section 9(3) probation officer's report. The first issue was dispensed with speedily on the basis that it had already been canvassed fully in the court *a quo* and ought not to have been raised at all on appeal (para 8). Regarding the probation report, it was argued that eviction proceedings could not be finalised without having studied the probation officer's report (para 10). Counsel for the respondents averred that the matter of the report was simply ignored during the court *a quo* proceedings (para 11). In fact, a request for submission of the report was made two months prior to the trial (para 16). Though a request was made, as required, no report arrived in time for the trial. Despite the absence of the report, the respondents failed to place any relevant information concerning their personal and other circumstances that may be of interest, before the court. In this regard the court concluded: 'The absence of a section 9(3) report accordingly is where they themselves have not raised these issues in my opinion not fatal to the proceedings and cannot be regarded as a bar to the proceedings' (para 17).

Regarding the particular grounds for appeal, the relevance of section 8 was focussed on first. Section 8, also referred to in the *Sterklewies* case above, read with section 9, meant that termination of the right of residence had to precede an eviction order as per section 9(2)(a) of ESTA (para 21). It was argued that, if the right of residence arose solely from an employment agreement, then the termination of the right of residence became redundant if the occupier resigned or was dismissed from employment (para 21). Accordingly, counsel for the appellants submitted that the termination of residence was achieved by the resignation of the respondent (para 22). The court refused to accept that view, as the respondent denied that his residence arose solely from his employment. On the facts it became clear that the respondent had resided on the property long (almost 13 years) before taking up employment with the appellant. There was furthermore no evidence that the residence was in fact connected to employment and no notice to terminate residence was ever served on the respondent (paras

24-25). With regard to *Boiyane* the requirements had thus not been complied with and the appeal was therefore dismissed. *Segone's* eviction was not granted by the court *a quo* on the basis that the appellant had not complied with section 9(2)(d)(i) of ESTA. Though all the required notices had been served, the dispute was that no personal service had occurred in relation to the respondent (para 28). The evidence, however, indicated that the notice was served in both English and Setswana (para 29). The court was satisfied that all the requirements had been met, resulting in the appeal succeeding.

Hattingh v Juta ((440/2011) [2012] ZASCA 84 (2012-05-30)) concerned an appeal against a judgment handed down by the LCC. The issue dealt with the right of an elderly mother to family life in accordance with a particular culture, as provided for in section 6(2)(d) of ESTA. It was argued that her right to family life allowed her adult children to reside with her. Though unsuccessful in the LCC, the former judgment did not at any length provide an in-depth analysis of the right to family life, in accordance with cultural background. Counsel for the appellants argued that the concept 'culture' in relation to cultural background, should be interpreted broadly and was in no way limited to considerations of race, ethnicity, religion, language and community. Each family had to be considered individually to determine its culture, being the way in which it was lived (para 12). In construing section 6, the importance of family and family life was at the core (para 14). The SCA emphasised that families were constructed, functioned and dissolved in a variety of ways (para 15). The right to family life was inherent in the fundamental right to human dignity that was enshrined in the Constitution. Concepts of family life and culture were furthermore linked (para 18). With reference to *MEC for Education, KwaZulu-Natal v Pillay* (2008 1 SA 474 (CC)) the court proceeded to unpack the concept of 'culture' (paras 18-20). To that end the court highlighted that culture was an inherently associative practice and that, while differing from religion, cultural practices were often influenced by religious practices. In O'Regan J's judgment, the community dimension thereof was elaborated on further (para 19). Essentially, a person's culture as envisaged by the Constitution was clearly not a matter of such a person's individual practice, but a matter of association and practices pursued by a number of persons as part of a community (para 20). Therefore, cultural rights were clearly associative in nature and had to be shared by at least a portion of the community. Section 6(2)(d) of ESTA was non-associative and fell to be determined solely by the manner in which Mrs Hattingh and her extended family lived their lives. Therefore the appeal had to fail (para 21). The eviction order for the two adult sons of Mrs Hattingh was thus confirmed. The SCA judgment is the first decision in which the framework of culture and land rights, linked to family life, was explored in detail. Despite confirming that families are constituted and function differently, the concept is not followed through to the final end result: for the Hattingh family this rather strange set-up constituted their family and had done so for a very long

time. Their right to family life had developed in accordance with this particular structure. For farmworker communities similar or identical family structures have existed for generations. This trait of different generations inhabiting a single dwelling with mutual support and belonging, is certainly shared by at least a portion of the farmworker community.

Despite being in operation for many years, there still seems to be some confusion as to when to apply PIE (commenced in 1998) and ESTA (since 1997). This may be the case, depending on the particular facts and circumstances of individual matters. Two cases have been handed down in the course of 2012 that illustrate the inter-connectedness of these legislative measures on the one hand and the level of scrutiny required in determining the relevant measure to employ, on the other. *Diamond Hill Trading 99 BK v Soet* ((1752/2011) [2012] ZAFSHC 82 (2012-04-26)) illustrates how difficult it can be to decide beforehand which legislative measure to employ in eviction proceedings. Employing the correct measure is important as it has jurisdictional implications relating to the specific forum to approach for relief and impacts on the particular procedural requirements with which to comply. The farm in question was 'Uitkijk' and it was registered in the name of the Trustees of Thusong Trust. After the required resolutions the majority of the trustees found in favour of selling the farm after which it was sold to the applicant. Transfer of said property took place in February 2011. The respondents were thereafter informed that they had to vacate the land. Failing to vacate the farm led to the eviction proceedings under section 4 of PIE. The respondents raised two points *in limine*: (a) that the purchase agreement was fraudulent and that the transfer of property in the name of the applicant was unlawful; and (b) that they were not unlawful occupiers under PIE but were occupiers for purposes of ESTA (para 8). With reference to the definitions of 'unlawful occupier' in PIE and 'occupier' in ESTA respectively, counsel for the applicant argued that it could never have been the intention of the Legislature for the present respondents to fall within the ambit of ESTA. This was so because the present respondents were the same persons who decided to sell the farm in the first instance (para 12). The Thusong Trust, referred to above, was established in 2002 with 37 trustees, including the present respondents. In accordance with the deed of trust, the majority of the trustees would have the final say in cases of conflict, as if the decision was unanimous. Though the respondents did not consent to the sale of the farm, the majority resolution was in fact reached and the sale proceeded, as explained above. It was argued that being former 'owners' excluded them from ESTA.

On the other hand, Counsel appearing for the respondents, emphasised that the land was indeed the property to which ESTA applied,. Though the farm was originally acquired by the Trust for commercial purposes, no such commercial farming enterprises were in place at the time of the eviction. Furthermore, the respondents were effectively in the employ of the Trust. Accordingly, the respondents occupied the farm with consent, the eviction application was aimed

at them in their personal capacity, resulting in the application of ESTA and not PIE (para 13). In this regard reference was made to section 24 of ESTA in terms of which consent to occupy bound a successor in title (para 18). Finding that the respondents were indeed occupiers for purposes of ESTA, the correct procedure under ESTA had to be followed. This raised the issue of whether the present court, the High Court, had the necessary jurisdiction to hear the application. Counsel for the applicant argued that it did have jurisdiction as the parties consented to it, in line with what section 17(2) of ESTA required (para 25). However, since the initial application was lodged under PIE, it was clear that the parties could not have consented beforehand to the court hearing the application under ESTA. In this regard the court required consent before lodging applications and not merely agreeing to it afterwards ('voorafgekreë toestemming') (para 27). On the basis that the court did not have the necessary jurisdiction and it was not consented to beforehand, the application was dismissed.

In *Willem Pieterse v Johannes Venter and Maria Venter* (unreported, (A5016/2011) [2012] ZAGPJHC 7 (2012-02-10)) interesting facts led to the question of whether PIE or ESTA would be the tool to be employed in eviction proceedings. It is an appeal against an eviction order that was granted previously against the present appellant. The facts were briefly the following: the respondents, old age pensioners at the time of these proceedings, purchased three holdings next to each other, namely erven 138, 139 and 140, for investment purposes in the 1980s. The appellant purchased holding no 141 in 2007, but had been leasing said property since 2001. The property that he had purchased and taken possession of had a sign that indicated the number 141 (para 5). On the holding were certain structures that had been erected by the previous owner, one Scheepers, after obtaining permission to do so under the Local Government Affairs Council in 1992 (para 5). When the appellant took possession of the property he erected further buildings and made other improvements to the existing buildings. During 2009 the respondents received a notice from the local authority that the buildings erected on holding number 140 were illegal as they had been erected without the necessary approval. That was the first time that the respondents and the appellant realised that the appellant had taken possession of the wrong parcel of land and that the buildings and improvements had been effected in relation to holding 140 and not holding 141 (para 6). The respondents' attorney immediately thereafter informed the appellant that he had to vacate the buildings he was occupying. When the appellant continued to remain on the property, an eviction application was lodged under PIE. In the notice of intention to oppose, the appellant raised a defence *in limine* that PIE was not applicable, but that the application was governed instead by section 2 of ESTA. No explanation or motivation was given for the application of ESTA (para 7).

The appellant raised four issues on appeal: (a) that a fundamental re-evaluation of ownership in light of Constitutional imperatives was required; (b)

whether the court had jurisdiction to hear the matter as ESTA applied; (c) if ESTA was not applicable and PIE was relevant, then the application was faulty as the local authority had not been joined in the proceedings; and (d) whether the granting of the eviction order was just and equitable within the circumstances (para 15). As the first ground of appeal was not pursued further, only the remaining three were dealt with. Concerning the issue whether ESTA was applicable, the requirements for being an occupier for purposes of ESTA had to be met. These requirements essentially involved (a) consent granted after 4 February 1997 to occupy, or (b) another right in law to occupy, (c) an occupier is a person who works the land himself without employees other than his family members; and (d) a person whose income did not exceed R5 000 per month (para 18). Actual consent was never established as the appellant and the respondents were all under the impression that the appellant had occupied the holding in his capacity of owner – he thus never required or was granted any consent. After receipt of the notice that he had occupied the wrong parcel of land, consent could obviously no longer be obtained (para 19). That much was clear from the immediate reaction of the respondents' attorney notifying the appellant to vacate the property. Due to the particular facts and circumstances, the presumptions within ESTA were also of no use to the appellant (paras 21-22). The appellant furthermore did not rely on 'any other right in law' to occupy, which could have constituted occupier status (para 25), he also provided no details as to whether he worked the land (para 26), or submitted any information about his monthly income (para 2). The court was thus satisfied that ESTA did not apply and stated that 'ESTA and the PIE Act are mutually exclusive; it is either the one or the other that is applicable, but not both' (para 28).

This case is a good example of how the scope of ESTA and PIE seemingly overlap. It is crucial that the correct eviction tool be identified and employed to effect the eviction. On the other hand, if a person relies on a particular defence contained in a legislative measure, then all information supporting such defence, has to be submitted to the court. The court can only decide (a) the correct mechanism to be used, and (b) whether granting the eviction order would be just and equitable in terms of the particular legislative measure, if all necessary information is before it.

3.2 Provision of Land and Assistance Act 126 of 1993

Land was designated in terms of the Provision of Land and Assistance Act 126 of 1993 in KwaZulu-Natal (GN 21-22 in *GG* 34934 of 2012-01-12; GN 1081-1084 in *GG* 34882 of 2011-12-20; GN 998-1000 in *GG* 34808 of 2011-12-02). The land may, amongst other things, only be used for settlement and agriculture and the Conservation of Agricultural Resources Act 43 of 1983 and the National Water Act 36 of 1998 are made applicable to the land. In a few notices it was clearly

stated that the municipality may not use the land for any other purpose except if written authorisation is obtained from the DRDLR (in these instances the land was earmarked for agricultural purposes only). In one of the notices the Department reserved a right of first refusal if the owner intends to sell or donate the property. The Department also reserved the right to do inspections for three cropping seasons and if the land is underutilised the property will revert back to the Department.

3.3 Land Titles Adjustment Act 111 of 1993

Land was designated in terms of section 2(1) of the Land Titles Adjustment Act 111 of 1993 (GN 330 in *GG* 35302 of 2012-05-10 (UmzimKhulu); GN 168 in *GG* 35085 of 2012-02-29 (Ixopo)).

3.4 Interim Protection of Informal Land Rights Act 31 of 1996

The application of the Act was extended twice, to 31 December 2012 and 31 December 2013 (GN 1030 in *GG* 34836 of 2011-12-08; GN 697 in GG 35625 of 2012-08-31).

3.5 Ingonyama Trust Land

Ingonyama Trust v Inkosi Radebe and Five Other Respondents ((9403/2009) 2012-01-25, KwaZulu-Natal High Court, Pietermaritzburg) deals with the powers and authority of the *Ingonyama* Trust in relation to land within its jurisdictional area. The applicant is the *Ingonyama* Trust, a corporate body that was created and established under section 2(1) of the KwaZulu-Natal Ingonyama Trust Act 3 of 1994 with the purpose of controlling and administering all land that was placed within its jurisdiction. The first respondent is *Inkosi* Radebe, a male *Inkosi* (traditional leader) of the Amahlubi Traditional Council and the second respondent is the Amahlubi Traditional Council, a council recognised in terms of the Traditional Leadership and Governance Framework Act 41 of 2003 and the KwaZulu-Natal Traditional Leadership and Governance Act 5 of 2005. The present application is for an interdict against the first and second respondents to restrain them from claiming or holding themselves out to be legally entitled to any land presently registered in the name of the applicant, and furthermore from interfering in any way whatsoever with the lawful occupiers' use and enjoyment of particular parcels of land identified in the documents; and restraining them from occupying or causing to occupy said portions of land, as well as dealing with, allocating, granting or extending any rights in relation to the land so identified. This application follows an earlier interim order granted by consent in December 2009 (para 28).

The factual and historical background is complex in that it explains in detail (and sometimes rather repetitively) the earlier racially based approach to land, the

colonial changes made to customary land tenure, as well as how it came about that the *Ingonyama* Trust was established and when (see paras 6-28). It is, however, very valuable as a historical record of the particular developments in relation to the KwaZulu-Natal Province and provides an overview of authority structures and power relations dating back from the pre-colonial and colonial era (see especially paras 19-28). It is also a useful reflection on customary or communal land tenure and how land allocations occur on a daily basis (paras 34-50). Above all, the historical and factual backgrounds underscore the complexities and intricacies embedded in the control over land and the use of land within the customary and communal areas in KwaZulu-Natal.

The *Ingonyama* Trust was established immediately prior to the first general election in April 1994. Under section 3 of the Ingonyama Trust Act all land owned by or that had been acquired by the KwaZulu-Natal government, vested in the Trust (para 11). In order to alleviate the administrative burden that fell on the Zulu King, the KwaZulu-Natal Ingonyama Trust Amendment Act 9 of 1997 was promulgated which made provision for the *Ingonyama* Trust Board to administer the Trust land and the affairs linked therewith. Land that constituted townships and was utilised by the state for domestic purposes was excised from the control of the Trust and transferred to relevant local authorities and state departments respectively (para 13). The amendment meant that the land controlled by the Trust fell in one of two broad categories: (a) the land which the applicant owned and held in trust on behalf of the beneficiaries listed in the schedule to the Amendment Act, represented by various traditional authorities or leaders; and (b) the remainder of the land – urban and rural – not connected to any tribe or traditional authority (para 14).

However, in the pre-constitutional dispensation in an attempt to address landlessness, certain community or traditional authorities were created by amalgamating a number of clans into one legal entity which would then administer and control specific parcels of land that were released by such authorities. The first respondent's predecessor in title was subjected to such an arrangement and his clan or tribe was amalgamated with others for the purpose of land use (paras 15-16). The third respondent was established in 1970 and was allocated a specific area of jurisdiction, which comprised a small piece of land. Said piece of land was held by the applicant in trust for the third respondent (para 18). Various portions of land, amongst others, had in the meantime been acquired by the Trust and two particular portions of land that were surrounded by the third respondent's land. In line with their mandate, the applicant had allocated portions of said land parcels to certain individuals for their exclusive use, in return for which certain moneys were paid to the applicant (para 20). The second and third respondents had, however, usurped jurisdiction over these particular land parcels and had granted permission to other persons (individuals and groups) to occupy and use the land in question (para 21).

The first respondent had also allowed his people to graze their livestock on the land. The lawful occupiers and tenants had in the process been prevented

from using the land and had effectively been evicted. As a result the applicant did not receive rental or other revenues from the land, as was their due. The water project established in the area was also affected negatively by the conduct of the first and second respondents (paras 24-25). The respondents' defence was mainly twofold: (a) that they were the lawful owners of the properties in question as graves of their forefathers were on the land, and (b) that the respondents have lodged a claim for the restitution of land under the restitution programme (para 27). After elaborating on customary law matters linked with land tenure (paras 29-43) and scrutinising the relevant provisions of the Ingonyama Trust Act (paras 45-52), the court per Madondo J found that the Trust did not have sole exclusive control and authority over land connected to a particular traditional authority or community. This meant that the Trust was not the only legal entity authorised and entitled to grant rights and allocations and permissions in respect of ownership or occupation and use of land, even if the land is registered in its name throughout the province (para 53). Instead, if the land is held in trust, then the Trust has to get prior written consent from the tribal authority or community authority concerned. Accordingly, the court could not confirm that the Trust had the *sole control and exclusive authority* over *all* land within the jurisdictional area (para 53). Had the court reached such a conclusion, it would also impact on trust land connected to recognised tribes and traditional authorities. Furthermore, confirming the applicant's exclusive rights, control and jurisdiction, would impact negatively on the rights and powers of traditional authorities under the Act (para 55). With regard to the land over which the applicant indeed had exclusive rights and control, for example, the two portions of land that had been hijacked by the first and second respondents, the court found that the respondents had failed to show any legislation or proclamation or any other law that granted them the authority to deal with the land in the manner that they had (para 57). The presence of the graves and the lodging of the land claim did not provide the necessary authority either (paras 57-58). The argument that the first and second respondents acted under the delegated authority of the King when they controlled and allotted the land was also unsuccessful as they failed to prove the alleged delegated authority (para 60). On the basis that the applicant has proved that it had the exclusive right to exercise the incidents of ownership, and because the respondents' continued unlawful control and use of the land caused irreparable harm, and since there was no other remedy but to approach the court, the application was successful (para 61).

The judgment has underlined how complex customary law land tenure can be and how many different sets of rules may be applicable in any given moment, depending on the actual location of the land and when and by way of which mechanism it had been acquired. Though the Ingonyama Trust Act seems to govern the whole of KwaZulu-Natal in relation to customary law land tenure, it is also clear that customary law practises and traditional authorities still have an

important role to play. The Communal Land Rights Act 11 of 2004 (CLARA), that was found to be unconstitutional in May 2010 by the Constitutional Court, applied to communal land in general, but specifically excluded the land governed by the *Ingonyama* Trust. Although the finding of the unconstitutionality of CLARA has resulted generally in communal land tenure being in limbo, it did not impact on the land within KwaZulu-Natal. Unfortunately this in itself does not simplify the matter. Instead, the judgment has shown that in KwaZulu-Natal the specific history of each parcel of land has to be established precisely before the correct legal position can be ascertained.

4 Unlawful occupation

Emfuleni Local Municipality v Builders Advancement Services and Four Other Respondents (unreported (A5047/2011) [2012] ZAGPJHC 39 (2012-03-23)) finally attended to a matter that had been erroneously pending since 2010. This is the third time that the issues have been dealt with in court: firstly, interim relief was applied for on 8 December 2009 and granted by Kgomo J; secondly, by Willis J on 1 April 2010 in which the application was postponed *sine die* which postponement was linked to a 'request' that the matter be referred to a full court of the High Court division and thirdly, the present application being dealt with by Van Joosten J.

The applicant is owner and developer of a number of erven within the (undeveloped) township of Ironside/Debonair Park in Vereeniging. The unlawful sale of erven by the first and second respondents (Builders Advancement Services CC and Nangalembe Mbalekelwa respectively) occurred during October 2009. As soon as the unlawful sale was suspected and thereafter confirmed by way of an inspection, the applicant lodged an application on an urgent basis in the court for: (a) an interdict against (i) the first and second respondents to prevent them from fraudulently selling more erven; and (ii) further invasion of property; and (b) an eviction order against the third, fourth and fifth respondents respectively. The third respondent constituted 17 numbered erven that were unlawfully occupied, the fourth respondent constituted 'further unlawful occupiers' and the fifth respondent were the 'invaders of the township'. In the first judgment interim relief was granted, pending the finalisation of the eviction applications. The eviction application came up for hearing before Willis J. As mentioned, that judgment involved a *sine die* postponement, various directions relating to the filing of affidavits and other necessary documents and the referral request, mentioned above (paras 1-3). Though the matter was urgent and had immediately been dealt with in 2008 by Kgomo J, it erroneously ended up in the normal appeal channel, which resulted in a delay of two years. In this regard the court highlighted the prejudice to all the litigants involved (para 4).

Van Oosten J first dealt with the 'referral request' of Willis J to a full court and found that such a 'request' would only be possible after consultation with the

judge president (or his or her deputy) or another senior judge, having been appraised of the circumstances. Therefore, regarding the 'procedure' for referral, the route that had been followed in the present instance, was not feasible (para 4). Further, the reasons for referring a matter to a full court were briefly examined. Though there was not a *numerus clausus* of such instances, the following were the reasons usually cited for referring matters to a full bench (paras 5-6): (a) where the Judge was faced with conflicting decisions; (b) where the case to be considered was of national importance; (c) to ensure consistency and to develop a uniform practice; and (d) where the question arose whether an appeal against a determination by the Commissioner of Customs and Excise made in terms of section 47(9) of Act 91 of 1964 should be heard by a single judge or full court. However, the fact that an important legal point was involved, did not in itself, warrant the referral of the matter to a full court (para 5). Willis J specifically requested a referral due to 'the controversy and sensitivity surrounding this matter' (para 7). Having considered all the factors and the relevant circumstances, Van Oosten J found that these considerations did not provide sufficient reason for such a referral (para 7). In fact, the nature of the eviction proceedings and the different considerations and facts of each case would not enable a court to 'provide the clarity and guidance in the general terms sought by Willis J' (para 7). The court furthermore underlined that '(c)omplicated, emotional and vexing issues are a given in the conundrum of cases judges are required to deal with' (para 7). Accordingly, the matter was not referred to a full court and the investigation was confined to the present application.

The applicant did not proceed with the relief initially sought against the fourth and fifth respondents, mainly because they could not be identified properly (para 9). The first and second respondents were clearly guilty of fraudulent conduct in that they had sold the erven belonging to the applicant, to the third respondents. The court was satisfied that all of the requirements for an interdict had been complied with (para 11). With regard to the eviction application, the court emphasised that the present instances did not deal with indigent settlers within an informal settlement (para 12). The applicant, as owner, had acted immediately and sought to protect its property. On the other hand, the occupiers, though unlawful, were unfortunate victims of a deliberate and orchestrated scheme, fraudulently devised by the second respondent for his own benefit (para 13). In the present instance none of the occupiers asserted the need for alternative accommodation or implied that they were in need of emergency housing. There was also no evidence before the court that the eviction would render them genuinely homeless and in need (para 13). Having considered all the relevant circumstances, the court found that it was just and equitable to grant an eviction order (para 14). Accordingly, the relief sought in the form of interdicts and eviction orders was granted in full. The court ordered that the costs be borne by the first and second respondents as they were the parties who benefited from the unlawful

scheme. Although the frustration of judges dealing with difficult, emotive and complex matters generally, and more so in eviction cases that may result in people losing their homes, was clearly articulated in Justice Willis' judgment, the above judgment underlines that dealing with these difficult issues is exactly what is required from judges. Of course guidelines, rules and frameworks may assist justices in arriving at the correct answer, but it is impossible to sculpture guidelines that will operate for all cases in all instances. There is no turning away or avoiding complex and emotive matters. The courts will just have to do their best in difficult circumstances.

Lundy and Nieuwoudt v Nkomo, the Illegal Occupiers of Portion 3 of Holding 177 President Park Agricultural Holdings and the City of Johannesburg Metropolitan Municipality (unreported (19998/2011) [2012] ZAGPJHC 11 (2012-02-10)) involves an appeal against the granting of an eviction order affecting the former owner after foreclosure and sale in execution of property. The respondent and her erstwhile husband (since then divorced) purchased the smallholding by way of loans which were secured by two mortgage bonds. After non-compliance with the terms and their inability to make payments, the foreclosure occurred which led to the sale in execution of the property. The property was purchased by the first applicant who immediately thereafter sold the property to the second applicant. The latter purchased the property by way of a loan which was secured by a mortgage bond. The second applicant is the registered owner of the property. Though liable for the repayment of the loan as well as the rates and taxes pertaining to the property, the second applicant was unable to occupy the property as the respondent (and other persons), were still in occupation thereof. Instead, the second applicant had to secure alternative accommodation for his family (see paras 1-5 for background). As mentioned above, an eviction order was granted in default against the respondent, which order was now appealed. The respondent offered the following as defence, namely: (a) that she was still the owner of the property and could therefore not be evicted; (b) other persons were also in occupation with her, including her children, and that these occupiers were her responsibility as she provided them with shelter; and (c) an eviction order would adversely affect the right to education of her children (para 6).

The court per Moshidi approached the issue by first stating some applicable legal principles (para 7). This exposition started with a quotation from the well-known *Ndlovu v Ngcobo* case which set out the facts of the *Ndlovu* matter. This was followed by quoting paras 18-19 of the same case in which Harms JA emphasised that the court had the discretion to determine whether the granting of an eviction order would be just and equitable and thereafter dealing with the evidential onus. In light of the above the court concluded that, though it had sympathy with the respondent, her circumstances did not constitute a valid defence (para 7.1). In addition, the respondent and her family 'cannot truly be said to be poor and destitute' (para 7.1). As support for this statement the court

referred to the *PE Municipality* case and underlined that she still employed three domestic persons. Furthermore, the applicants had done what they had to and complied with the provisions of PIE, whereas the first respondent had done nothing to secure alternative accommodation through the third respondent (para 7.3). In this regard the following conclusion was reached: 'It is just and equitable for the first respondent and those who occupy property under her to be evicted there from, after considering all the circumstances as envisaged in *Ross v South Peninsula Municipality* 2000 (1) SA 589 (C)' (para 8).

It is not exactly clear from the judgment when the property was declared specially executable in terms of the mortgage bonds. However, the property was sold by the first applicant to the second applicant on 19 August 2010. The new position as to sale in execution of homes and dwellings compelling judicial overview and the consideration of specific factors, which had been incorporated in our law at the end of 2010 and the beginning of 2011 had thus not been incorporated in the present case. However, the eviction issue is addressed rather superficially, with a glaring absence of relevant and recent case law analysis. For example, the reference to *Brisley v Drotsky* is somewhat misplaced. Under the *Brisley* case circumstances that were of judicial relevance only, were considered. That meant that personal, including socio-economic considerations, were ignored, from the outset. The only two factors that were deemed to be relevant were ownership and unlawful occupation. This judgment was, however, overruled a few months later by the *Ndlovu v Ngcobo* judgment, which was ironically the first case that the court quoted to start its exposition of legal principles. Under the *Ndlovu* approach all relevant circumstances have to be considered, including personal and socio-economic factors. Apart from the fact that the present case and the *Brisley*-case can be distinguished on the facts, the *Brisley* case is not authority any more for the application of PIE as it had been overruled by the *Ndlovu* judgment. Various SCA and CC judgments had underlined the consideration of all relevant circumstances, including the possibility of suitable alternative accommodation, since the *Ndlovu* judgment. In the present case, no mention is made of whether the family have alternative accommodation available to them or whether such accommodation can be made available. The reference to the *Ross* case is equally unsuitable: the judgment is that of a division of the high court, which as mentioned before, has been influenced radically by the *Ndlovu* (SCA) and the numerous other CC judgments since 2000. It is incomprehensible that a judgement that was handed down in 2000, before the enormous case law developments linked to eviction, homelessness, dignity etc, was cited as authority. It is even more puzzling when it is kept in mind that PIE was not even applied in the *Ross* case, on which the court relied here. It may be possible that a case law analysis of more recent and relevant judgments may result in exactly the same conclusion that was presently reached here. However, a total absence of such a discussion and an avoidance of crucial developments in relation to the

consideration of all relevant circumstances, also in relation to eviction following foreclosure, is disconcerting.

The Occupiers of Saratoga Avenue v City of Johannesburg Metropolitan Municipality and Blue Moonlight Properties 39 (Pty) Ltd ((CCT 12/12) [2012] ZACC 9 (2012-05-24)) provided the reasons for dismissing an urgent application on 30 March 2012 brought by applicants that sought compliance with, or variation, of the order handed down by the CC in *Blue Moonlight 1 (City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC)). The latter judgment resulted from an application for leave to appeal to the CC against the decision of the SCA which, in turn, had heard it as an appeal from the South Gauteng High Court, Johannesburg. In the SCA the structural interdict and compensation order granted in the high court were both set aside, but the eviction was upheld. In the CC the first respondent (the City) sought leave to appeal against those parts of the SCA order that declared its housing policy unconstitutional and ordered it to provide temporary emergency accommodation to the Occupiers. The CC, presently hearing the matter, granted leave to appeal, but dismissed the appeal. The order at issue in the present application resulted from the Occupiers' conditional cross-appeal (para 3). In the cross-appeal the occupiers requested that any order of eviction be linked to the provision of suitable alternative accommodation by the City and that the City be ordered to take appropriate steps to remedy the housing policy. The court granted leave to cross-appeal and upheld the cross-appeal to the extent that the City was ordered to provide temporary accommodation in a location as near as possible to the area where the property was situated. The occupiers were ordered to vacate no later than 15 April 2012 (para 4). The occupiers lodged an urgent application, heard and dismissed on 30 March 2012. The application was based on an anticipated non-compliance by the City with its obligation to provide temporary accommodation to both the specific occupiers mentioned in the order and their close relations occupying premises through the Occupiers. Compliance was sought in relation to everyone – either on the basis of the order as it stood or if the original order did not include those occupying premises through the Occupiers, on the basis that the order should be varied to include them as well.

Dismissal by the court was on two grounds: (a) that the CC was the inappropriate forum in which to bring the application; and (b) that in any event, no case was made out for non-compliance or variation. Regarding the former ground, the CC confirmed that, in a successful appeal, the appellate court may make an order that the court of first instance should have made. Accordingly, that order then became the order of the court of first instance. Execution and enforcement of the order should then take place in that court (para 7). The reasons therefore were logical and practical (para 9). As the order of the appeal court merely corrected the original order, the court of first order was usually best equipped to deal with matters relating to the enforcement thereof. There was no indication in *Moonlight 1* that the CC would have a continued function in overseeing any further developments. It therefore had to be

accepted that the order of appeal became the order of the court of first instance (para 13). Therefore, the correct forum for the present application was the high court.

Apart from the technical problem with the application, it was also dismissed on the basis that it lacked merits. The order incorporated an implicit obligation on the City to engage meaningfully with the occupiers in the process of eviction. The CC had to date only incorporated such an obligation in instances when the state was the party that sought eviction (para 17). In the present instance the City and the occupiers negotiated a settlement agreement and postponed the date of eviction. In this process neither the City nor the occupiers consulted with the building owner, the second respondent. Therefore, no meaningful engagement occurred (para 17). These constituted the reasons for the CC's dismissal of the urgent application.

Arendse v Arendse (12659/2009) [2012] ZAWCHC 156 (2012-98-20)) dealt with an application to review and set aside the granting of an eviction order under section 4 of PIE by the Goodwood magistrate. The eviction order confirmed the eviction of a mother and her three minor children on behest of her ex-husband. The review application has been lodged by the evictee (the applicant) and is being opposed by the respondent, the owner of the house and the applicant's ex-husband. In 1995 the parties entered into a Muslim marriage which was followed by a civil marriage, in community of property, in 1996 (see paras 8-15). In the late 1990s the couple purchased their first property located at Aliwal Street, Ruyterwacht. The applicant in the present review proceedings paid the deposit for the house after which the respondent paid the monthly mortgage installments. In April 2000 the parties had a civil divorce. The divorce settlement granted custody of the three minor children to the applicant and included provisions setting out maintenance and child support responsibilities, as well as a monetary contribution of R13 000 to the applicant. The respondent's undivided share in the common property was thereafter transferred to the applicant. Despite the civil divorce, the family continued to reside together in the property located at Aliwal Street.

In July 2001 the respondent purchased a property located on Cecil John Rhodes Drive. While still in occupation of the house on Aliwal Street that property was put up for sale. Previously, under their Muslim marriage, a dowry consisting of a house was negotiated in favour of the applicant. After the purchase of the property in Cecil John Rhodes Drive the parties divorced under Muslim rites, but still continued to stay together as a family in the Aliwal Street property until it was sold. The proceeds of the sale of the Aliwal Street property, after payment of the bond, were used for extensions to the Cecil John Rhodes property. Later in 2003, after the Muslim divorce was finalised, the whole family, including both parties and their three minor children, relocated to the Cecil John Rhodes property. Both parties agreed that the move was for the benefit of the children. The applicant and the children lived in the house while the ex-husband resided in a separate building at the back. The whole family shared a bathroom (para 14).

In 2009, after allegations that the respondent had sexually molested one of his minor daughters, the applicant approached the Muslim Judicial Council claiming her dowry. The applicant contended that the Cecil John Rhodes property was to be her dowry, while the respondent argued that the dowry had been settled when the applicant received the proceeds of the above-mentioned Aliwal Street sale. The respondent thereafter instituted eviction proceedings against his former wife on the following grounds: as sole owner of the property located at Cecil John Rhodes Drive he had consented to his former wife occupying the premises temporarily on the basis that rent of R800 was paid monthly. As she failed to pay the rent, he withdrew his consent, thereby resulting in her occupation being unlawful (para 16). He further stated that the applicant's presence in the house was problematic due to her being bi-polar and epileptic, as well as her erratic and impulsive behaviour as a gambler (para 17). He further contended that she received a pension payment, that she was financially independent and that she could rent her own accommodation if necessary (para 18). In response, the applicant argued that not only was she unemployed, but she was totally unemployable due to her medical conditions. She further contended that she was not financially independent, that her erratic and impulsive behavior was grossly exaggerated and that it would not be in the best interests of her children if she were to leave without them, especially in light of the fact that she was granted custody in the divorce settlement. Despite these contestations, the eviction order was duly granted against her as well as those occupying with or under her. Though no reasons for the eviction were initially set out by the magistrate, the following reasons were proffered eight months later when the review application was launched (paras 22-25): (a) the applicant was the sole owner of the property concerned; (b) as consent to occupy had been withdrawn, the occupier became an unlawful occupier; (c) a mere denial that the occupier could not afford alternative accommodation was insufficient – the necessary proof had to be placed before the court; and (d) the dowry could not be considered as Muslim marriages were not recognised in South Africa. The eviction order was thus granted, adding that the applicant could proceed with her monetary claims against the respondent.

Due to the suspension of the eviction order pending the final determination of the review application, the parties continued to reside together in one property. The respondent remarried in the course of 2011 and lived with his wife on the property as well. Since the eviction order was granted, some alterations to the main house had been done by the respondent resulting in the structure being without the necessary ventilation for the applicant and her children and preventing natural light from entering the house. The applicant furthermore feared that the eviction order was an attempt to gain *de facto* custody of the children if the applicant were to leave the property (para 28).

In the process of reviewing the granting of the eviction order, the court per Meer J considered section 4(6) and (7) of PIE in particular. Section 4(6) is relevant

in instances where unlawful occupation has been less than 6 months and section 4(7) in instances where unlawful occupation exceeded six months. Irrespective of the actual duration of unlawful occupation, the court emphasised that all relevant circumstances had to be considered before a court was able to determine whether the granting of the order would be just and equitable (para 31). Accordingly, though certain provisions underlined that the rights and needs of children, the disabled, elderly and female-headed families had to be considered in particular, all relevant circumstances had to be considered overall. Because alternative accommodation was crucial to the particular facts and circumstances of this case, it had to be considered, irrespective of the duration of unlawful occupation (para 33). With reference to *Port Elizabeth Municipality v Various Occupiers* (2005 1 SA 217 (CC)) the court further underlined that courts were enjoined to seek concrete and case specific solutions (para 34). Actual, active judicial management, according to equitable principles, was what was required (para 35). Courts were furthermore obliged to be innovative and, if necessary, to depart from the conventional approach in this endeavour. In this regard the court was satisfied that the magistrate, in granting the eviction order, 'fell short by far' in fulfilling this task (para 36).

It is ironic that the circumstances and facts of this case were directly aligned to the factors listed in section 4(6) and (7) which dealt with children, the disabled and female-headed families in particular. The rights and needs of the minor children were never considered by the magistrates' court. There was no investigation as to what the needs of the children were and how the eviction, if granted, would impact on their rights and needs, including – but not limited – to their schooling situation (para 38). The fact that the granting of the eviction order would render the mother and her minor children homeless, was glaringly ignored. The applicant herself was furthermore particularly vulnerable, being unemployed and disabled. This dimension was never really considered by the court either. Instead, the magistrate's reasons for his judgment focused on the first respondent's property rights at the expense of the circumstances of the applicant and her minor children. The magistrate's approach is rather reminiscent of the 'old' pre-Constitutional approach to the *rei vindicatio* dealing with immovable property. The magistrate found that the applicant failed to present her case properly and fully. However, the magistrate failed to take cognisance of the many defences that she had raised during the hearing (para 43). The magistrate did not consider the factors listed in section 4 of PIE fully. Nor did other guidelines or directives that had been issued under more recent case law developments, *inter alia* under *Lingwoord v Unlawful Occupiers of R/E of Erf 9 Highlands* ((2008 3 BCLR 325 (W)), been considered. In this regard the court found that: 'The circumstances of this case, involving as they did, the unfortunate family dynamic of a father seeking to evict his 3 minor children together with their mother, cried out, one would have thought, for a solution by way of mediation and engagement short of going to court' (para 45). Accordingly, mediation, a method that had been suggested many times before in case law, was not even considered

in these circumstances. Instead, the magistrate 'considered his role to be that of passive evaluator of evidence placed before the court' (para 46). Overall, the court in the present proceedings was satisfied that the applicant was entitled to an order reviewing and setting aside the eviction order. She was also granted an order that confirmed that the eviction order previously granted had infringed her rights under section 26 of the Constitution (para 49).

This judgment illustrates that ownership and property rights do not always trump other rights, including (unlawful) occupational rights. Instead, all circumstances have to be considered and in light of what is just and equitable, one right may supersede another. In this context, in these circumstances, the rights and the best interests of children and the needs of the disabled and vulnerable were considered to weigh more than the right to property. This end result may differ in another case where the facts and the circumstances are different. Only when all the facts and circumstances are before the court, will the court be able to consider whether the granting of an eviction order is just and equitable. In this regard the emphasis on an active participatory role for magistrates and judges is welcomed. However, the following questions remain: is the (unlawful) occupation, against the wishes of the owner, to remain indefinitely? What are the implications of this for owners of immovable property? What about the allegations of sexual molestation by the father of the minor child? Is the setting aside of the eviction order in the child's best interest if the child and the alleged perpetrator reside on the same premises? How would that particular factor have impacted the scale when the various factors were weighed?

5 Housing

In *Pheko v Ekurhuleni Metropolitan Municipality (Socio-Economic Rights Institute of SA as Amicus Curiae)* (2012 4 BCLR 388 (CC)) the Ekurhuleni Municipality declared a local state of emergency in terms of the Disaster Management Act 58 of 2002 (DMA) due to the possible risk of sinkholes in the area where people lived. The municipality issued directions for evacuation and demolition of homes in terms of section 55(1)(d) of the DMA. The occupants alleged 'that they were being unlawfully and forcibly evicted from their homes and that their homes were being demolished. The forcible eviction and demolition of their homes without an order of court, they argued, not only violated their constitutional rights in relation to housing but also their right to have their dignity respected and protected. The applicants also contended that the conduct of the Municipality was not in line with PIE. Also, they argued that they were intimidated by the "Red-Ants", hence their urgent interdictory application' (para 13).The court found that 'that in engaging the DMA to evict the applicants and demolish their homes without an order of court, the Municipality acted outside the authority conferred by the DMA and contrary to section 26(3) of the Constitution' (para 45). The Minister for Human Settlements and the Public

Protector initiated investigations into corruption and maladministration in the provision of social housing. The provision of sub-standard houses by the private sector will also be investigated (see *Legalbrief Forensic* (2012-08-09)).

The South African Council for the Project and Construction Management Professions published rules regarding the payment of annual fees for registered persons with its council in terms of the Council for the Project and Construction Management Professions Act 48 of 2000 (BN 196 in *GG* 34807 of 2011-12-02). Calls for nominations for non-executive directors for the Housing Development Agency Board were published (Gen Not 868 in *GG* 34811 of 2011-12-09; Gen Not 197 in *GG* 35137 of 2012-03-09).

The Minister for Human Settlements published Social Housing Regulations in terms of the Social Housing Act 16 of 2008 (GN R51 in *GG* 34970 of 2012-01-26). The regulations deal amongst others with the accreditation of social housing institutions (regs 2-3; Annexure A); their registration (reg 4) and compliance monitoring (regs 6-16). The regulations also provide for a code of conduct (reg 17). The regulatory authority may invest in a social housing institution if it complies with certain criteria that are set out in regulations 18-28. The regulatory authority has certain powers relating to entry, enquiry and seizure of documents (reg 30). The regulations provide for cooperative agreements with other delivery agents, provincial government and the National Housing Finance Corporation (regs 31-33).

6 Land use planning

The Spatial Planning and Land Use Management Bill [B14-2012] was formally introduced in Parliament during 2012 (Gen Not 5124 in *GG* 35445 of 2012-06-15); for a discussion of the Bill see Pienaar, Du Plessis and Olivier 'Land matters and rural development: 2011' (2011) 26 *SAPL* 523-565). The Cities Network published a report on planning law reform in South Africa drawing attention to problems of a fragmented planning structure in South Africa and stressed the need to finalise national legislation and to provide standard draft provincial and local legislation in this regard (Cities Network *Addressing the crisis of planning law reform in South Africa* (2012)). A call for nominations to serve on the South African Council for Planners as well as Appeal Board in terms of the Planning Profession Act 36 of 2002 was also published (Gen Not 420-421 in *GG* 35382 of 2012-05-25; Gen Not 550, 562 in *GG* 35514 of 2012-07-13).

An Office of the Surveyor General was established for the Eastern Cape and the name of the Officer of the Surveyor General for Cape Town was renamed Surveyor General of the Western Cape (GN 494 in *GG* 35463 of 2012-06-29). The Director-General of Rural Development and Land Reform prescribed fees in terms of section 8 of the Land Survey Act 8 of 1997 (Gen Not 283 in *GG* 35212 of 2012-04-05).

The City of Tshwane budgeted R301.9m to purchase land for social housing projects within more affluent areas within the cities. The idea is to provide workers

with low cost housing within reach of their workplace (for example, domestic workers, gardeners etc). (Claassen '"Armes" na ryk buurte' *Beeld* (2012-05-31) 1).

7 Deeds

An amended schedule of fees was published in terms of the Deeds Registries Act 47 of 1937 (GN R166 in *GG* 35083 of 2012-02-29).

8 Sectional titles

The Registrar of Deeds published a notice with regard to the filing of a sectional title file under the provisions dealing with lost or destroyed documents (section 25(2) of the Sectional Titles Act 95 of 1986, 578 Zwavelpoort, Tshwane Metropolitan Municipality – Gen Not 648 in *GG* 35587 of 2012-08-17).

9 Agriculture and rural development

9.1 Agriculture

In the Annual Report 2011/2012 of the Department of Agriculture, Forestry and Fisheries (DAFF) (http://www.daff.gov.za/.../2011_12/AR2012.pdf), the Minister indicated that the main focus was on the alleviation of poverty, the creation of employment and the improvement of food security, as well as the conservation and the sustainable utilisation of South Africa's natural resources. Threats experienced during the period under review included climate change and animal diseases (p ix), as well as 'food inflation with severe hikes in the price of basic food'. DAFF initiated the National Farmer Registration Process in KwaZulu-Natal, which will establish a comprehensive database of all agricultural producers with respect to ownership, demographics, production capacity, the categories of products and employment per geographical area. The vision of DAFF is 'a leading, dynamic, united, prosperous and people-centred sector', and its mission focuses on economic growth and development, job creation, rural development, the sustainable use of natural resources, and food security (p 8).

On 13 March 2012 the DAFF Director-General presented the five year Strategic Plan 2012/2013-2016/2017 (http://www.pmg.org.za/node/31149) to the Select Committee Land and Environmental Affairs. A number of challenges are identified, including '(i)nterdependence on (i)ntergovermental coordination' and '(i)nadequate monitoring and enforcement in the sustainable use of natural resources' (4-5). DAFF contributes to Outcome 7 ('vibrant, equitable, sustainable rural communities contributing towards food security for all') and Outcome 10 ('protect and enhance environmental assets and natural resources') (p 6). It provides for a number of development targets through programme interventions, such as the increase of smallholder farmers from 200 000 to 250 000 (2014) and

employees on commercial farms to increase from 780 000 to 800 000 (2014); the creation of 145 000 employment opportunities in agro-processing (2020); the rehabilitation of 3.2 million ha of agricultural land (2014), and the placement of 300 000 households smallholder schemes (2015) (p 7). The departmental key programmes include for example agriculture production, health and food safety (16-20), food security and agrarian reform (21-24), forestry and natural resource management (29-35). Some of the 2012/2013 programme outputs are the review of legislation administered by DAFF; the development of an intergovernmental strategy and the alignment thereof with the departmental mandate and the alignment of provincial departments of agriculture's (hereinafter PDoA) programmes with those of DAFF).

9.2 Rural Development and Land Affairs

The Annual Report of the DRDLR for the financial year 2010-2011 (http://ww2.ruraldevelopment.gov.za/.../rdlr_annual_report2011.pdf) stated that the vision of the DRDLR was 'vibrant, equitable and sustainable communities' and that its mission had changed to 'initiate, facilitate, coordinate, catalyse and implement an integrated rural development programme' (p 7). During the period under discussion, the Office of the Chief Land Claims Commissioner was reorganised, and the provincial restitution support staff were transferred to DRDLR (p 19). As regards the Recapitalisation and Development Programme (hereafter RDP), established to turn around unsuccessful restitution and redistribution farms, a new approach as regards the selection of strategic partners (especially as mentors) and the identification of able redistribution beneficiaries was implemented (p 10). A further 411 farms were being developed (p 18). Within the context of the Comprehensive Rural Development Programme (hereafter CRDP), two small rural towns (Prince Albert Hamlet and Dysselsdorp) had been revitalised (p 11). Cooperation with a number of other national and provincial government departments resulted in the successful implementation of a youth pilot development programme as provided for in the National Rural Youth Service Corps (hereafter NARYSEC) (p 11).

The DRDLR Director-General indicated that the CRDP made major strides during the period under review, as 16 225 community and institutional gardens were established, and 1 918 gardens and two agri-parks with a view to increasing food security. The CRDP was rolled out in 39 municipal wards, and 221 cooperatives were established (p 13). As regards redistribution, 322 845 hectares were made available to 3 089 beneficiaries (p 18). Of the restitution claims, 457 were settled, and 124 507 hectares were restored, benefitting 13 310 households (p 13-14).

The 2011/2012 Annual Report of the DRDLR (http://ww2.ruraldevelopment.gov.za/.../rdlr-annual-report-2012.pdf) covers the third year of the Department's

existence (p 10). Even though numerous targets were met, the Minister stated that 'our progress has not yet kept pace with our expectations' (p 10). Some encouraging examples of the Department's performance in the year under discussion include the creation of 9 889 employment opportunities in all CRDP initiatives, the fact that there were approximately 8 000 participants in the NARYSEC programme by 31 March 2012, the capacitation of 3 819 CRDP beneficiaries, and the training of 2 589 individuals from four communities in agricultural enterprise management (p 10-12). DRDLR over-performed regarding its target of identifying five technologies suitable for small farmer production – a total of 14 appropriate technologies were identified. In addition, innovative technologies were introduced in 44 communities (p 12). A total of 392 849.71 ha of land were acquired by the Department, and 257 farms recapitalised. The CRLR settled 416 claims between April 2011 and March 2012, benefiting 14 437 households. A total of 98 484 ha of land were approved for restoration. The total award cost approved in terms of the settlements was R1 544 170 711.27, benefitting 72 796 beneficiaries (p 13). A total of 209 backlog restitution claims were finalised and 416 claims were settled (p 17).

DRDLR successfully audited 54% of state land, verified 623 078 (out of a total of 1 155 508) land parcels, and updated the comprehensive land register by the end of March 2012 (p 16). Challenges experienced by the Department included disputes amongst beneficiaries, untraceable claimants, exorbitant land costs, disputes relating to the validity of claims by farmers and protracted negotiations. A new departmental structure was developed and there was a change in political leadership, when the Deputy Minister was replaced (p 17). The Annual Report 2011-2012 of the CRLR (http://ww2.ruraldevelopment.gov.za/.../Annual_Report_Commission_on_Restitution_of_Land_Rights.pdf) indicated that the total capital expenditure for the financial year was R2b (R1,1b for land acquisition and transfer costs, R761m for financial compensation, and R87m for development grants) (p 8). The Report identified a number of external challenges such as 'community and family disputes; demands for exorbitant amounts for the land that is claimed; boundary disputes between communities; disputes between communities and office bearers in communal property institutions; traditional leadership; unavailability of resources; both human and financial' (p 14).

According to the DRDLR Annual Performance Plan 2012/2013 (hereafter APP (http://d2zmx6mlqh7g3a.cloudfront.net/.../120530presentation_0.pdf) the key thrust of DRDLR is (p 3): 'addressing the triple challenges currently facing South Africa namely, poverty, inequality and unemployment with specific bias rural areas ... to be achieved through up-scaling the Comprehensive Rural Development Programme (CRDP), job creation and socio-economic infrastructure development'. The eight DRDLR Strategic Goals and Objectives (http://ww2.ruraldevelopment.gov.za/.../Annual%20PerformancePlan-07032012.pdf) are (p 25): (1) Corporate governance and service excellence through compliance with a legal framework achieved by 2014;

(2) Reformed policy, legislative and institutional environment by 2014; (3) Effective land planning and administration that is biased towards rural areas; (4) Integrated institutional arrangements for effective cooperative governance and stakeholder participation by 2014; (5) Increased access to and productive use of land by 2014; (6) Improved access to affordable and diverse food by 2014; (7) Improved rural services to support sustainable livelihoods by 2014; and (8) Improved access to sustainable employment and skills development opportunities by 2014. These goals are linked to the Millennium Development Goals, the 2012 State of the Nation Address and Outcome 7 ('the creation of vibrant, equitable and sustainable rural communities and food security for all') (p 12). As regards redistribution, DRDLR planned to acquire 321 122 ha; 416 new farms will be recapitalised; eight irrigation schemes will be revitalised; 288 new land reform jobs will be created; and 595 farmers will be trained (p 40). Strategically located land will be acquired and allocated to redistribution beneficiaries (p 39). With respect to restitution, it is envisaged that 380 land rights will be restored, or awards of alternative equitable redress finalised, as well as that 133 land claims will be settled (p 37). All validated claims in respect of state land will be transferred, and that all financial compensation claims will be finalised (p 37). The CRDP will be rolled out in the 22 prioritised poorest districts, and job creation will be effected by means of infrastructural projects and rural enterprises (p 36).

9.3 Land Bank

The Land Bank, which currently reports to the Minister of Finance, celebrates its centenary this year. In its Annual Report 2011/2012 (http://www.landbank.co.za/), it is indicated that 13 335 new job opportunities had been created and that, on account of its successful turnaround strategy, an additional R200m had been allocated for developmental purposes. The new banking division, retail emerging markets (hereinafter REM) focuses strongly on providing support to small scale farmers and assisting them in becoming commercial farmers (p 3). The wholesale finance facility provides concessionary lending rates for emerging farmers, in respect of which an interest subsidy scheme has been implemented; within this context, more than 800 farmers have benefited (p 9). Lending rates for commercial farmers and agricultural bodies that work with emerging farmers in respect of skills transfer and the provision of after-care services are also lowered. Its fit for future programme provides for the attainment of the following four interrelated outcomes by 2016/2017: predictable and enhanced customer interaction, development impact, a growing business that is based on clear achievable targets, and a sustainable delivery channel network (p 9).

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