

Land matters and rural development: 2013 (2)

1 General

Three new Policy Frameworks were published on 23 July 2013 (see *Land Reform* below). This recent increase in legislative and policy document activity may be linked to the Government's general reconsideration of land reform matters in the light of the centenary of the commencement of the Black Land Act 27 of 1913. Renewed activity within the broad field of land reform is also connected to the developmental approach that has become more pronounced since 2009.

The Department of Rural Development and Land Reform (DRDLR) had already decided in 2010 to embark on a comprehensive land audit as it was 'clear that records of who earned what in South Africa; where, and what proportion of this belonged to the State, ... were uncoordinated, inadequate and incomplete'. The State Land Audit gathered information relating to the identity of the owner as well as that of the occupier/user, the rights to the land, its current usage, and the buildings and improvements existing on the land concerned.¹

Registered state land is defined as land owned by the state (national, provincial, municipal and parastatals) and registered in the Deeds Registrar's Office as such.

Unregistered state land comprises surveyed land belonging to the state without being registered in the Deeds Office. Of the total surface area of South Africa (121,973,200 ha), 7% is currently still unaccounted for, 14% is state land and 79% is private land. The ratio of state land to private land per province (excluding the land unaccounted for) is as follows: Eastern Cape 9:67%; Free State 7:91%; Gauteng 17:65%; KwaZulu-Natal 50:46%; Limpopo 20:70%; Mpumalanga 25:63%; North West 23:71%; Northern Cape 5:94% and Western Cape 8:89%.

The former TBVC areas and self-governing territories (approximately 13% of South Africa) have the following extent: Ciskei 947,960 ha; Gazankulu 746,925 ha; KaNgwane 366,314 ha; KwaNdebele 337,332 ha; KwaZulu 3,938,362 ha; Lebowa 2,249,748 ha; QwaQwa 114,525 ha; Transkei 5,094,446 ha; Venda 646,993 ha; and Bophuthatswana 3,991,519 ha.

¹Land Audit http://www.gov.za/speeches/docs/2013/land_audit.pdf (accessed 2013-09-26).

Currently, the DDLR is not in a position to identify the extent of South African land held by foreign individuals, companies and trusts. In August 2013 it was announced that a further land audit will be undertaken to determine racial and foreign land ownership patterns. It is proposed that a land management commission will be instituted to undertake this task.²

According to the 2012 Development Indicators Report,³ a total of 76 705 restitution claims (as lodged by the final submission date of 31 December 1998) had been settled at the end of the financial year 2011/2012; 77,334 claims were settled by 31 March 2013. In 2010/2011, 1 495 claims were settled, and in 2011/2012, 1 835 claims. (Settled claims within this context mean the issuing of a certificate in terms of section 42D of the Restitution of Land Rights Act 22 of 1994 by the Minister for RDLR.) The Report acknowledged that 'insufficient attention was given to ensuring finalisation and sustainable development of land restored to beneficiaries'.

As regards Land Redistribution, 3 840 355 ha had been acquired by the end of 2011/2012, but 1.5 million ha still needs to be transferred to beneficiaries. The identified shortcomings included issues relating to access and availability of land for urban-based economic development, as well as the 'under-utilisation of newly acquired land by beneficiaries (which concern is currently being addressed by the recently introduced Recapitalisation and Development Programme – see discussion below). A major policy shift is envisaged in order to bring about improved spatial planning as well as proper land use and management. In addition, it is realised that effective post-settlement support is an indispensable requirement for the success of the Land Acquisition and Redistribution Programme.

In this note, the most important measures and court decisions pertaining to restitution, land redistribution, land reform, housing, land use planning, deeds, sectional titles, agriculture and rural development are discussed.⁴

2 Land restitution

The Minister for RDLR published his intention to introduce the Restitution of Land Rights Amendment Bill of 2013 in the National Assembly. The Bill will amend the cut-off date for the lodging of claims for restitution to 31 December 2018.⁵

²*Legalbrief Today* (2013-08-20) <http://www.legalbrief.co.za>.

³http://www.thepresidency-dpme.gov.za/dpmewebsite/_admin/Images/Product Documents/Final%20to%20the%20printers.pdf; see also Commission of Restitution of Land Rights; Annual Report 2012/2013 <http://d2zmx6mlqh7g3a.cloudfront.net/cdn/farfuture/aPvY-7Ri2k4A6TAdjT66nkKfVUI1hMsXZfSmQffHl/mtime:1375949479/files/130806annreport.pdf> ((accessed 2013-09-26)).

⁴In this note the most important literature, legislation and court decisions are discussed for the period 2013-05-01 to 2013-09-15.

⁵Clause 1.

According to the Memorandum to the Bill this was necessitated by the number of persons and communities who were excluded from the restitution processes. These persons include 'those who could not lodge claims by the cut-off date of 31 December 1998, those dispossessed before 1913, and those dispossessed through betterment planning schemes and not allowed to lodge their claims to the Commission'. The window period to lodge the claims was too short and not everyone was informed about the requirement of the lodging of the claims. The research methodology that informed the restitution process was, according to the Memorandum, poor and the verification systems inadequate.⁶

The eventual Act will regulate the advertisement of claims in the media circulating nationally and in the provinces;⁷ will provide that the lodging of fraudulent claims will be an offence;⁸ will regulate the appointment, tenure of office and appointment of the judges of the Land Claims Court (LCC)⁹ and will extend the Minister's powers of delegation.¹⁰ The Bill has been severely criticised and it is speculated that the Bill may be unconstitutional.

According to the Commission of Restitution of Land Rights' Annual 2012/2013 Report referred to above, 92,187% (71,292 claims) were settled by means of financial compensation (as elected by the successful beneficiaries concerned), whilst only 7.813% (6,042 claims) were settled by means of the restoration of land. If the 92,187% had opted for restitution of land, an additional 1.992 million ha would have been transferred in terms of the Restitution Programme (which would have resulted in a total of approximately 5 million ha of land acquired). In the financial year 2012/2013, 376 claims – in respect of 111,278 beneficiaries were finalised, resulting in the transfer of 195,967 ha (acquired for R1,57 billion) and the payment of financial compensation, amounting to R993 million. It is envisaged that with the re-opening of the restitution process, successful claimants would be encouraged to opt for restoration (in which case they will also benefit by participating in the Recapitalisation and Development Programme – see discussion below). In order to deal with the backlog of claims that have not yet been settled, the Commission entered into agreements with the HSRC, Unisa and other tertiary institutions to provide research support, and has been utilising the DRDLR Land Rights Management Facility's mediation services (which provided R11,4 million for legal representation of impoverished claimants).

2.1 Notices

Several land restitution notices were published (Western Cape: Wellington;

⁶Paragraph 2.1-2.3.

⁷Clause 2.

⁸Clause 4.

⁹Clause 5-6.

¹⁰Clause 12 – GN 935 in GG 36826 of 2013-09-13.

Worcester Piketberg, Muizenberg, Gugulethu 1 each; Northern Cape: Frances Baard, Siyanda District Municipality 1 each; KwaZulu Natal: Durban 1, no district 2; Gauteng: Tshwane 5, no district 1; Limpopo Greater Tzaneen, Vhembe 1 each; Eastern Cape: Mt Fletcher 9, East London 4, Lady Frere 1, Stockenstrom/Inkwanca 12; Mpumalanga: Nkangala 1, no district 7; Free State: Vrede 1). A number of withdrawal and amendment notices were also published (KwaZulu Natal: withdrawals 4, amendments 3; Gauteng 2 withdrawals; Limpopo 1 amendment; Mpumalanga 2 withdrawals and 10 amendments). Each year witnesses less notices being published which is a good sign that the administrative processes are coming to an end.

2.2 Case law

*Matladi v Greater Tubatse Local Municipality*¹¹ dealt with an application for leave to appeal, linked to the prospect of interdicting developments within the local authority's jurisdictional area. This was not the first time the matter was dealt with in court; instead, it had a long history in which it had already been brought before the LCC and the Supreme Court of Appeal (SCA) before reaching the Constitutional Court (CC). In light of the fact that the applicant's deceased mother lodged a claim with respect to farm land which was in the process of being developed, with massive developments still planned, the applicant lodged an application interdicting proposed developments under section 6(3), read with section 11(7) of the Restitution of Land Rights Act 22 of 1994.¹² The developments included the laying out of new townships, providing the necessary infrastructure and roads and the provision of basic services, including water and electricity, all of which encompassed millions of rands. The application was unsuccessful in the LCC on procedural grounds but also on the basis that the balance of convenience and fairness did not favour the granting of the order restraining further developments because, if the claim succeeded, the applicant could still be awarded undeveloped or other land or equitable redress. The applicant thereafter approached the SCA for leave to appeal which was also refused.

The grounds for the present application in the CC were *inter alia*:

- (a) that the SCA misdirected itself by relying on *King Sabata Dalindyebo Municipality v KwaLindile Community*¹³ which had in the meantime been set aside by the CC in *KwaLindile Community v King Sabata Dalindyebo Municipality*; ([2013] ZACC 6; 2013 (5) BCLR (CC)), and
- (b) that the interdict ought to have been granted because the municipality

¹¹2013 JDR 1337 (CC), delivered on 14 June 2013.

¹²Hereafter Restitution Act. See for background paras 3-8.

¹³[2010] ZASCA 96 (*King Sabata*).

did not make use of a section 34 application as it was obliged to do. In considering whether the application for leave to appeal ought to be granted the CC underlined that the matter had to raise a constitutional issue and that it must be in the interests of justice to grant the appeal.¹⁴ Because a claim for restitution raised constitutional issues, the application was permissible.

Section 6(3) of the Restitution Act had a specific function. The underlying reason for making provision for the possibility of an interdict was located in the risk that the objectives of the Act could be frustrated.¹⁵ While the LCC spent a lot of time and energy on the procedural requirements the CC found that, even if the procedural requirements had all been met, the application would still falter on the ground that the appeal had no prospect of success.¹⁶ In this light the approach followed by the LCC was correct, namely that the balance of fairness did not favour the applicant. The reason for that was that the applicant could still be successful with his land claim and could still receive restoration, albeit not necessarily actual or specific restoration. To that end, the objectives of the Restitution Act would still be achieved.¹⁷

The CC also drew a distinction between this matter and the *KwaLindile Community v King Sabata Dalindyebo Municipality* case. The present matter was based on an interdict while the *KwaLindile Community* case was a section 34 application. Under section 34 of the Restitution Act government bodies and organs of state may apply to have land or portions of land located in their jurisdictional areas removed from the restitution process. That removal had to be in the public interest. Section 34 procedures therefore played a very specific role and were distinguishable from the present matter, based on an interdict. While the Restitution Act provided for such a procedure under section 34, local authorities or organs of state were not compelled to follow that route. Instead, the choice of a local authority not to launch a section 34 application provided no reason for a court to grant an interdict as prayed for here.¹⁸ Furthermore, prohibiting the municipality from delivering housing and basic services would prevent the municipality from fulfilling its constitutional duties.¹⁹ Thus, the interdict was properly refused and the CC found that it would not be in the interests of justice to grant leave to appeal. This judgment is a clear indication that, while there is a constitutional right to lodge restitution claims under section 25(7) of the Constitution where relevant, there is no right to specific restoration.

¹⁴Paragraph 11.

¹⁵Paragraph 13.

¹⁶Paragraph 16.

¹⁷Paragraph 16.

¹⁸Paragraph 18.

¹⁹Paragraph 18.

*The Baphiring Community v Tshwaranani Projects*²⁰ embodied an appeal against the LCC judgment handed down in *Baphiring Community v Uys*.²¹ In the *a quo* judgment the LCC decided against the actual restoration of certain parcels in land to the claimants, based on economic and capacity considerations. The essence of the decision was that actual restoration would be too costly and that the state would not be able to afford it, and therefore it was not in the public interest to make the actual restoration. In the SCA judgment per Cachalia JA (with Shongwe, Majiedt JJA, van der Merwe and Mbha AJJA concurring) the court underlined that, in light of the evidence placed before the LCC, it was understandable that the court *a quo* reached its final conclusion of non-restoration. However, as detailed evidence was clearly lacking or absent, the LCC was in no position to consider fully whether actual restoration ought to take place. To that end the court ought to have called for sufficient (additional) evidence to be placed before it. In this regard both the Commission on the Restitution of Land Rights and the LCC had important roles to play. As the LCC did not call for such evidence, it constituted a material irregularity that vitiated a non-restoration order.²²

Consequently, the appeal was upheld and the matter was remitted to the LCC for consideration and to determine anew the feasibility of actual restoration. While reconsidering the matter, the LCC would have to consider the long list of factors set out in the detailed order handed down by the SCA.²³ Included in the list of factors are, *inter alia*, the nature of the land and the surrounding environment at the time of dispossession and changes that have taken place on the land in the meantime; official land use planning measures governing the land concerned; the cost of expropriating the land (including mineral rights, if relevant); institutional and financial support to be made available for resettlement; the extent of compensation to be paid to the current owners of the land and the full details regarding the number of current occupiers, as well as the number of persons to be settled. Should land be restored, the issue of 'overcompensation' would also have to be considered. Finally, any issue that may have a bearing on the feasibility of restoring the land to the claimant community would also have to be considered.

The above order handed down by the SCA regarding the list of factors to be taken into account concerning actual restoration is both detailed and nuanced. It highlights that considering whether the land is to be restored is a complex and multi-dimensional matter. While economic considerations obviously come into play, the issue extends to financial considerations only. It is critical to place all the necessary information before the court. Having regard to the list of factors, the end result may still be that of non-restoration, but by then an all-encompassing,

²⁰Case number 806/12, [2013] ZASCA, 6 September 2013.

²¹2010 3 SA 130 (LCC).

²²Paragraphs 18-19.

²³Paragraph 22.

in-depth analysis has occurred in terms of which all relevant factors were considered. The duty on courts to grant effective relief also resonated here: where evidence is lacking, the court has to call for additional evidence to be placed before it. Only when all relevant information is before the court can a considered and carefully weighed decision be made.

3 Land reform

In the course of 2010 the DRDLR announced the Recapitalisation and Development Programme (RADP) in light of the dismal success rate of land reform projects since 1994. In March 2011 a Policy Framework for Recapitalisation and Development was published and in 2012 implementation guidelines were announced. In July 2013 a revised Policy for the Recapitalisation and Development Programme was again published, aimed at the revitalisation and resuscitation of struggling projects. Apart from its resuscitation function, the Programme is also aimed at assisting all land reform farms to become 100% productive and to rekindle the class of black commercial farmers destroyed by the 1913 Black Land Act.

The Programme would apply to past and future land transactions and included all categories of property acquired and still to be acquired for land reform purposes (including state and public land such as commonage). While the 2011 Policy placed particular emphasis on the promotion of equity schemes, the 2013 Policy was clearly more farmer-oriented. In this regard the particular aim of the Policy was formulated as follows:²⁴

The policy seeks to provide black emerging farmers with the social and economic infrastructure and basic resources to run successful agricultural business. It is the intention of the policy that black emerging farmers are deliberately ushered into the agricultural value-chain as quickly as is possible, through state intervention. This is a strategic farmer support policy by the developmental state.

While the 2013 Policy document is more detailed than its predecessor, it still has not provided more information on the particular criteria for the selection of participants. In light of the main objective alluded to above, the Policy is to be implemented in the 23 poorest districts in South Africa. In this regard the spatial development frameworks of various regions will play an important role, as provided for under the Spatial Planning and Land Use Management Act 16 of 2013. Regarding the criteria for selection the 2013 Policy underlines that farmers will be selected on the basis of their 'commitment, ability and passion for hands-on-farming'.²⁵ The information from both farm assessment and profiling will be used in the selection process. Again, insufficient information is provided regarding the farm assessments and profiling as such. Because the overarching aim is

²⁴Policy July 2013 at 10.

²⁵Policy July 2013 at 15.

resuscitation, the following categories of properties will come into play:²⁶ selected distressed lands reform properties; properties selected by the District Land Reform Committees; sites within former homelands and other communal areas; and farms, acquired by individuals or collectives from historically disadvantaged communities in need of strategic support.

From the above it becomes clear that a new institutional framework with particular bodies and institutions is required and that the Policy extends to communal land as well. In this regard the 2013 Policy extends the initial 2010 focus that was on land reform projects only. The Policy provides for a complex structure for monitoring, including institutional and financial monitoring and tax compliance. To that end all applicants must have legal entities that comply with South African Revenue Services and have to submit a comprehensive business plan or development plan. While the necessity for financial scrutiny and monitoring is clear, it introduces extreme red tape and bureaucracy that could weigh down the process immensely. The risk is real that setting up the infrastructure and enabling the operation and management thereof may prove to be too burdensome. Because different kinds of farmers and applicants will be involved, who need to be monitored constantly by way of different sets and requirements, the complexity of the programme is compounded. The degree of complexity increases when all of the recent policy developments are considered as a whole.

Also published in July 2013 was the State Land Lease and Disposal Policy. It is generally a lengthy document of which the relevance is not limited to the land reform programme only. As it encapsulates all state-owned immovable property and the leasing and disposal thereof, it also has implications for relevant government departments, recordkeeping in general and budgetary and financial considerations.

The Policy applies to all immovable assets for which the 'Department has legal title' and include the following categories (Policy July 2013 17):²⁷ former South African Development Trust land, including land in the former self-governing territories and national states that have not been assigned to authorities yet; land that has been acquired under the Land Reform: Provision of Land and Assistance Act 126 of 1993; other immovable assets that had been transferred from other Government departments for land reform purposes; immovable assets acquired under the Restitution of Land Rights Act 22 of 1994 that are temporarily held by the state for future transfer to claimants; immovable assets held by the Minister in trust for traditional communities; and some assets that had been acquired by the state as part of asset forfeiture involving the Asset Forfeiture Unit.

Chapter 2 of the Policy focuses on agricultural leases. The underlying aim is to provide land or to make land available to different categories of farmers for

²⁶Policy July 2013 at 17.

²⁷Policy July 2013 at 17.

lease and in some instances, for the option of acquiring ownership. In this regard the underlying goal is to broaden access to land, but not necessarily to change the land ownership pattern because land ownership as a rule would remain vested in the state. Ownership patterns would only be amended where ownership itself is transferred. Four different categories of farmers are envisaged, namely category 1: households with very limited or no access to land; category 2: small-scale or subsistence farmers; category 3: medium-scale commercial farmers who have already been farming commercially for some time and finally, category 4: large-scale or well-established commercial farmers who have been farming at a reasonable commercial scale. It is also possible for one farmer to graduate from one category to the next, resulting in one farmer being able to benefit more than once under this Policy. Though this may be beneficial, it can also be impractical as it can require relocation in certain instances. Persons in category 3 and 4 qualify for a long term lease with an option to purchase.

The District Beneficiary Selection Committees screen all potential lessees and make recommendations to the Provincial Technical Committee which makes final recommendations to the National Land Allocation and Recapitalisation Control Committee. The recommended lessees are selected from updated district databases of potential lessees. Where no database exists, the necessary advertisements have to be published in local newspapers. All leases are thereafter approved by the Approval Authority and the necessary documents have to be completed and finalised. Different procedures for final approval are relevant where restitution land is relevant.

The determination of rental is set out in section 9 of the Policy. Business plans, developed by the applicants, will form the basis for the determination of rental. Because the amount is not fixed, no annual escalation is relevant. Rents may therefore fluctuate, depending on the projected annual income. Accordingly, the administration of rental payments seems complex and time-consuming and requires meticulous financial monitoring. In light of the fact that different categories exist and that different rentals prevail as explained, supervising the payment of rental may be quite challenging. It is questionable whether this complex system would be viable in light of present departmental capacity difficulties.

The lease period is 30 years which may be renewable for another 20 years.²⁸ The first five years will be treated as a probation period in which time the performance of the lessee will be assessed. The assessment relies mainly on the ability of the lessee to implement his or her business plan.

Provision is also made for an option to purchase for farmers falling in categories 3 and 4.²⁹ The lessees' right to exercise this option is dependent on a

²⁸Policy July 2013 at 20.

²⁹Policy July 2013 25-26.

successful completion of the probation period, on whether production has been expanded or at least maintained, on whether the farmer has used recapitalisation funds effectively (where relevant), on whether the lessee complied with the terms of the agreement, on whether the farmer had been deemed capable to manage the finances independently as well as the market produce, and on whether the farmer consents to the state's right of first refusal being registered against the title deed.

Chapter 5 also provides for the possibility for labour tenants and occupiers to become lessees as well. Labour tenants may apply for long term leases and have to comply with the requirements set out in Chapter III of the Land Reform (Labour Tenant) Act 3 of 1996. Likewise, occupiers who would qualify for relief under section 4 of the Extension of Security of Tenure Act 62 of 1997 may also apply for long-term leases.

The benefits incorporated in the approach to broaden access to land *via* lease agreements (linked to production, food security and sustainability), have to be weighed against: (a) the bureaucratic and complex structures needed to manage and operate the proposed system; and (b) the possibility that insecurity of tenure resurfaces when the lease is cancelled. With respect to the former, it is a pity that the process is not simpler and has not been streamlined more. Setting up the system and administering the various processes, which also includes continued monitoring afterwards, may prove to be especially challenging.

3.1 Land Titles Adjustment Act 111 of 1993

Certain land was designated for purposes of the Land Titles Adjustment Act.³⁰

3.2 Interim Protection of Informal Land Rights Act 31 of 1996

The application of the provisions of the Interim Protection of Informal Land Rights Act has been extended for another period of 12 months to 31 December 2014. This Act has now been extended 17 times and still the land tenure problems existing in South Africa have not been solved. With the invalidation of the Communal Land Rights Act 18 of 2004 (CLaRA) on 11 May 2010 by the Constitutional Court in *Tongoane v Minister for Agriculture and Land Affairs*,³¹ the pre-27 April 1994 race-based and geographically diverse statutory framework for communal tenure and its administration continued to be applied (with few post-1994 amendments). Section 11 of the Interpretation Act 33 of 1957 will have to be invoked for measures that have been repealed by the Repeal of the Black Administration and Amendment of Certain Laws Amendment Act 20 of 2012 that came into operation on 28 December 2012. The 2011 Green Paper on Land Reform envisages the development of a new policy and statutory framework for

³⁰GN 683 in GG 36826 of 13 September 2013 (Tshwane Metropolitan Municipality).

³¹2010 6 SA 214 (CC).

communal and tenure reform; however, no new draft policy and/or statutory initiatives have been published.

4 Unlawful occupation

In *Blue Moonlight Properties 39 (Pty) Ltd v The Occupiers of Saratoga Avenue*³² the court granted the eviction application as prayed for and handed down a long, detailed order. Under that order the city was to pay the applicant an amount equivalent to the fair and reasonable monthly rental for the premises for the period July 2009 until the date of vacation, being the end of March 2010. The city's application of its Housing Policy was found to be unconstitutional and was ordered to remedy its policy and to report back to the court in this regard. It was against the above order that an appeal was lodged in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd*.³³ While finding that the city's housing policy was indeed unconstitutional because it excluded persons from emergency housing where they had been evicted from private land, the SCA distinguished the present case from that of *President of the RSA v Modderklip Boerdery (Pty) Ltd*³⁴ on which the awarding of damages was apparently based. To that end the SCA concluded that compensation could not be appropriate relief in the present matter and that the ordering of the stipend, albeit in the alternative, was not appropriate relief either.³⁵

Later, in *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and the City of Johannesburg*³⁶ the order of the SCA was essentially confirmed, highlighting the unconstitutionality of the Housing Policy. However, more than a year later, in May 2013 it became clear that the city had not progressed at all with respect to the housing crisis of the occupiers concerned. In these conditions the owner maintained that it could not continue to wait indefinitely to regain possession of its property, which complaint led to *Hlope v The City of Johannesburg Metropolitan Municipality*.³⁷ From the judgment handed down by Judge Satchwell it is clear that, despite knowing of its obligations since February 2010, the city had not absorbed the importance of the various judgments, still did not understand its role concerning sheltering the occupiers and failed to prepare and respond appropriately to the CC judgment. In fact, it seemed as if the city was reluctant to comply with the directions and focused on lamenting its position instead.³⁸ Having

³²Case number 2006/11442, delivered on 4 February 2010 in the South Gauteng High Court per Spilg J.

³³2011 4 SA 337 (SCA).

³⁴2005 5 SA 3 (CC).

³⁵Paragraph 72.

³⁶2012 2 SA 104 (CC).

³⁷Case number 48102/2012, delivered on 3 May 2013, South Gauteng High Court, Johannesburg per Satchwell J.

³⁸Paragraph 10.

regard to the events that occurred and the reports that had been submitted, the court ordered the city to provide full and complete answers to a list of questions and to respond specifically to particular issues, to be signed by the second respondent (Johannesburg Executive Mayor), third respondent (Johannesburg City Manager) and fourth respondent (Johannesburg Director of Housing) personally. The city was also granted a fixed period of time to take the necessary administrative and other steps to ensure that the city complied with the previous order handed down in February 2013. In the event of non-compliance the applicants were granted leave to supplement their papers and to enrol an application for contempt of court or claims for constitutional damages.

This means that, while constitutional damages were not part-and-parcel of the SCA and CC judgments, it may again become relevant on the basis that court orders have not been implemented, as was the case in *Modderklip*. The struggles of both landowner and occupiers have been pushed to the extreme in the *Moonlight Properties 39 (Pty) Ltd* cases. While the lack of capacity and resources should not *per se* be excuses for poor performance, it is a real concern, especially in the local government sphere.

5 Land use planning

Since the promulgation of the Development Facilitation Act 67 of 1995, two particular developments impacted on the application and future relevance of the Act. Firstly, government had embarked upon a process of rationalising and re-configuring all planning laws with the aim of improving 'land management'; and secondly, certain interpretative difficulties emerged with regard to the final Constitution and its implications for planning law. Since the 2001 version of the Land Use Management Bill was published, various versions thereof had been drafted and rejected. More than a decade later, on 5 August 2013 the Spatial Planning and Land Use Management Act 16 of 2013 was signed by the President.³⁹

The underlying idea of the Act is to replace the fragmented approach to land use planning and management by introducing a single, uniform management system.⁴⁰ In this light the structure of the former Development Facilitation Act which separated the rural and urban developmental approaches and dealt with each separately in different chapters, was discarded. Instead, overarching frameworks operating on four distinctive levels will in future guide and regulate land use and land development. To that end frameworks have to be developed at national, provincial, regional and municipal levels. Guiding and informing these frameworks are sets of developmental principles, norms and standards, provided for in sections 7 and 8 respectively.

³⁹ GG 36730 of 2013-08-05.

⁴⁰ See also the goals listed in s 3 of the Act.

Five basic principles underpin spatial planning and development, namely, the principles of: (a) spatial justice; (b) spatial sustainability; (c) efficiency; (d) spatial resilience; and (e) good administration. The first principle is especially pertinent to broadening access to land, both in rural and urban contexts. In this regard broadening access, coupled with inclusion, is underlined. The underlying idea is that all future development frameworks have to address the inclusion of persons and areas that were previously excluded, with an emphasis on informal settlement, former homeland areas and areas characterised by widespread poverty and deprivation. In this regard particular emphasis is furthermore placed on the fact that spatial planning mechanisms, including land use schemes, must incorporate provisions that enable redress in access to land by disadvantaged communities and persons.⁴¹ Land development procedures must furthermore include provisions that accommodate access to secure tenure and incremental upgrading of informal areas.⁴² With regard to the principle of spatial sustainability, special emphasis is placed on the protection of prime and unique agricultural land⁴³ and the promotion of the effective and equitable functioning of land markets.⁴⁴

The principles that underpin development and land management and the norms and standards that guide these endeavours have to be reflected and incorporated in the tools and mechanisms that give effect to them. The principles in isolation would thus be ineffective. The actual embodiment of the principles takes place in the various development frameworks and the actual integrated development plans that have to be drafted.⁴⁵ The national, provincial, regional and municipal frameworks, drafted in light of the norms and standards, have to be aligned. The process of drafting these frameworks is complex and time-consuming and entails notices, public consultation and legal and administrative requirements. To that end it may take a while before these new initiatives impact on the *actual* spatial planning and land development in practice.

In the municipal sphere much is expected.⁴⁶ Municipal spatial development frameworks have to provide for short-term needs (5 years) as well as longer-term needs (up to 20 years) and include *inter alia*, provisions dealing with population growth estimates; estimates of demands for housing and the designation of areas where incremental upgrading may be incorporated. Municipal land use schemes are thereafter drafted in light of the spatial development frameworks. In this regard provision is specifically made for the participation of traditional councils.⁴⁷

⁴¹Section 7(1)(a)(iii).

⁴²Section 7(1)(a)(v).

⁴³Section 7(1)(b)(ii).

⁴⁴Section 7(1)(b)(iv).

⁴⁵See ch 4 in general.

⁴⁶See s 21.

⁴⁷Section 23(2).

Municipal land use planning is essentially dealt with by the municipal planning tribunal or, in some instances, by a designated official.⁴⁸ In this regard all applications are scrutinised in light of the overarching frameworks and localised integrated development plans, undergirded by the basic principles. The composition of the tribunal, its functions and how it operates are all set out in detail in the Act.⁴⁹ Apart from the usual development applications, tribunals are also empowered to deal with change of use applications, applications for township establishment; the subdivision of land; the consolidation of different pieces of land; the amendment of a town planning scheme and the removal, amendment or suspension of restrictive conditions.⁵⁰ In making its determination, the tribunal has to take note of the public interest; the constitutional transformation imperatives and the related duties of the state; the facts and circumstances relevant to the application; the respective rights and obligations of the parties involved; the impact on engineering services and any other factors prescribed, including time frames.⁵¹

Section 52 deals exclusively with applications that affect national interest. While national interest is not defined, instances that would fall within this ambit include strategic national policy objectives; principles of priorities – including food security; international relations and co-operation and economic unity. These instances have to be brought to the attention of the Minister. It is unclear whether the relevant officials would know when these areas of interest are being triggered in order for it to be forwarded to the Minister's attention. Relevant priorities or strategic national policy objectives are not elaborated on in the Act itself.

While the idea is stated clearly that applications have to be dealt with as prescribed in the Act, section 55 also provides for some exemptions. In this regard the Minister may, by notice in the *Gazette*, exempt a piece of land or a particular area, as described in the notice, on the basis of the public interest. Exemptions may be conditional and may be amended or withdrawn at a later stage. Public interest is not defined or elaborated on in this regard.

Schedule I of the Act contains a list of matters to be addressed in provincial legislation. These include, *inter alia*, the determination of procedures concerning the subdivision of land, including land for agricultural purposes or farming land and procedures regarding the incremental upgrading of informal settlements. The legislative measures that stand to be repealed when the Act commences include the Removal of Restrictions Act 84 of 1967; the Physical Planning Acts of 1967 and 1991 respectively, the Less Formal Township Establishment Act 113 of 1991 and the Development Facilitation Act. Much still has to be done before the Act can operate effectively. In this regard particular periods of time (for

⁴⁸Section 35.

⁴⁹Sections 36-40

⁵⁰Section 41.

⁵¹Section 42.

example linked to procedures) still have to be determined by the Minister by way of consultation and regulations still have to be drafted. Section 60 also provides for numerous transitional provisions. All applications that have already been lodged under the Development Facilitation Act and which are in the process of being finalised, have to proceed under that Act. The Minister is also obliged to determine a date by which time all the Development Facilitation Act applications must have been finalised.⁵²

The present Act has a much more transformational approach than the Development Facilitation Act. At many different levels and in various contexts this particular dimension is accentuated, linked with different emphases placed on historical redress, equitable access and inclusion. While the underpinning principles support and guide these endeavours, the real challenge is bringing the principles to life in the various frameworks, schemes and plans and thereafter implementing and monitoring them effectively. Accordingly, exactly how the principle of justice with respect to broadening access to land in rural and urban contexts will pan out, remains to be seen.

In *Le Sueur v Ethekewini Municipality*⁵³ the applicants, trustees of a trust, applied to the court to declare an amendment of the Ethekewini Town Planning Schemes of 9 December 2010 introducing split zonings unconstitutional.⁵⁴ The City of Cape Town was added as *amicus curiae* to oppose the application. The applicant argued that the municipality had no functional power to introduce amendments relating to environmental issues in terms of Schedules 4B and 5B of the Constitution. The KwaZulu-Natal Planning and Development Act 6 of 2008 repealed the Town Planning Ordinance 27 of 1949 (N). Schedule 4 of the Act includes a transitional measure pertaining to decisions that were not finalised before the commencement of the Act.⁵⁵ The applicant argued that the resolution to adopt the town planning scheme was taken after 1 May 2010 and did not fall under the transitional provisions and that municipality acted *ultra vires*.⁵⁶ The court found that the amendments have been pending and that a resolution has been taken in this regard and that the matter has to be resolved in terms of the Ordinance. With regard to the functional area of the environment the court found with reference to sections 24(b), 152 and 156 of the Constitution as well as environmental legislation that 'municipal planning' includes the need to protect the natural environment⁵⁷ and that 'municipalities are in fact authorized to legislate in respect of environmental matters to protect the environmental at the local level'.⁵⁸

⁵²Section 60(2)(d).

⁵³Case no 9714/11 KwaZulu Natal High Court, Pietermaritzburg, delivered 30 January 2013.

⁵⁴Paragraph 1.

⁵⁵Paragraph 5.

⁵⁶Paragraph 7.

⁵⁷Paragraph 16-39.

⁵⁸Paragraph 40.

6 Deeds

The Deeds Registries Amendment Bill⁵⁹ was introduced in the National Assembly. The Bill aims to amend the Deeds Registries Act 47 of 1937 to, amongst others, provide the Registrar a discretion to rectify errors dealing with ‘the name of a person or a description of property mentioned in deeds or other documents’ and ‘to provide for the issuing of certificates of registered title taking the place of deeds that have become incomplete or unserviceable’.⁶⁰ According to the Memorandum, if an error is common to two or more deeds or documents all the documents had to be lodged for amendment – the proposed amendment will allow the registrar of deeds the discretion to decide *which* documents need to be lodged. Section 38 only provides for a certificate of registered title for destroyed title deeds, the amendment seeks to include certificates ‘where the title deeds become incomplete or unserviceable.’

The Bill also makes provision for the update of deeds with regard to the names of companies, close corporations and the surnames of women.⁶¹

7 Sectional titles

The Minister gave notice of his intent to introduce a Sectional Titles Amendment Bill⁶² in the National Assembly.⁶³ The aim of the Bill is, amongst others, to amend definitions, to further regulate the intended establishment of schemes and the sale of units to lessees, to provide for the cancellation of registered sectional plans⁶⁴ and to allow for the transfer of parts of common property with the written consent of the owners of sections and holders of registered real rights.⁶⁵ The Bill also allows for the alienation of a portion of land over which a real right of extension is registered.⁶⁶ Clause 6 amends section 18 to provide for the cession of a mortgage real right of extension and a mortgage real right of exclusive use area. It will now be possible to cancel the registration of a part of a section pursuant to expropriation.⁶⁷ The Bill provides for the issuing of more than one certificate of real right of extension⁶⁸ and more than one certificate of real right of exclusive use area.⁶⁹

⁵⁹B13B-2013.

⁶⁰Long title read with Clause 1-2 amending ss 4 and 38.

⁶¹Clause 6 amending s 93.

⁶²B11-2013.

⁶³GN 498 in GG 2013-05-15.

⁶⁴Clause 3 amending s 14.

⁶⁵Clause 3 inserting s 15B(5A)(7)-(11).

⁶⁶Clause 5 amending s 17.

⁶⁷Clause 7 amending s 19.

⁶⁸Clause 8 amending ss 25 and 27.

⁶⁹Clause 9 amending Clause 27; see also the Memorandum to the Bill.

8 Surveying

The Committee for Spatial Information published a Policy on Pricing of Spatial Information Products and Services for comment.⁷⁰ The purpose of the policy is to 'ensure that informed decisions can be made regarding the pricing of spatial information in the public sector and that there is consistency in the application of the pricing policy in the public sector.' The idea is to enhance service delivery and to prevent municipalities and provinces to duplicate and pay for spatial information.

The land survey regulations⁷¹ issued in terms of the Act 8 of 1997 was amended.⁷² The reference to 'GPS' is substituted by 'GNSS' – Global Navigation Satellite System.⁷³ Regulation 3 is amended to refer to the GNSS. Regulations 6, 18 and 20 were accordingly amended. Various Board Notices were published to regulate matters pertaining to the Quantity Surveying Profession⁷⁴ ranging from requirements to which a voluntary association should comply in terms of section 14(d) of the Quantity Surveying Profession Act 49 of 2000 to be recognised under the Act, to a Quantity Surveying Programme Accreditation Guideline and Code of Professional Conduct.

9 Expropriation

The Minister of RDLR published a Property Valuation Bill, 2013 for comment.⁷⁵ Reasons for the Bill are government's non-performance with regard to land reform (it has only managed to transfer a quarter of 30% of its land transfer target) and the escalation of land prices (Memorandum to the Bill). According to the Memorandum it is not desirable that the market alone determine the pace of land reform delivery.⁷⁶ Another problem is that there is no uniform framework for the application of valuations. The Bill therefore proposes the establishment of an Office of the Valuer General that will evaluate properties that have been identified for land reform or expropriation purposes.⁷⁷ The office will also have to value land that has been identified for acquisition or disposal by a government department, organ of state or a municipality.⁷⁸ The Bill also creates a review committee that will consider objections to valuations done by the Office of the Valuer General.⁷⁹ The Bill defines 'market value' as 'the estimated amount for which the property should

⁷⁰GN 501 in GG 36479 of 2013-05-17.

⁷¹GN R1130 of 1997-08-29.

⁷²GN 645 in GG 36779 of 2013-08-30.

⁷³Regulation 1.

⁷⁴BN 139-144 in GG 36663 of 2013-07-12.

⁷⁵GN 504 in GG 36478 of 2013-05-23.

⁷⁶Paragraph 1.3.

⁷⁷Clause 3-15.

⁷⁸Clause 5.

⁷⁹Clause 18-36.

exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction after proper marketing and where the parties had each acted knowledgeable, prudently and without compulsion: Provided that in determining market value for purposes of this Act, prices paid by the State for any acquisition of property must be excluded: Provided further that in the event that no creditable data is available, prices paid by the State for any acquisition of property must be considered'.⁸⁰ 'Value' for the purposes of land reform and expropriation must 'reflect an equitable balance between the public interest and the interests of those affected by the acquisition' with reference to the requirements of section 25 of the Constitution of the Republic of South Africa, 1996. 'Property' includes immovable property but also rights in or to such property or any movable property that is acquired with the movable property. If 'property' relates to expropriation the definition in the (still to be formulated) Expropriation Act, 2013 is to be followed. The Bill creates offences, for example, if a person fails to answer a question or to comply with a request or direction of the valuer he or she may be guilty of an offence.⁸¹ The Minister may issue regulations relating to the criteria for the determination of the value of the property, the standards and procedures for the valuation of the properties, any fees payable or any other matter that the Minister may regard to be necessary for the furtherance of the objectives of the Act.⁸² The Bill repeals the Land Affairs Act 101 of 1987.

10 Minerals

The Mineral and Petroleum Resources Development Amendment Act 49 of 2008⁸³ came into operation on 7 June 2013.⁸⁴ The commencement of the MPRDAA triggered the commencement of the National Environmental Management Amendment Act 62 of 2008 which will come into operation 18 months after 7 June 2013.⁸⁵ The Mineral and Petroleum Resources Amendment Bill⁸⁶ amends the MPRDAA and a National Environmental Management Laws Second Amendment Bill⁸⁷ amends the National Environmental Management Act 107 of 1998, the 2008 Amendment Act as well as various other environmental management laws in order to align the environmental and mining authorisation processes. Although the amendments mostly deal with the environmental consequences of mining, concerns are raised that the Minister may gain too

⁸⁰Clause 1.

⁸¹Clause 41.

⁸²Clause 42.

⁸³MPRDAA; with the exception of ss 11(1), 38B, 47(1)(e), 102(2) and s 106(2).

⁸⁴Proclamation 14 in GG 36512 of May 2013 read with Proc 17 in GG 36541 of 2013.

⁸⁵Section 14(2).

⁸⁶B15-2013.

⁸⁷B26-2013.

much power in deciding on the allocation of mining authorisations. Various concerns were also raised during the parliamentary hearings with regard to the security of right holders.⁸⁸ In future, the Minister of Mineral Resources will be the decision-making body on environmental matters pertaining to mining and will also appoint his or her own mining inspectorate – excluding mining issues from the current environmental inspectorate's jurisdiction. The Minister of Water and Environmental Affairs will be the appeal authority for any decisions relating to environmental authorisations taken by the Minister of Mineral Resources. Mines will have to follow the procedures set out in the National Environmental Management Act. The implementation of all of these amendment laws are going to be complex and confusing and the Department of Mineral Resources will hopefully draft some guideline documents to assist mines in the transition to the new dispensation.

11 Agriculture and rural development

According to the Annual Report 2012/2013 of the Department of Agriculture, Forestry and Fisheries,⁸⁹ the Department functioned within the context of three transversal policies: The Industrial Policy Action Plan 2 (IPAP2); the New Growth Path (NGP) and the National Development Plan (NDP). DAFF is also responsible for contributing to the government-wide outcomes-based performance management focus in respect of: (a) Outcome 4: 'Decent employment through inclusive economic growth (through improved support to small business co-operatives – output 2)'; (b) Outcome 7: 'Vibrant, equitable and sustainable rural communities and food security for all (through sustainable agrarian reform – output 1; improved access to affordable and diverse food – output 2; improved rural services to support livelihoods – output 4)', and Outcome 10: 'Environmental assets and natural resources that are well protected and continually enhanced (by protecting the country's biodiversity – output 4)'.

The Agricultural Broad Economic Empowerment (AgriBEE) Sector Code was gazetted and commenced on 28 December 2012. The Forest Sector Charter is being finalised. Fisheries Management is being integrated into the DAFF Charters.

South Africa is food secure at national level; however, more than 20% of the South African population is food insecure at the household level. Taking into account the need for access to sufficient, nutritious, safe and affordable food, the Food Security and Nutrition Policy will be finalised during the financial year 2013–2014 (the objectives being the reduction by 2013 of acute hunger to zero and access to decent nutrition for all). In addition, in cooperation with DRDLR

⁸⁸See http://www.pmg.org.za/committees/Mining?quicktabs_committees_tabs=1#quicktabs-committees_tabs.

⁸⁹DAFF <http://www.doa.agric.za/docs/AnnualReports/annr1213.pdf> (accessed 2013-09-26).

food production was accelerated by means of the implementation of the Food Production Initiative.

A positive development is the 12,7% increase in agricultural employment (54 000 new employment opportunities, being part of the total agricultural labour force of 739 000 employees – this is in line with the projected increase of a total of 1 million jobs by 2030 as indicated by the NDP). There is progress with the implementation of the Comprehensive African Agricultural Development Programme (CAADP) by means of the signing of the CAADP Compact in 2013. As regards participation in the Strategic Infrastructure Programme, DAFF coordinated SIP11 which aims at increasing investment in rural infrastructure in order to support agricultural production as well as job creation within rural areas.

An Agricultural Landholding Policy Framework was published. It is a lengthy document and consists of three main sections: (a) setting out the Policy and the approach thereto; (b) a legal comparative section; and (c) a summary of the whole of the document. Annexure A deals with development support which essentially lists the various role players that may be involved in the process, including the Land Management Commission, the Land Rights Management Boards (and local committees), the District Land Reform Committees and the Office of the Valuer-General. The Policy Framework impacts on two areas in particular: (a) broadening access to land in principle; and (b) placing restrictions on how much land one individual or entity may own. In this respect the Policy is aimed at regulating access to land generally and regulating agricultural land ownership in particular, thereby also impacting on the agricultural land market itself. The overall aims of the Policy are to facilitate the entry and participation of small farmers into mainstream agriculture; redistribute land from large agricultural holdings to cooperatives and family owned landholdings; and increase efficiency, competitiveness and sustainability of all agricultural landholdings.

The Policy Framework impacts on all levels and all forms of landholdings used for agricultural purposes, including privately and publicly held holdings, both in relation to rural and urban contexts. The Policy impacts on everyone in the country, citizens and foreigners alike. The Policy furthermore relates to land reform parcels as well as other land holdings that were not acquired by any land reform initiative.

A three pronged approach is proposed, namely, (a) taking the necessary legislative and other steps to bring excessive agricultural landholdings below the ceiling point; (b) taking the necessary legislative and other measures to lift those holdings that are below the floor level; and (c) where holdings are operating within the bands, taking the necessary measures to optimise the exploitation of these holdings.

Much still has to be done before the agricultural landholding categories can operate effectively. In this regard the ceilings and the floors, respectively, need to be determined and the corresponding legislative measures have to be drafted

– perhaps from scratch, or amended if legislative measures already exist. Because there are so many variables in determining the different brackets or bands within which the system has to operate, it may take some time before the groundwork is laid. In this regard the possibility of employing spatial and development planning frameworks, provided for under the SPLUMA, discussed in more detail above, is mentioned. Only after the areas have been mapped out, can the designation of the upper, middle and lower bands for landholdings take place.

The District Land Reform Committee determines the floor, middle and upper bands for a particular district. In this process various factors come into consideration, including climatic factors; the value of the land in question; the current production output, the number of farm workers and the potential of the soil, as well as the technology used and the capital requirements for different enterprises. In order for the whole process to work, monitoring and evaluation principles have to be in place, all of which still have to be developed by government. The Policy Framework will do much more than only regulate the size of land holdings. It will effectively regulate the agricultural land market, will impact on production in principle and will introduce a new set of measures, categories and institutions. Again, the bureaucracy in which such an approach will result, is a matter for concern. Laying the groundwork for the process to function effectively is going to be a complex and time-consuming process. Having regard to the fact that both the ceilings and floors are not cast in stone and may therefore fluctuate, the monitoring and maintenance aspects of the general approach are disconcerting. Would brackets need re-evaluation and consequent re-adjustments continuously?

Given that the State Land Lease and Disposal Policy provides for different categories of farmers and the Agricultural Landholding Policy provides for different bands of ownership, overall different sets of farmers are created – each with distinctive relevant legislative and policy measures applicable. With respect to both the lease of land and ownership categories, monitoring and evaluation systems and principles come into play. In the meantime a Draft Climate Change Sector Plan for Agriculture, Forestry and Fisheries was also published for comment.⁹⁰ Overall, the new Policy Frameworks provide for a complex, top-heavy system to be developed and implemented. While these new policy documents provide some insight as to possible new developments, detail is still lacking and many questions remain unanswered.

A Draft Conservation of Agricultural Resources Amendment Bill, 2013⁹¹ was published for comment. The purpose of the amendment of the Bill is to establish

⁹⁰GN 7 in GG 36063 of 2013-01-09.

⁹¹GN 673 in GG 36605 of 2013-07-02.

soil conservation committees at metropolitan,⁹² district,⁹³ provincial⁹⁴ and national level.⁹⁵ These committees have to promote and advise on matters relating to the conservation of agricultural resources (Memorandum). The Bill also introduces an Agricultural Resources Review Board who may review any decision of any official or the Minister or MEC.⁹⁶ The Bill also includes various cooperative governance instruments⁹⁷ and provides for delegations and assignment of powers by the Minister to the MECs.⁹⁸ The Minister will also be able to publish norms and standards for the monitoring, evaluation and assessment of matters relating to agriculture and to establish the mechanisms to ensure the execution thereof.⁹⁹ All programmes, projects, grants, funds, delegations, assignment, service levels agreements and private-public partnerships will be subject to performance auditing¹⁰⁰ and provinces will be monitored.¹⁰¹

Certain land in the District of Frankfort, Free State, was excluded from the provisions of the Subdivision of Agricultural Land Act 70 of 1970.¹⁰²

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

⁹² Clause 4.

⁹³ Clause 4.

⁹⁴ Clause 5.

⁹⁵ Clause 5).

⁹⁶ Clause 23 read with Clause 10.

⁹⁷ Clause 29-32.

⁹⁸ Clause 15-20.

⁹⁹ Clause 20.

¹⁰⁰ Clause 21.

¹⁰¹ Clause 22

¹⁰² GN 666 in GG 36822 of 2013-09-06.