Land matters and rural development: 2014(1)

1 General

Leading up to the 2014 pre-election period, land reform matters received more attention than in the preceding two years. The centenary of the 1913 Land Act also drew attention to the plight of many people who are still living in dismal conditions (see eg Nxumalo 'Children who don't see the sky' *Mail & Guardian* 2013-08-23-29) 20). New Bills to speed up the land reform process were introduced and Parliament approved the Restitution of Land Rights Amendment Bill [B35B-2013] to allow additional land claims to be lodged until 30 June 2019 (see the discussion *infra*). The courts also delivered important decisions pertaining to land restitution, tenure reform and land use planning.

In this note on land, 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.[1]

2 Land restitution

Disputes are rife amongst communal property associations (CPAs) and communities who received land based on restitution claims. One example of such a dispute is that between the Mameroste and Dikgatlhong communities in North West who received their land in 2006. The community accuses the CPA of maladministration and corruption and contends that most of the land earmarked for agriculture and tourism is unproductive or destroyed. Previously, however, a commission appointed by the Department of Rural Development and the Public Protector found that there was no mismanagement of public funds – these findings are disputed by the community. The case came before the North West High Court in August 2013 (Dipa 'Ruined lodge sparks community ire' *Mail & Guardian* (2013-08-23-29) 16).

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[1] In this note the most important literature, legislation and court decisions are discussed for the period 2013-09-15 to 2014-04-30.

2.1 Notices

Only a few land restitution notices were published (Western Cape: District Six, Retreat, Goodwood, Worcester, Delft and Mossel Bay 1 each; Claremont 2; Eastern Cape: Lady Frere, Bizana and Butterworth 2 each, Queenstown and Matatiele 1 each; Mpumalanga: Nkangala 10, Ehlanzeni 1; Gauteng-North West: Bojanalo 2, Waterberg 1, Tshwane 17, Mafikeng 1; KwaZulu-Natal: Lower Umfolozi 2, Pinetown and Shelley Beach 1 each, Rural claims without district mentioned 4). A number of withdrawal and amendment notices were also published (amendment notices: KwaZulu-Natal 1, Free State 1, Gauteng-North West 2, Mpumalanga 6, Western Cape 2, Limpopo 4; withdrawal notices; KwaZulu-Natal 3, Gauteng-North West 1, Mpumalanga 6, Free State 2, Western Cape 1).

2.2 Restitution of Land Rights Amendment Bill

Various attempts to amend the Restitution of Land Rights Act 22 of 1994 were published, which included the first attempt in May 2013 (GN 503 in *GG* 36477 of 23 May 2013), followed by the Restitution of Land Rights Amendment Bill [B35 of 2013] on 13 September 2013 and the final version [B35B-2013] that was passed by the National Assembly on 12 March 2014. While the initial Draft Bill suggested numerous amendments to the formal and legal requirements for lodging land claims, provided a detailed set of provisions dealing with the appointment, role and function of judges in the Land Claims Court (LCC), as well as suggested amendments to section 33 of the Land Rights Amendment Act 22 of 1994, the September 2013 version of the Bill was watered down rather drastically. To that end the legal requirements contained in section 2 and the factors to be considered under section 33 of the Act remained unchanged. The main amendments incorporated in the September 2013 version dealt with the appointment, role and function of judges in the LCC and adjusting the formal requirement for the lodging of land claims. The latter entailed that the deadline of 31 December 1998 was substituted by a new date constituting 31 December 2018. The latest 2014 version is identical to the September 2013 version except that an additional period of six months had been added to the submission deadline. Therefore, the deadline has been substituted to read 30 June 2019. The main importance of the amendment therefore lies in the reopening of the land claims process. Concerns raised in the previous discussions regarding the uncertainty that coincides with the reopening of the claims process, the administrative and other burdens caused by such an Act and the legal complexities regarding claims already finalised, though not repeated here, remain equally valid.

2.3 Case law

Malewa Communal Property Association v Khombindlea Trading 1 CC (Case no 7392/13, delivered on 28 February 2014, North Gauteng High Court, Pretoria) concerned a lease agreement and its implications for land restitution. In 2010 the respondent and the second applicant, the Minister of Rural Development and Land Reform entered into a written lease agreement for a period of 5 years, until July 2015. The rental was set at R30 000 per annum, payable before the 7th month of each year, failing which interest would be charged (para [4]). The first applicant, the Malewa CPA, lodged a claim on the leased property which was settled successfully. The property, including the portion leased by the respondent, was transferred in the names of the first applicant. This all occurred after the lease agreement, alluded to above, was entered into. At some point the respondent was in arrears with the rent. After receiving a letter, the respondent paid the outstanding capital amount, but refused to pay the interest, calling instead for a breakdown of how the interest was calculated (paras [6]-[7]). While refusing to pay the interest, the money was indeed deposited in the respondent's attorney's trust account. Instead of providing the required explanation of how interest was charged, the present application was lodged.

Essentially, the applicants wanted to evict the respondents and on the basis that the lease agreement was breached, resulting in its cancellation (para [8]). From the correspondence it became clear that the applicants, (the new landowners who were successful with the land claim) were never in favour of the lease agreement and wanted to cancel it. They therefore linked it to the breach of contract. However, if a breach was not the real problem, then other procedures would have to be followed. It was clear that the respondents paid all the arrears and that the only issue outstanding, was the breakdown on how the interest was calculated. It was thus clear that the respondents intended to respect the lease agreement and wanted it to remain intact (para [16]). The respondents could only be in breach of the contract after the breakdown of the interest calculation had indeed been provided and they thereafter still refused to pay the interest (para [18]). In the alternative, the applicants relied on section 11(7) of the Restitution of Land Rights Act 22 of 1994. This entails that, once a notice had been published with respect to a parcel of land, no sale, donation, exchange or contract may be entered into without having informed the Commissioner of the intention to do so in writing. Even if section 11(7) was breached, the good faith of the parties would still be considered. At the time the lease was entered into the respondent had occupied the property with the consent of the then landowner, the Minister (para [20]). By entering into the lease agreement the Minister wanted to preserve the value of the property so that the beneficiaries could find it in good condition. That, according to the court per Kganyago J, was done in good faith.

Accordingly, as no grounds existed for the cancellation of the lease agreement, it remained intact. To that end the application for eviction was dismissed.

3 Land reform

3.1 Land Titles Adjustment Act 111 of 1993

Land was designated in the district of Bojanalo in the North West Province in terms of section 2(1) of the Land Titles Adjustment Act (GN 280 in *GG* 37522 of 2014-04-11).

3.2 Land Management Commission Bill

On 27 September 2013 the Land Management Commission Bill was published for public comment (Gen Not 964 in *GG* 36880 of 27 September 2013). The Bill is divided into four chapters: the first Chapter dealing with the interpretation and objects of the Act, Chapter 2 with the Land Management Commission; Chapter 3 with disputes in respect of land and the final Chapter with administrative and other matters. The main objective of the Bill is to establish a Land Management Commission (cl 2). First mention of the Land Management Commission was in the 2011 Green Paper on Land Reform. Under the Green Paper the functions were mainly fourfold, namely, to be advisory, to coordinate, to regulate, to audit and to act as reference point. All stakeholders would be represented in the Commission. It would have wide authority and powers, including powers to verify and or to validate or invalidate individual or corporate title deeds; to grant amnesty or initiate prosecution; and seize or confiscate land obtained by fraudulent or corrupt means. In terms of clause 2 of the Bill the main functions of the Commission will be:

> (a) to maintain and establish a government database of all state land registered in the name of a department, including unsurveyed, unregistered state land; and
> (b) to adjudicate land ownership disputes in respect of which two or more title deeds have been issued on the same parcel of land.

In clause 7 of the Bill, that deals with the functions of the Commission in more detail, an additional function is added, namely that the Commission has to advise the Minister and other relevant ministers on ownership relating to state land and land in communal areas. Accordingly, while the brief seems broad *prima facie*, the actual functions of the Commission seem to focus on state land in particular: collecting information and compiling said database and advising relevant functionaries with regard to all state land, including unsurveyed, unregistered state land. To that end a clear link exists between this Bill and the State Land

Lease and Disposal Policy Framework, which was published in July 2013, though the exact dimensions of the alignment are as yet unclear.

In order to complete the data as required, accounting officers of departments that have state land registered in the names of departments have to submit to the Commission the details of the state land so registered, the details of all acquisitions and disposals of state land and any other information that may be prescribed (cl 10). In light of the fact that the brief of the Bill also encapsulates unregistered and unsurveyed land, it is presumed that departments that have authority over such land would also have to provide the necessary information. Exactly how that is to be done, in the absence of survey and registries and deeds, is unclear. For purposes of the Bill 'state land' means 'land which is vested in the national government or relevant provincial government as defined in the Constitution of the Republic of South Africa, 1996 and any other land which after commencement of the said section was acquired by an organ of state' (cl 1).

Chapter 3 deals with disputes in respect of land. While the compilation of a database deals with state land only, disputes with respect to land impact on state and private land. Clause 11 provides that if two or more persons claim ownership of land in respect of which a title deed has been issued and both persons have registered title deeds with respect to the land, that person or persons may lodge an application with the Commission to investigate and make a finding on the matter. The finding has to be confirmed by the LCC. With regard to state land the relevant department or functionary, as explained above, has to provide the necessary information to the Commission. The result of such a process would point out anomalies where land ownership is concerned. It is not as clear how private persons or entities would know that more than one person or entity has title with regard to the same parcel of land. Of course the deeds registries located nationally are public and any person has access to the information, it is quite possible that persons may, depending on the circumstances, be unaware that they are not the only title holders. Being ignorant of that fact, there is nothing that could urge persons to initiate the process set out in clause 11. Once such an application has been lodged, the Commission has rather wide powers to investigate and scrutinise the matter, report its findings and make recommendations as to the rightful title holder (cl 12 and 13). A decision of the Commission may be taken on review or appeal to the LCC only.

Chapter 4, comprising clauses 14-19, provides for administrative and other matters. The Minister has to provide the Commission with the necessary support, including infrastructure and financial support, in order to perform its functions effectively. Clause 17 provides for the issuing of regulations.

The Commission can play an important role in providing legal certainty regarding the scope and location of state land and ownership issues respectively. Knowing how much land is state land, where it is located and who or what the functionary is, can also contribute greatly to the efficacy of the redistribution

programme. The Commission is also relevant with regard to other recent policy initiatives, including the State Land Lease and Disposal Policy, published in July 2013. The role the Commission is to play with regard to communal land, in particular, is unclear as other authorities, including local authorities and traditional leaders, also come into play. The necessity of drafting a policy that deals with communal land in particular, is again highlighted.

3.3 Extension of Security of Tenure Act

The publication of the Extension of Security of Tenure Bill on 17 October 2013 (Gen Not 1035 in *GG* 36942 of 2013-10-17) is interesting for two main reasons: (a) three years have passed since the the Draft Tenure Security Policy and corresponding Draft Land Tenure Security Bill were made public in December 2010 (GN 1118 in *GG* 33894 of 24 December 2010), and (b) the latest version of the Bill has departed drastically from the 2010-approach and has, instead, remained true to the original 1997 version of the Act, but with newly suggested amendments. Therefore, in initial idea to merge the Extension of Security of Tenure Act 62 of 1997 (ESTA) and the Land Reform (Labour Tenants Act) 3 of 1996 into one legislative measure fell by the wayside.

In light of the fact that the main body of ESTA essentially remains unchanged, the major development lies in the insertion of a whole new Chapter IVA, that provides for a Land Rights Management Board, discussed in more detail below. Other amendments include the insertion of a new definition dealing with dependants and family respectively. 'Dependant' includes a family member to whom the occupier has a legal duty to support, while 'family' means the occupier's spouse (including a partner in a customary union, whether or not the union is registered), child (including an adopted child), grandchild, parent, grandparent, who are dependants of the occupier and who reside on the land with the occupier (s 1). It will be interesting to see whether, in reality, these new definitions contribute to greater tenure security for family members. Of importance is that persons listed here do not acquire tenure security on their own or in their own capacity, but on the basis that they are dependent on the occupier. This dependency is furthermore limited to instances where a legal duty to support exits. Depending on the circumstances, it is possible that the definitions provided here may in fact be less broad and more restrictive, compared to the approach to 'right to family life' set out in the Constitutional Court judgement in *Hattingh v Juta* (2013 3 SA 275 (CC)). This is the case because the court focussed on a balancing act and not on the elements (or components) of 'family life' or 'culture'. To that end the content of family life for purposes of the ESTA had effectively been broadened and was certainly not linked to dependency or a legal duty to support.

Section 1 of the Act now provides that 'reside', for purposes of qualifying to be an occupier under the Act, means to live permanently at a place and 'residence' has a corresponding meaning. This is not really in line with previous case law and reasoning, especially that of the LCC. That court found that in relation to migrant workers who occupy single quarter hostels for a period of time only (and thus not constituting their permanent homes) still 'reside' for purposes of ESTA, thereby making the Act applicable to them (eg *National Union of Mineworkers and Others v Murray & Roberts Cementation (Pty) Ltd* [2010] JOL 25379 (LCC)).

The sections dealing with eviction, sections 10 and 11 respectively, have not been amended drastically though the insertion of Chapter IVA will inevitably impact on how evictions are approached and regulated. Sections 10 and 11 now include an obligatory attempt to mediate and settle any disputes. This development supports a more conciliatory approach.

Chapter IVA is almost all that has remained from the 2010-version of the Amendment Bill that proposed the merging of ESTA and labour tenancy legislation. Under the suggested section 15A a Land Rights Management Board is established. The Board has an overarching function while various Land Rights Management Committees are to be established to function on district level. The composition of the overarching Board and its functions are set out in sections 15B and 15C respectively. A very long list of functions is provided, including the function to advise the Minister and Director-General on security of tenure matters in respect of commercial farming areas, rural freehold and communal areas. While ESTA focussed on commercial farming areas generally, the Bill now also incorporates communal areas and 'rural freehold' areas. It is interesting that references to 'communal areas' have slipped in with respect to both this Bill and the Land Management Commission Bill. It is interesting in light of the fact that a policy dealing with communal land is still lacking. Yet, legislative provisions impacting on this kind of tenure keep on appearing.

Some of the other functions of the Board include creating and maintaining a database of occupiers, land rights disputes and their resolution; the provision of mediation and arbitration; monitoring and evaluating the impact of related laws; creating mechanisms for the provision of legal assistance and legal representation; identifying and recommending acquisition of land for settlement or resettlement of occupiers, including the facilitation of the implementation of section 4 that provides specifically for the creation of long-term security; the facilitation of the provision of municipal services and generally to deal with any matter referred to it by the Minister. The functions set out here would require capacity, both with regard to human and financial resources.

Integral to the effective functioning of the Board, are the various committees. These are provided for in section 15H. The specific functions of the committees are the following (s 15H(4)): to identify and monitor land rights disputes observed through adequate participation of all actors whose relative rights are contested;

to take steps to resolve a dispute; to refer the dispute to the Board if it cannot be resolved and to assist the Board in its functions, especially in providing information necessary to populate the database and to identify land for settlement purposes. The underlying idea is that land disputes would first be dealt with by the committees, thereafter by the Board and finally by the court.

The Bill is a drastic departure from the earlier version that merged ESTA and labour tenancy legislation. The establishment of the Land Rights Management Board and district committees may be burdened by human resources and financial constraints and shortcomings. It is furthermore critical that the new bodies and institutions are all aligned with other existing and newly proposed bodies and institutions. It is possible that, when all of the newly proposed institutions are considered, including those proposed under Policy Frameworks published in July 2013, a top-heavy administrative structure is the end result that may prove too complex and too expensive to maintain.

3.4 Case law

Eikendal Vineyards (Pty) Ltd v Engelbrecht (LCC 184/2013, 4 December 2013, LCC Randburg) deals with an urgent eviction application under section 15 of ESTA. The facts are briefly the following: the respondent was a former employee of the landowner, the applicant, until he was dismissed in April 2011. Prior to his dismissal and immediately thereafter he had been occupying a house with his parents, long-term occupiers under section 4(8) of ESTA. He is an adult, 31-year-old male. Being a *tik* addict he has been involved in numerous violent and disturbing incidences over a long period of time. Despite being sent to rehabilitation facilities twice, to which the landowner contributed financially, the process was unsuccessful and the respondent had continued his violent behaviour, causing distress and financial and bodily harm to persons close to him (para [10]). These occurrences, coupled with various written protests from co-workers and other persons occupying the land, led to the present urgent eviction application. Having complied with the formal requirements, the court considered the legal requirements under section 15 (para [16]). Section 15(1)(a) requires real and imminent danger of substantial injury or damage to persons and injury if the person is not removed from the land. The conduct of the respondent and the consequences thereof, including the hospitalisation of his own father, underscored the possibility of real and imminent danger (para [17]). In line with section 15(1)(b) the court per Meer AJP found that no other suitable remedy was available (para [18]). As explained, earlier attempts at rehabilitation were all unsuccessful. Under section 15(1)(c) the court also considered the relative hardship to the respondent and other affected persons. In the present circumstances, such a consideration favoured the granting of an urgent eviction order (para [19]). The final requirement under section 15(1)(d) that adequate

arrangements had to be made in the event of a final eviction order not being granted, was also met. Accordingly, all of the requirements for an urgent eviction application were complied with.

The respondent averred that he could reside in the house with his parents in light of the 'right to family life'. However, in this regard the court stated that '(s)ee *Hattingh v Juta* 2013 (3) SA 275 (CC) in which it was effectively found that the right to family life did not entitle an adult son and daughter to live with an occupier parent. The right to family life in terms of Sec 6(2)(d) of the Act was found not to encompass this' (para [21]).

It is not clear what to make from the above statement: does the Court mean to say that the right to family life was not based on requests from parents or that the right to family life did not encompass an adult son and daughter in law? The importance of the Constitutional Court (CC) judgment is that the CC did not set out the elements of the right to family life, but instead, focussed on the impact of the balancing of the rights of the respective parties. The difference becomes clear when the facts of this particular case are considered: if the elements of the right to family life are set out to exclude adult children, in other words, exclude children older than 18 years, then the respondent would automatically be excluded and that would be the end of the matter. However, in line with the CC judgment, any kind of family would in principle qualify for purposes of the right to family life under ESTA. This means that an adult son, like the respondent, would in principle fall within the ambit of 'family'. However, having regard to the enormous negative impact of his occupation and the detrimental consequences thereof, the balancing act would favour the rights of the landowner, the applicant. Accordingly, while an adult son like the respondent would form part of the family life to which the long-term occupiers have a right to, his conduct (which impacts on the balancing of the respective rights of the parties) would lead to the conclusion that the parents' right to family life cannot outweigh the rights of the landowner. The same result would be achieved, namely granting the urgent eviction application, but the method would be more in line with the approach followed in the CC. While the granting of an urgent eviction order cannot be faulted in these particular circumstances the approach followed here by the LCC concerning the right to family life cannot be supported.

Botya v Society of the Catholic Apostolate (Case no: 3753/2013; delivered on 27 February 2014, Eastern Cape Division, Grahamstown) concerned the return date of a *rule nisi* calling on the respondents to show cause why an order should not be issued interdicting and preventing the respondents from evicting the applicants; ordering the reconnection of electricity and allowing cattle belonging to the applicants to return to the farm in question. The applicants had been employed by the respondent, the farm owner, for many years and had also resided on the farm in question. (Some occupiers had been in occupation of their homes since 1960.) When their employment was terminated, many had remained

on the farm (paras [3]-[9]). During the period March 2013-September 2013 the applicants, who stood to be evicted by the respondent, received two letters informing them that they had to vacate the farm. In the meantime, before the eviction proceedings were officially lodged, the electricity supply was disconnected, their cattle was driven from the farm and the camp in which the cattle grazed, burned. In light of the fact that the applicants did not vacate, as requested per letter, a further letter was delivered informing the applicants that an eviction application had been lodged under ESTA. Apart from the notice of eviction the letter also cited apparent misconduct of the applicants and certain unlawful activities as well as the fact that cottages presently occupied by the applicants were needed by the new lessee. In response, the applicants averred harassment and unlawful eviction, based on the disconnection of the electricity supply and the driving away of their cattle (para [9]). The applicants further argued a result in their favour because they were not allowed to make representations, despite section 8.

On the other hand, the respondent placed the following information before the court, namely that, in light of economic factors, the operation on the farm was terminated, the occupiers voluntarily accepted severance packages and the land was leased. The new lessee offered the occupiers employment which they refused. Part of their severance agreements included that they had to vacate the farm together with their livestock as the lessee required the houses for the new employees (para [12]). It further transpired that the electricity was disconnected after employment was terminated and that the occupiers only resided on the farm during the week as they had accommodation in Queenstown, which was built for them by the respondent. The cattle were furthermore not driven away, but kept in another camp nearby and the pasture was burned as it was the custom to do so in order to renew pasture. It also became clear that: (a) the respondent intended to follow the eviction procedures set out in ESTA; and (b) that the rights of all section 8(4)-occupiers (or long-term occupiers) would be respected (para [14]).

While certain facts were in dispute (see para [17]) and while there was uncertainty as to whether the electricity supply had since been restored (para [21]), the Court per Robertson J emphasised that the issue before the court was an interdict preventing an unlawful eviction, calling for the requirements for an interdict (para [22]). On the facts it became clear that the court could not conclude that the respondent's conduct in relation to the cattle had been unlawful. Although ESTA stated that an occupier could not be deprived of access to water (s 6(2)(e)), there was no right to be supplied with electricity. With reference to *Prentjies v Visagie* ([1999] JOL 5719 (LCC)) the court was unable to conclude that the respondent acted unlawfully in discontinuing the electricity supply (para [24]). In light of the requirements for an interdict and the fact that the applicants failed to establish an injury committed or a reasonable apprehension of injury, as well as

no unlawful conduct on the part of the respondent, the application failed (para [25]). The *rule nisi* was accordingly discharged with costs.

In *J & F Le Roux Properties CC v Manisi* (Case no: 17328/13, delivered on 4 March 2014, Western Cape High Division, Cape Town) an eviction application was lodged under the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 (PIE), but finally decided under ESTA. An eviction application was lodged under section 4 of PIE in relation to a 75-year-old occupier who had been in occupation of a labourer's cottage on the farm in question since the 1960s. Because of ill-health and because his family members could not take care of the occupier, Mr Manisi (the first respondent), during the week, he was relocated to a home for the elderly in Worcester. On that basis, it was argued, the first respondent had lost his status as an occupier under ESTA, rendering PIE relevant instead (paras [1]-[3]). As he was taken back to the cottage for holidays and long weekends, his belongings, including possessions of sentimental value, were kept at the cottage. The respondent was adamant that he had not abandoned his right to reside on the premises and that he was still an occupier for purposes of ESTA. In this context the main question before the court was whether the first respondent was still an occupier of the premises within the meaning of the word under section 1 of ESTA (para [7]).

Referring to *Kiepersol Poultry Farm (Pty) Ltd v Phasiya* (2010 3 SA 152 (SCA)), where the Supreme Court of Appeal (SCA) found that a person who left some of his belongings in a house on a farm did not qualify as an occupier under ESTA, it was argued that the present respondent was in an identical position (paras [8]-[9]). The court per Binss-Ward J highlighted the differences between the two sets of facts and the two cases, eg, in *Kiepersol* the occupier voluntarily left his home and did not return to stay in the house, but merely returned to visit the farm. In this case the respondent did not leave his home voluntarily, but was forced to do so due to his ill-health and his family being unable to assist and help him during the week. He still regarded the cottage as his home where his possessions were and where he still attended to the garden (para [11]). The court also highlighted that 'the meaning of "residing"' in the relevant sense does not fall to be determined on the basis of an arithmetical calculation of where a person spends most of his time or where he sleeps most nights' (para [12]). Apart from elaborating on what was deemed to be considered a home, the court also reverted to the main goal objective of ESTA, namely to address the vulnerability of persons like the first respondent to eviction from places that they deem their homes and to afford security of tenure (para [13]). Section 5 of ESTA furthermore provided for fundamental human rights, including the right to human dignity, freedom and security of the person, privacy and freedom of movement, therefore required a particular approach to and interpretation of ESTA (para [13]). In light of all of this, the court reached the conclusion that it was 'not persuaded in the given circumstances that the fact that the first respondent is obliged by the

exigencies of his physical health to spend the greater part of his time staying in an old age home entails that he has given up his home on the farm' (para [15]). Should the first respondent return to his home on the farm he would also be assisted by the presence of his daughters, thereby also embodying the right to family life, as was highlighted in the 2013 CC judgment of *Hattingh v Juta*. The application was accordingly dismissed with costs.

Here the court followed a purposive approach to the interpretation of 'home' and 'reside'. It was emphasised that in determining whether a structure was in fact a 'home' the process did not necessarily require an arithmetical formulation that can be applied meticulously. A nuanced approach is therefore propagated, taking into consideration all of the factors and circumstances, including those circumstances over which the occupier has no control.

4 Unlawful occupation

Two main issues emerged from case law within the context of unlawful occupation and eviction: firstly whether PIE applies in the first instance and if so, its requirements; and secondly, the administration and management dimension of housing, unlawful occupation and eviction. With respect to the former, a lengthy judgment was handed down by Gamble J in *Fischer v Persons Whose Identities are to The Applicants Unknown and Who have attempted or are Threatening to Unlawfully Occupy Erf 150 (Remaining Extent), Philippi; and Ramahlele and Forty-six Applicants v Fischer* (case no 297/2014, delivered on 13 March 2014, Western Cape High Division, Cape Town).

The first applicant – Mrs Fischer – has been the owner and in occupation, of a brick house for many years. As the unfenced property, which she has been occupying with her son, was located on the Cape Flats, surrounded by some vacant areas covered by the usual Cape Flats bush and vegetation, the property had been prone to incursions and people seeking to erect informal structures thereon (paras [1]-[6]). The owners approached the City of Cape Town to remove said occupiers, which was indeed done in April and again in May 2013. After these removals a small number of occupiers put up four to five structures every night and took them down again in the morning. In August 2013 the City gave Mrs Fischer notice under section 6 of PIE to evict these unlawful occupiers. As her attorney, who was appointed to assist, did nothing, the structures grew to about 20 in number. Early in 2014, on 7 and 8 January the City's demolition squad conducted a series of raids in the area during which numerous structures were pulled down, dismantled and destroyed (paras [11]-[13]).

Two applications were relevant here: (a) the main application in which the applicants, Mrs Fischer and the City of Cape Town applied to prevent any further incursions onto the property, which was attended to by way of a *rule*

nisi; and (b) a counter-application lodged by 42 listed persons seeking to discharge the *rule nisi* and also seeking substantive relief, amongst other things, a declaration that the conduct of the applicants in the main application was unconstitutional and unlawful, interdicting future harassment, intimidation and assault; and the erection of temporary habitable dwellings that afford shelter, privacy and amenities at least equivalent to those that were destroyed. Judge Gamble first attended to the City's allegations regarding the status of the structures (paras [20]-[40]). Various affidavits attested to by persons who were involved in the dismantling process or who were aware of the process but not actually present during the raids, were relayed. Essentially these affidavits confirmed that (a) the Anti Land Invasion Unit was tasked to monitor all activity in the area so that land invasions could be reported and as far as possible, be prevented; (b) that the members of the Unit operated in line with strict policy guidelines and directions; (c) that homes were not destroyed as a court order was required; and (d) that only structures that were not complete or not yet a home or that were in the process of being built or that were uninhabited were destroyed. The argument was as follows: what was destroyed did not constitute homes and therefore PIE was not relevant (para [24]). In order to distinguish between structures that stood to be destroyed and those that would remain, an 'X' was painted on the relevant structures that were not to be destroyed. Because some structures that were destroyed on 7 January had been erected overnight again, they were again dismantled on 8 January. However, with regard to both 7 and 8 January, certain structures were untouched and remained intact. When the Fischers questioned why some structures were still intact, they were informed that those structures had been occupied and therefore constituted homes. When questioned as to what would constitute a structure as opposed to a home, the following factors were listed: the state of completion of the structure; whether the construction materials appeared to be new; whether it contained any furniture or belongings and whether the ground around the structure appeared to be undisturbed (para [35]).

The parties were then requested to address the court on two issues: (a) since the incursion occurred on private land, in what capacity the City purported to act; and (b) on what basis the City claimed that its conduct was lawful within the context of section 26(3) of the Constitution and PIE (para [42]). With respect to the former, the City referred to section 6 of PIE and alternatively, section 5. Section 6 provided that when it was in the public interest the local authority (as an organ of state) may get involved in eviction proceedings affecting private land. Section 5 of PIE provided for urgent measures, where relevant. Because the structures so dismantled and destroyed were deemed *not to be homes*, PIE was not relevant, as explained (para [37]). If PIE was not applicable, where did the City acquire its power to enter onto private land and demolish structures thereon? This question was answered with reference to

section 151(3) of the Constitution (dealing with the local government generally) and section 152, which provided that the object of local government included the provision of services in a sustainable manner, the promotion of social and economic development and the promotion of a safe and healthy environment (para [50]). The City also argued that the CC has accepted that government sometimes took lawful action for which no specific authority existed in legislation but which was sourced in the power to perform the general constitutional duties imposed upon it (para [51]), eg in *Minister of Public Works v Kayalami Ridge Environmental Association* (2001 3 SA 1151 (CC)) and *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* (2005 5 SA 3 (CC)).

The City further argued that it had done exactly what was reasonable so as to prevent an unlawful land invasion from becoming a major problem (para [54]). This, it argued, was also what was required under section 26(1) and (2) of the Constitution as the conduct of the unlawful occupiers impacted directly on the City's overall duty to realise housing rights for the public at large. These actions all stemmed from the general duty of the local government to plan for the progression of the right to housing in an orderly and systematic manner and that it must be permitted to plan and manage land usage within its jurisdiction with a free hand, subject to applicable national and provincial legislation and policy (para [58]). Therefore the City had to intervene. The court was satisfied that the City was enjoined to take all reasonable steps to prevent unlawful incursions onto private land and that in this particular case Mrs Fischer has requested the assistance of the City (para [60]).

The next issue was whether PIE was relevant. Here the court alluded to various judgments in which the interpretation of PIE was dealt with, including how PIE was to be approached and ultimately applied (paras [63]-[66]). It was especially emphasised that the focus now was not on the prevention of unlawful occupation, but on the prevention of unlawful eviction (para [65]). Concerning its relevance, the court underlined that 'the mischief which PIE is aimed at addressing is to ensure 'due process in relation to the eviction of unlawful occupiers from land, buildings or structures' (para [67]). The court reached this conclusion with reference to the definitions of 'evict, 'building or structure', 'land' and 'unlawful occupier' (para [68]). Of importance were the following: (a) the occupiers had no consent to be on the Fischer property; and (b) the erections and structures destroyed fell within the definition of 'building or structure'. The only issue was whether the occupiers were deprived of occupation of the temporary structures or occupation of the land on which these were erected.

The City argued that all structures in which the demolition squad found people or signs of human habitation were regarded as homes and were thus not destroyed. It was thus argued that the structures destroyed were vacant in the sense that no people were found therein or that there were no signs of

human habitation. Consequently, the destruction did not constitute the destruction of a home (para [73]). In this approach the underlying reason why any person would erect a structure in the first place, was thus ignored. Instead, the fact that the structure was erected indicated an intention on the part of the builder to take up residency therein (para [78]). Apart from the fact that the person may have been at work intending to occupy the structure when he or she returned, the court highlighted the fact that essentially, what was occupied was no the structure as such, but the land on which it was erected (para [82]):

In my view, since the fundamental principle of PIE is to afford a right to due process to the most marginalised members of society before being evicted from another's land, it does not serve the purpose of the legislation to measure with 'intellectual callipers', as it were, how long the occupier has been on the land, or whether there are factors indicating a possibility that an act of occupation has not been completed or that the person may perhaps have given up occupation, before affording the right to judicial oversight of the process of eviction. If the structure is complete, the invasion of the piece of land in question has taken place, occupation has occurred and the provisions of PIE are applicable.

With regard to the interpretation of 'home' the court confirmed that by applying a contextual interpretation to the word in the section of the Constitution which deals with socio-economic rights, the interpretation should be wide rather than restrictive. Correspondingly, a generous interpretation of PIE was also warranted (para [93]). It was thus not so much the period of occupation of the property which rendered PIE applicable, but the intention behind it. The court concluded that, in light of the facts and considerations, including the approach to and interpretation of PIE, the occupiers were deprived by the City of the procedural right to be heard under PIE before their structures were destroyed (para [97]). However, the court went to some length to stress that, by granting the relief sought, it did not reward the occupiers for their unlawful conduct which remained unacceptable in a democratic state. By taking the law into their own hands the occupiers have instead, compromised the orderly advancement of housing rights under section 26 (para [98]). It also acknowledged that the outcome may be a difficult one for the local government, given that resources are limited. However, the City's conduct must be in accordance with the rule of law. To that end the main application, being the *rule nisi*, was postponed and the counter-application was granted. The conduct of the City was unconstitutional and unlawful and the City was directed to construct for those counter applicants whose informal structures were thus demolished and who still required them, temporary habitable dwellings that afforded sufficient shelter.

This is an important judgment that has major implications for occupiers, landowners and local authorities. The facts illustrated the complexity that

essentially involved a stand-off between the landowner on the one hand wanting to protect her property and the occupiers on the other, in urgent need of housing, but ultimately having to be afforded the opportunity to have their plight adjudicated on in a court of law. The landowners did everything they possibly could to protect their property: they enlisted the help of a lawyer and approached the local authority. They finally lodged the present application aimed at preventing future incursions. Conversely, the occupiers must have the opportunity to protect the right not to be arbitrarily evicted or have their homes demolished. In this regard the approach followed by the court that essentially *the land,* and not the structures, had been invaded and occupied, seems sensible, but may cause difficulties in future. The land had been invaded and the structures erected for a very particular reason: to be used for shelter and residential purposes. Applying PIE to instances of invasion of land blurs the distinction between trespassing and unlawful occupation.

Apart from the question as to when trespassing ends and unlawful occupation begins, the following three issues still remain: (a) the continued plight of the unlawful occupiers; (b) the position of the landowner; and (c) the actual remedy employed here and its implications. Firstly, the plight of the unlawful occupiers is not over: once their structures had been reconstructed by the City, as ordered, lawful eviction proceedings are likely to be lodged against them. Having their homes restored did not in itself make their occupation lawful – they remain unlawful occupiers who stand to be evicted once the legal procedures have been adhered to. Secondly, it is critical that the rule of law prevails. In this context it is crucial that local government follow the procedures and act within the letter of the law. While the aforementioned is not negotiable, one cannot but be somewhat concerned about the position of the landowner. As elaborated on at length in the *Modderklip* case, protecting one's property remains the primary concern of the landowner – it is in the first place not the government's task to protect private property. Yet, Mrs Fischer did everything she could – legally – to protect her property. Finally, the end result is that the structures demolished had to be erected. It is not clear on what legal basis or under which legal remedy this occurred. Apart from one reference in the judgment to 'the spoliation application' (para [20]), it is unclear whether the result is in fact the conclusion of a successful *mandament van spolie.* It remains unclear as the requirements for the *mandament* were not alluded to at all, for example, what happened to the original building materials, did they exist and can the *status quo ante* in fact be restored? Or is the result the conclusion of an interdict? Again, the requirements were not set out and scrutinised. Or is the result similar to a constitutional possessory remedy that was first developed in the well-known *Tswelopele* case? Or may the result be ascribed to the operation of section 26 only? These considerations are important as they directly relate to issues of suitable remedies and sources of

law. In this particular case it is furthermore important because, as clearly indicated in the judgment, PIE ought to have been observed, but wasn't. Yet, even if one applies PIE, PIE does not make provision for restoration. While it is crucial that this gap in PIE be attended to, as has been pointed out before in discussions and commentaries, it has to be approached sensibly and methodologically. The result which requires the reconstruction of structures in this case may be the right outcome, but it must be clear how that outcome was reached and what the implications are for future litigation and legal certainty.

Govan Mbeki Municipality v Xaba and Others (Case no 45410/13, January 2014, North Gauteng High Court, Pretoria) concerned an urgent eviction application under section 5 of PIE. The applicant, the local authority, brought an urgent application to evict various respondents from local government housing. The respondents had been in occupation of the relevant houses for many years. In the course of 2012 the local authority decided to sell these houses, providing the present occupiers (the respondents) first opportunity to purchase. Although the respondents indicated their intention to purchase the property, they refrained from meeting the conditions. Despite being granted an extension, the respondents were still unable to meet the requirements. The applicant therefore cancelled the agreements and sold the properties to other purchasers who met all the requirements and conditions (paras [4]-[8]). The respondents remained in occupation and refused to vacate. To that end the urgent application was lodged and granted, followed by the present provision of reasons for the granting of the application. All of the requirements for an urgent application were complied with and suitable alternative accommodation was also available in the form of rental accommodation. In that regard no breach of section 26 had occurred and the provisions of PIE had also been complied with.

The administration and management dimension to housing and unlawful occupation, linked to eviction, resonated in *Ekurhuleni Metropolitan Municipality v Various Occupiers, Eden Park Extension 5* (Case no 873/2012, delivered on 26 November 2013, SCA). It dealt with an appeal against the judgment handed down by Satchwell J in which an eviction application was dismissed with costs. In the present matter a low-cost housing development was embarked upon to benefit squatters, homeless persons and backyard dwellers of Eden Park and feeder areas in particular (para [2]). However, when the development was well under way it became known that of the 2 149 housing stands only 77 would be allocated to the applicants from Eden Park and other feeder areas (para [4]). In November 2003 the provincial department initiated a new housing allocation programme (para [5]), which was followed by a new waiting list issued by the municipality in January 2004 (para [7]). Several meetings followed and eventually in October 2008 the residents of Eden Park began occupying the unoccupied and incomplete houses in Extension 5 (para [7]). Essentially the

unlawful occupiers argued that the eventual occupation of houses resulted from the incoherent and mysterious beneficiary identification process; the general failure on the part of the applicants to explain their housing policy and their beneficiary qualification criteria and their overall unwillingness and inability to engage with the respondents. The High Court was not persuaded that it would be just and equitable to order the eviction, for the following reasons: (a) the appellants displayed uncertainty and confusion as to the identity of the persons to be evicted; (b) the integrity of the waiting list and the allocation process had been compromised; and (c) the appellants adopted an 'exclusionary' eviction process in that it did not have proper regard to the personal circumstances of each of the unlawful occupiers (para [10]). In this regard Ponnan JA (with Malan, Majiedt, Willis and Saldulker JJA concurring), with reference to the well-known case of *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* (2010 3 SA 454 (CC)) underlined that where state land was involved different and more stringent considerations could apply under section 26(2) of the Constitution (para [13]). Accordingly, the reasonableness or otherwise of government's conduct was a material factor in determining whether eviction was just and equitable (para [13]). An eviction order could only be granted if it was just and equitable, taking into consideration all the circumstances of all parties involved. Once that decision had been made, the court had to consider (a) the conditions of eviction and (b) the date thereof (para [12]). The concept of 'just and equitable' was thereafter scrutinised in light of the Companies Act 71 of 2008 and 1972 case law (para [17]). Overall, the conclusion was reached that in these circumstances a not too purely legalistic or purely technical approach had to be followed (para [18]). Essentially, the court was called upon to go beyond its normal functions and to engage inactive judicial management according to principles of an ongoing, stressful and law-governed social process (para [19]).

While the respondents were clearly desperate, it could hardly excuse their conduct which was part of a deliberate strategy to gain some preference in the allocation of housing resources over other persons (para [22]). However, on the facts it became clear that, far from adopting the directive and amplifying it as the municipality asserted, it actually adopted different criteria when the allocation of houses occurred. While two different official policies existed (para [24]), it was furthermore unclear which criteria were finally employed to compile the allocation lists (para [25]). Accordingly, the resolution and directive, upon which the appellants asserted they relied, were actually at odds with each other. In these circumstances the integrity of the listing and allocation processes was clearly compromised (para [26]). The court reached the conclusion that the appellants could, in these circumstances, have been in breach of their constitutional obligations and have failed to meet the obligations imposed upon them by the Housing Act 107 of 1997 (para [28]). 'But it is not

necessary to go that far. It suffices for present purposes to hold, as the high court did, that it would not be just and equitable to order the eviction of the respondents' (para [28]). The appeal therefore failed and was dismissed with costs.

The judgment emphasised that the provision of housing is a serious duty that has to be exercised responsibly and meticulously. It is critical that the integrity of the system is not compromised. Addressing the backlog and alleviating the housing crisis is not assisted when misallocations occur, where listings are compromised and complex and time-consuming legal processes have to be employed to ameliorate the situation.

5 Land use planning

Spatial planning and land use management had been contentious issues for the past decade or so, which required constant policy and legislative interference. Although the process of drafting and re-drafting of legislation had been ongoing for some time following the publication of the Draft White Paper on Spatial Planning and Land Use Management and a Draft Land Use Management Bill in 2001 (Gen Not 1658 in *GG* 22473 of 20 July 2001), the Portfolio Committee on Rural Development and Land Reform finally adopted the Spatial Planning and Land Use Management Bill (B14B-2012) on 12 February 2013 after it was published for comment in the course of 2012 (Gen Not 5124 in *GG* 35445 of 15 June 2012). On 5 August 2013 the Spatial Planning and Land Use Management Act 16 of 2013 (SPLUMA) was signed by the President (*GG* 36730 of 5 August 2013). The latest development was finally the result of *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal, Gauteng Development Appeal Tribunal* (2010 6 SA 182 (CC)) which impacted on Chapters V and VI of the Development Facilitation Act 67 of 1995 in light of Schedules 4 and 5 of the Constitution. As Chapters V and VI were found to be unconstitutional and suspended for 24 months, Parliament was pressed to provide relief in the form of new legislation.

The underlying idea of the SPLUMA is to repeal the Development Facilitation Act 67 of 1995 and thereby to replace the fragmented approach to land use planning and management by introducing a single, uniform management system. Section 3 also lists the following as objectives of the Act: to ensure that the system of spatial planning and land use management promotes social and economic inclusion; to provide for development principles and norms and standards; to provide for the sustainable and efficient use of land; to provide for cooperative government and inter-governmental relations amongst the national, provincial and local spheres of government; and to redress the imbalances of the past and to ensure that there is equity in the

application of spatial development planning and land use management systems.

Accordingly, in this light the former approach of separating rural and urban developmental approaches and to deal with each separately in different chapters, respectively in Chapters V and VI of the Development Facilitation Act, 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.

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 the land reform process, especially with respect 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 (s 7(1)(a)(iii)). Land development procedures must furthermore include provisions that accommodate access to secure tenure and incremental upgrading of informal areas (s 7(1)(a)(v)). With regard to the principle of spatial sustainability, special emphasis is placed on the protection of prime and unique agricultural land (s 7(1)(b)(ii)) and the promotion of the effective and equitable functioning of land markets (s 7(1)(b)(iv)).

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 not be effective. The actual embodying of the principles takes place in the various development frameworks and the actual integrated development plans that have to be drafted (see the whole of Ch 4 of the Act that deals with spatial development frameworks). The national, provincial, regional and municipal frameworks, drafted in light of the relevant norms and standards, have to be aligned. The process of drafting these frameworks is complex and time-consuming and entails notices, public consultation and numerous 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.

Because a lot of land use planning activity occurs on municipal level, much is expected from local government (see the whole of s 21). Municipal spatial development frameworks have to provide for short-term needs (five 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 (s 23(2)).

Municipal planning is imperative for successful land use planning and management overall. To that end municipal land use planning is essentially dealt with by the municipal planning tribunal or, in some instances, by a designated official (s 35). 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 (ss 36-40). Apart from 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 (s 41). 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 (s 42).

It is quite possible that land use planning and management would encapsulate applications that affect national interest. These applications are dealt with in section 52. 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 them to be forwarded for 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 commencement of the Act repeals various legislative measures, including 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 67 of 1995. Because of the repeal of these measures, as well as the fact that many development applications are in the process of being dealt with, section 60 contains important 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 (s 60(2)(d)).

The transformational thrust of the Act is apparent. At many different levels and in various contexts, the transformational dimension is accentuated, linked to 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. It is also going to be very interesting to witness the alignment (or not) of these legislative developments with various Policy Framework developments that were published in July 2013. In this regard the Agricultural Landholding Policy, in terms of which ceilings and floors for agricultural landholdings are provided for, has clear connecting points with development frameworks set out in the SPLUMA.

5.1 Case law

Berg River Municipality v Zelpy 2065 (Pty) Ltd (2013 4 SA 154 (WCC)) concerned the application and interpretation of the National Building Regulations and Building Standards Act 103 of 1977 (Building Act) and its relevance with regard to zoning schemes. The owner, Zelpy, erected buildings without the approval required under section 4(1) of the Building Act. The application was for an interdict preventing Zelpy from occupying or using the property until an occupancy certificate was issued under section 14(1) of Act. Though the facts are quite complex and quite a long period of time was involved during which both parties acted and reacted continuously (see paras

[4]-[11]), only the relevant facts are highlighted here. In short: the respondent required approval for building plans which could only happen after a rezoning application had been lodged successfully. An environmental impact assessment (EIA) was also required. Throughout the various applications and appeals the respondent continued his unlawful erection of buildings and ignored all instructions from the municipality.

Because a new rezoning application had been lodged in the meantime, the municipality decided not to seek an immediate demolition order, but rather an interdict to prevent the use or occupation of the new structures, with a right to apply on the same papers for demolition if the new rezoning application failed. Zelpy's counter-application entailed a permission to occupy the new structures prior to the issue of an occupancy certificate, such permission to endure pending a decision on the new rezoning application. The municipality averred that, because no approved building plans existed for the new structures, the application could not be granted. While it seemed that both parties accepted that the use of the new structures without an occupancy certificate or permission granted under section 14 was unlawful, the question to be decided was whether section 14(1A) permitted a local authority to grant permission for a building to be used where the building has been erected without the local authority's approval (para [16]).

Section 4(1) of the Act provides that no person, without the prior approval in writing of the local authority, may erect any building in respect of which plans and specifications were to be drawn and submitted under the Act. A person who contravened section 4(1) was guilty of an offence (s 4(4)). Because the new building required plans which were not approved, the new structures were clearly unlawful (para [18]). In light of the requirements for an interdict, namely a clear right, an injury actually committed or reasonably apprehended and the absence of a similar protection by any other ordinary remedy, Zelpy argued that the criminal sanction in section 14(4), read with section 24, was a satisfactory alternative remedy. To that end, it was argued, the requirements for an interdict had not been met.

In order to determine whether the above approach was sound, Rogers J first considered the broad scheme of the Act (see para [25] and further). Firstly, a person may not erect a building without the necessary approval from the local authority. If he erected a building without approval, he was guilty of an offence. Secondly, a person who lawfully erected a building with the local authority's approval could not use or occupy the building without the local authority's permission in the form of an occupancy certificate. The reason for both these provisions was to make sure that buildings were safe and suitable for their intended use. Therefore, even when a building had been erected in accordance with approved plans, section 14 did not permit it to be used or occupied without the necessary consent (para [26]). Because there was no express prohibition

in the Act against the use and occupation of a building erected without approved plans, the prohibition is implied. That was necessary in order to realise the ostensible legislative intention or to make the statute workable (paras [28] and [31]). Here the court reached the conclusion that section 14 only applied with respect to buildings erected with the local authority's approval. It would be inconceivable that the lawmaker would have intended that while lawfully erected buildings could be used and occupied only after obtaining a certificate of permission contemplated in section 14, an unlawfully erected building could be lawfully used and occupied (para [32]). This approach was supported by the fact that permission under section 14(1A) was intended to be temporary, prior to the issuing of an occupancy certificate. The introductory part of section 14(4)(a) further expressly referred to a building 'erected or being erected with the approval of the local authority' (para [34]). Consequently Judge Rogers found that section 14(1A) did not apply to buildings erected or being erected without approval. Instead, section 14(1A) would entitle a local authority to grant permission for a building to be used where the building has been or was being erected in accordance with the municipal approval, but there was some impediment to the issuing of the occupancy certificate (para [39]).

The next question to be considered was whether the interdict ought to be granted. While the first two requirements seem to have been met, the third requirement, alluded to above, required further scrutiny. Zelpy's argument was that criminal offences created by the Act were a sufficient remedy (para [44]). Considering the scheme of the Act again, the court concluded that (a) the only penalty was a fine of R100 per day amounting to R27 000, and (b) that the lawmaker intended the local authority to have the power to seek civil remedies (para [46]). In fact, interdicting unlawful building would be the usual response of local government in similar situations. Further, a criminal remedy would not generally be regarded to be available to the harmed individual. It further did not provide 'similar protection': the interdict would result in the cessation of the unlawful activity while a criminal remedy would not (para [47]). Because the respondent was a company imprisonment would also not be an option. Overall, the court concluded that 'such criminal charges .... would not have constituted a satisfactory alternative to an interdict as contemplated in Setlogelo' (para [51]). The interdict was thus granted, preventing the use of the new structures without an occupancy certificate. In the case of the new rezoning application being unsuccessful, the municipality's application to lodge the demolition application on the same papers was refused by the court, on the basis that circumstances would have changed by that time. An application for demolition would then have to be lodged afresh.

In *The Habitat Council v Evangelical Lutheran Church, Strand Street* (Case no 23061/2009, decided on 14 August 2013, Western Cape High Court, Cape Town) two applications, both raising the same constitutionality point, were dealt

with together. The first application was the *Gordonia* application and the second the *Habitat* application. The Gordonia application was linked with an application for the proposed development of a residential site, lodged by the second respondent (the developer) which authorisation was granted by the former Minister of Local Government, Environmental Affairs and Development Planning. Also in 2009, the Minister upheld an appeal brought by the developer that the City had failed to consider an application for development timeously. Planning permission was granted for the whole of the development, which included rezoning and the subdivision of erven into 80 single residential erven. Immediately hereafter applications for the review and the setting aside of both the environmental authorisations and planning approvals were lodged by the third respondent, one Cornelis Augoustides. Despite this application, the City itself also brought a separate application in November 2009 to review and set aside the planning approvals alluded to above. This application was later amended to also include an attack on the constitutionality of section 44 of the Land Use Planning Ordinance 15 of 1985 (hereafter LUPO).

The Habitat application also raised the constitutionality of section 44 of LUPO. This application concerned the redevelopment of a block in the City of Cape Town, dominated by 18th century buildings which were historically connected to the Lutheran Church. The property belonged to Gera Investment Trust of which the third to sixth respondents were current trustees. While the facades of the outer building would be retained a whole-scale development would result in a modern four-storey office building. Under section 108(1) of the zoning scheme regulations the property fell within an 'urban conservation area' which meant that development or redevelopment would require special consent. It was for this special consent that the Trust applied to the City's Spatial Planning, Environment and Land Use Management Committee (SPELUM). The consent was denied which triggered an appeal under section 44 of LUPO, which was upheld by the Minister in October 2012. While the development could continue, the Minister underlined that he was in no position to impose conditions and recognised the role of the City and their involvement in that regard. In response to the City's draft conditions the Minister in February 2013 imposed a set of conditions that would guide the development.

The Habitat Council thereafter lodged an application under section 8 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) aimed at setting aside the decision to allow development, as well as the set of conditions alluded to above. This application was also linked to the unconstitutionality of section 44 of LUPO insofar as it allowed the Minister to finally determine municipal planning applications falling within the functional competence of the City as local government. Under the Constitution the various spheres of government include the local, provincial and national governments – each distinctive from the other although they were inter-dependent and inter-related.

Under section 156(1)(a) of the Constitution a municipality has executive authority in respect of matters listed in Part B of Schedule 4 and Part B of Schedule 5 of the Constitution. This includes 'municipal planning'. Under section 104(1)(b) of the Constitution the provincial government likewise has power to pass legislation for its province with regard to various items, including regional planning development and urban and rural development. Under section 44(1)(a)(ii) of the Constitution the national government has the power to pass legislation with regard to any matter, including a matter within the functional areas listed in Schedule 4, but excluding, (subject to subs (2)), a matter within a functional area listed in Schedule 5. In this regard Judge Davis pointed out that two principles have emerged: (a) that the different functional competencies in Schedules 4 and 5 should be interpreted distinctly from one another; and (b) that the municipality's exclusive powers have to be interpreted as applying primarily to matters which may appropriately be regulated intra-municipally, as opposed to intra-provincially. Accordingly, where a matter required regulation inter-provincially as opposed to intra-provincially, the Constitution ensured that national government was accorded the necessary power, either exclusively or concurrently under Schedule 4 or through the powers of intervention accorded to it by section 44(2). The principle should therefore also apply with regard to intra-municipal as opposed to inter-municipal regulation (p 16).

Regarding functional areas in local government matters the meaning thereof had to be determined by considering relevant legislation. While both areas essentially provided for planning and land use control, as well as for forward planning in principle, regional and provincial planning entailed laying down broader guidelines for areas comprising the whole or parts of more than a single local or metropolitan municipality (p 18). When considering land use control applications the provincial government had to confine itself to the regional provincial effects. This meant that it could not reject a proposal because it contained a feature that had only intra-municipal effects. This approach permitted a clear demarcation between municipal and provincial government.

In exercising their powers and functions, it meant that provincial government could regulate the manner in which municipalities exercised their executive authority. Here the court was satisfied that this meant that the provincial government could assess the outcome of the municipal planning process. It could therefore require the municipality to reconsider their decision if the manner in which the decision was made or the justification thereof or the nature and effect was likely to underline the effective performance by the municipality of its forward planning and land use control functions. Usually the vast majority of decisions taken by municipalities under LUPO would involve municipal planning matters. The decision involving the *Habitat* case, made

under section 108(1) of the zoning scheme also fell within this ambit. Provincial interest in the heritage or conservation of particular areas in a particular city was dealt with by the relevant heritage legislative measures. Accordingly, the purpose of section 108(1) does not have extra-municipal effect.

After setting out the background, the court considered the constitutionality of section 44 of LUPO in particular. LUPO was a pre-constitutional measure, though it had been amended a few times since 1994. Though section 44 referred to the relevant 'Administrator', under the assignment proclamation reference to the Administrator had to be read as reference to the 'competent authority', which in this case was the Minister (p 26). With reference to the Minister's oversight authorities, as explained above, the first respondent had the power to assess the procedure and outcomes of municipal planning processes. However, section 44 permitted appeals to the Province against every decision made by a municipality in terms of LUPO and it allowed the Minister to replace any decision so reached. This was the case also where an application only affected municipal planning matters. That would lead to a conflation of provincial and municipal powers, which was inconsistent with the Constitution, thereby rendering section 44 of LUPO unconstitutional (p 28).

The next aspect the court dealt with was that of retrospectivity. Here the court emphasised that a finding of unconstitutionality and invalidity without any limitation on its retrospective effects would give rise to a full-blown form of retrospectivity and would have dire consequences for all developments and construction, including unlawfulness (p 30). Consequently, a draft order, which was later made an order of the court, set out that as a default position, all existing decisions, made under section 44 of LUPO in the period since the Constitution commenced, would remain valid. However, with respect to the decisions made in the Gordonia and Habitat applications in particular, the decisions were set aside (p 31). To that end the applicants in these two applications were afforded effective relief, immediately.

The finding of the unconstitutionality of section 44 was to be suspended for a period of 24 months to allow the Western Cape Provincial Parliament to amend or replace it. For this period alternative wording would be read into section 44(2) and (3) while section 44(1), dealing with appeals, remained unaltered. However, concerning appeals brought to the first respondent under section 44(2) and (3) reformulation was warranted. In this regard the court identified two categories: (a) where appeals were made to the province and only issues relevant to municipal planning were raised; and (b) where development raised issues of regional planning and development, urban and rural planning or provincial planning. In light of all of the above the applicants were accommodated by way of interim relief in that they could launch fresh section 62 appeals under the Local Government: Municipal Systems Act 32 of 2000. This was quite extraordinary, necessitated by the particular

circumstances, as the applicant would generally not be able to launch a fresh appeal at this rather late stage.

Booth v Minister of Local Government, Environmental Affairs and Development Planning (2013 4 SA 519 (WCC)) concerned various applications to bring the unlawful practice of attorneys in line with the zoning requirements of LUPO. The Booth firm had been practising law on property zoned 'General Residential' since 1990/1991. In 2008 the applicants lodged an application to rezone the property as 'Special Business' which would have allowed a law practice. After the application was denied and various other appeals and applications were lodged consecutively, the City lodged an application for a declaratory order setting out the conduct of the applicant as unlawful and interdicting such unlawful use of the property (para [3]). Following this, a review application was lodged by the applicant. The case presently dealt with included the review and interdict applications.

Judge Rogers first set out the relevant legislative framework (para [10] and further). Applications for rezoning are set out in sections 16 and 17 of LUPO, while the basis for refusing such applications is set out in section 36 (see para [11]). The first ground for review was that the MEC had based his decision on the Land Use Management Policy for Kenilworth Main Road and Kenilworth Road (the KRP). It was argued that the Policy was used as rules and not as guidelines which meant that no proper attention was given to the appeal (para [14]). Essentially, the Policies concluded that no further rezoning, temporary departures or consent would be granted in future for Kenilworth Road Properties. That had been the case because, after conducting numerous studies, it was concluded that Kenilworth Road remained highly desirable for residential purposes and that that particular character had to be protected. The MEC, who considered the proposed development undesirable therefore supported that approach and had set out his reasons to that effect in the appeal lodged. The court underlined that where policies were concerned, a specific process of public participation has occurred. Furthermore, where polices were coherent and rational and when they were implemented consistently, it provided a large measure of useful predictability to the public (para [29]). If a departure from the Policy was required and relevant then the applicant would have to point that out specifically and would have to indicate why such a departure would not impair the overall objectives of the relevant Policy. The applicant refrained from doing that and expressed no opinion as to why the applicant's case was an exceptional one. Hence no reason to depart from the Policy was placed before the MEC (para [32]). Therefore, it was quite acceptable for a decision-maker to reason that *prima facie* land use which was inconsistent with the Policy was undesirable – specifically because the Policy was formulated to determine, for future consistent land use planning, what was and what was not desirable for the relevant area (para [33]). While the MEC

acted in accordance with the Policy, which he found to be sound, the applicant did nothing to convince that the Plan should not be applied to his particular application (para [35]).

The second issue the court dealt with which was linked to the first ground of review was the application for rezoning as 'Special Business Use' which zoning permitted a wide range of activities, including retail trade, cafe, restaurant, bar and laundrette. Because rezoning was not there to merely permit what an applicant currently wished to do, the first ground of attack failed (para [40]). The second ground was that the MEC had misconstrued section 36 of LUPO and had incorrectly put a wrong onus on Booth. It was argued that the MEC had approached the case on the footing that Booth could only succeed by proving that the rezoning would be positively desirable whereas the MEC could only refuse the application if he found it to be positively undesirable (para [41]). Section 36(1) set out mandatory grounds of refusal while section 36(2) set out discretionary grounds if the application did not fall at the first hurdle (para [45]). Overall, section 36(1) only made sense if it was read providing that the only grounds on which an application may be refused (though refusal was not mandatory in these circumstances) were lack of desirability and effect of existing rights. Accordingly, read with section 36(2) it meant that if the application was not refused (but instead granted) the terms of approval had to take into account only the matters listed in section 36(2) (para [46]). Here the court found that the MEC was not compelled to refuse an application merely because there was some element of undesirability. However, what he could not do was refuse the application with reference to any other criteria. Overall, the finding made by the MEC was that the proposed use was positively undesirable, a finding influenced by his acceptance of the KRP as an appropriate guide. The second ground was thus also rejected (para [53]), resulting in the review application failing. As the review failed, there was no defence against the interdict application. However, it was discussed whether there ought to be some suspension of the final order, despite obvious criminalisation, as the property could not be used as a law practice (para [64]). In the present circumstances a suspension of one month was decided on (para [66]). The application for review was accordingly dismissed and the interdict granted, suspended for a period of one month.

6 Deeds

The Deeds Registries Amendment Act 34 of 2013 was published on 18 December 2013 (*GG* 37173 of 2013-12-18). The Amendment Act 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' (long title read with ss 4 and 38). According to the Memorandum, if an error was common to two or more deeds or documents, all the documents had to be lodged for amendment. However, the amendment allowed the Registrar of Deeds the discretion to decide which documents needed to be lodged eventually. As section 38 only provided for a certificate of registered title for destroyed title deeds, the amendment was needed so as to also include certificates 'where the title deeds become incomplete or unserviceable'. The Act also provides for the update of deeds with regard to the names of companies, close corporations and the surnames of women (s 93).

7 Sectional title

The Sectional Titles Amendment Act 33 of 2013 commenced on 18 December 2013 (*GG* 37172 of 2013-12-18). The amendments deal *inter alia* with the regulation of the notification of the intended establishment of schemes and the sale of units to lessees, provide for the cancellation of registered sectional plans (s 14(8)), the issuing of a certificate of registered sectional title in respect of a fraction of an undivided share in a section (s 15B); the registration of a transfer of a part of the common property with consent of the owners (s 17), the endorsement of title deeds to reflect the amended quota schedules (s 17(5)), consent of holders of registered real rights over exclusive use areas to the alienation of property (s 17(4)(bA)); cession of a mortgage real right of extension (s 18) and the issuing of more than one certificate of real right of extension and more than one certificate of real right of exclusive use area (s 27).

8 Valuation of property

The new proposed measures for the valuation of property is mainly linked to land reform but it seems that these measures may also be used by state departments to ensure good governance in land transactions where the state is involved. The Draft Property Valuation Bill was first published for comment on 23 May 2013, followed by a new version in March 2014. Overall the main thrust of the draft Bill was contained in the latest version, although some smaller changes are noticeable. Chapter 1 of the Bill still retains the relevant definitions. In this regard the following definitions, all of which have undergone some (smaller) changes, remain pertinent to the main objectives of the Act:

> "property" means-
> (a) immovable property registered in the name of a person;

(b) any moveable property which is contemplated to be acquired together with the relevant immovable property; and
(c) a right in or to such property, including an unregistered right recognised and protected by law.

'value' for purposes of section 12(1)(a), means the value of property identified for purposes of land reform; which must reflect an equitable balance between the public interest and the interests of those affected by the acquisition, having regard to all the relevant circumstances, including the –

(a) the current use of the property;
(b) the history of the acquisition and the use of the property;
(c) ()the market value of the property;
(d) ()the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) the purpose of the acquisition'

While the draft Bill listed four objectives of the Act, the latest version now includes five objectives, namely to (cl 2):

(a) give effect to the provisions of the Constitution which provide for land reform and to facilitate land reform through the regulation of the valuation of property;
(b) ()provide for the establishment of the Office of the Valuer-General;
(c) provide for the valuation of property that has been identified for purposes of land reform;
(d) provide for a voluntary valuation service to departments; and
(e) provide for the setting of criteria and procedures and the monitoring of valuations.

It seems as if the main difference between the May 2013 version and the 2014 version of the Bill is that the Act now also provides for voluntary valuation services if relevant departments required them. The overarching focus to establish the Office of the Valuer-General and to generally provide for compulsory valuation where property has been identified for land reform purposes remained intact. The Office of the Valuer-General is set out in the whole of Chapter 2. In this regard provision is made for its establishment (cl 4), the status of the office (cl 5) and the functions thereof (cl 6), while the powers are set out in clause 7. In contrast to the original version there is no clear distinction between what the Office of the Valuer-General must do and what the Office may do. Instead, the functions are all listed in clause 6. These include that the Office must value any property contemplated in section 12(1)(a). On the other hand, whenever a department requests a valuation, then the office may then provide that evaluation, also in relation to section 12(1)(b) of the Act. The Office furthermore has to make recommendations to the Minister with regard to:

(a) criteria for the determination of the value of property contemplated in section 12(1)9a) (for land reform purposes);
(b) procedures and guidelines, excluding the method of valuation for relevant properties, the manner in which a valuation must be performed and any other relevant factors; and
(c) a system to monitor compliance with the criteria and procedures contemplated in the above instances.

The Office must further also determine the matters that must be reflected in a valuation report as provided for in section 15 of the Act.

Chapter 2 is sub-divided into two parts: Part 1 deals with the establishment, status, functions and powers of the Office – as alluded to above, while Part 2 deals specifically with the appointment of the Valuer-General and Chief Operating Officer (cl 8-10). In this regard the responsibilities of the Valuer-General are set out in clause 9 and the appointment and the responsibilities of the Chief Operating Officer in clause 10. The Chief Operating officer is to be appointed by the Minister and has the responsibilities to organise, control, manage and effectively utilise and train all the staff; maintain discipline and perform all such powers and duties delegated to him or her.

Chapter 3 deals with the valuation of property. All valuations have to be done by qualified and competent persons who meet all professional and other requirements. As mentioned above, the valuation of property identified to be acquired for land reform purposes has to be valuated by the Office of the Valuer-General. These kinds of valuations are prescriptive, in accordance with section 12(1)(a). However, apart from these valuations, governmental departments may also request the valuation of property, for other purposes, as set out in section 12(1)(b). Accordingly, while the initial Bill prescribed the valuation of all property (a) acquired for land reform purposes, as well as (b) forming part of any transaction where the state is a party, the latter fell away in the 2014 version. This means that all relevant property in any transactions where the state is involved need not be valuated in principle by the Office. It is, however, quite possible that such a valuation may be requested in certain instances. This approach seems more sensible as obligatory valuations affecting all transactions where the state was involved, irrespective of the purpose thereof, would have amounted to extensive processes and would have burdened the Office unreasonably. Following a valuation, a valuation report has to be compiled within a fixed period of time (cl 15).

Chapter 4 deals with financial and other matters and consists of two parts: Part 1 links up with financial administration and Part 2 deals with miscellaneous matters. The funds required for the functioning of the Office of the Valuer-General are essentially appropriated by Parliament (cl 17) and have to be audited annually (cl 18). Part 2, dealing with miscellaneous matters, includes provisions setting out

the delegation of powers and duties in certain instances (cl 19) and the making of regulations by the Minister under clause 20.

While the main thrust of the original Bill has remained, the recent Bill seems more streamlined. Not requiring valuation of property in all instances where the state is a party, but providing the option to have property valuated, may streamline the overall process further. However, utilising expropriation to expedite the process of land reform generally, may still pose some challenges. While the Bill contributes to guidelines and will certainly assist in providing more legal certainty regarding valuation of relevant properties, the overall process may still be complex and time-consuming. The obligatory valuation of property for land reform purposes, however useful, is still time-consuming.

9 Housing

The Social Housing Regulatory Authority notified provisionally accredited social housing institutions established in terms of the Social Housing Act 16 of 2008 to submit documentation regarding their housing developments or the administration thereof (s 13). All these institutions have to apply for re-accreditation which will be considered on the basis of the institution's arrangements for 'good governance, financial sustainability, effective tenant management and efficient property management capacity' (Gen Not 1088 in *GG* 36996 of 2013-11-08).

The Construction Industry Development Board published draft best practice Standards and Guidelines for comment in terms of the Construction Industry Development Board Act 38 of 2000 (BN 226 in *GG* 37014 of 2013-11-15). The South African Council for Planners published Rules and a Code of Conduct for their profession in terms of the Planning Profession Act 36 of 2002 (s 30(2) – Gen Notice 1230 in *GG* 37189 of 2013-12-23), as well as draft regulations to provide for procedures and matters whereby the profession wants to reserve certain work exclusively for professional and technical planners (Gen Not 1094 in *GG* 37009 of 2013-11-08). However, some of the matters mentioned may be in conflict with the work of the legal profession as well as with the work of environmental assessment practitioners, for example 'the assessment of the impact of spatial policies, plans and programs (including spatial development frameworks) on the environment as part of any Strategic Environmental Assessment (SEA) report in ... the National Environmental Management Act or similar or superseding legislation' (reg 4(1)(c)(ii)) and the removal of restrictions (reg 4(1)(a)(iv)). Regulation 4(4)(a)-(b), however, recognises the possibility that some work will have to be done by practising attorneys or professional land surveyors.

10 Agriculture and rural development

10.1 Agriculture

On 5 November 2013 the Department of Agriculture, Forestry and Fisheries (DAFF) and the AgriBEE Charter Council made a presentation on the status of transformation in the agricultural sector to Parliament's Portfolio Committee on Agriculture, Forestry and Fisheries[2]. The AgriBEE Sector Code was gazetted and commenced on 28 December 2012 in terms of section 9(1) of the Broad-based Black Economic Empowerment Act 53 of 2003. Although compliance with the AgriBEE Sector Code is currently voluntary, various measures have been put in place to ensure compliance (DAFF's procurement policies, water licences issued by the Department of Water Affairs, agricultural import and export permits and the certification of fresh produce market agents must all be compliant with the AgriBEE Sector Code). DAFF is currently implementing three strategies to give content to the AgriBEE Sector Code, namely the CASP (Comprehensive Agricultural Support Programme) to improve enterprise development; the utilisation of the AgriBEE Fund to improve Black equity ownership in the entire agricultural value chain; and the incubation of farmers in Limpopo.

A presentation was also made on the disbursements of funds from the AgriBEE Funds[3]. Empowerment is measured against seven factors: 1. Equity ownership; 2. Management and control; 3. Employment equity; 4. Skills development; 5. Preferential procurement; 6. Enterprise development; and 7. Rural development, poverty alleviation and corporate social investment. By the end of October 2013 the balance in the AgriBEE Fund was R231m (with an annual allocation of R35m). Whilst CASP focuses on on/off farm infrastructure and production inputs, and MAFISA focuses on production inputs, the AgriBEE Fund's two main focus areas are the promotion of equity, and agro-processing and value adding. Of the 67 proposals that have been submitted, screened and evaluated, six (with a total value of R25.5m) have been recommended.

DAFF's Strategic Plan for the period 2013/14 to 2017/18 has been aligned to the national transversal policy framework, which consists of the National Development Plan (NDP), the New Growth Path (NGP), the Industrial Policy Action Plan 2 (IPAP2) and the decisions of the Presidential Infrastructure Coordinating Commission (PICC)[4] Key focus areas are the promotion of (a) food security (with more than 20% of South Africa's population currently being food insecure at household level), (b) smallholder farmers and cooperatives, (c) agro-

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[2]http://www.pmg.org.za/report/20131105-transformation-in-agricultural-sector-input-department-agriculture-forestry-and-fisheries-agribee-charter.

[3](http://www.pmg.org.za/report/20131105-transformation-in-agricultural-sector-input-department-agriculture-forestry-and-fisheries-agribee-charter.

[4]http://www.daff.gov.za/doaDev/topMenu/DAFF%20Strategic%20Plan%202013.pdf.

processing, (d) access to forestry resources, and (e) access to fisheries (including marine and inland aquaculture).

According to the 2012-2013 Annual Report of the Marine Living Resources Fund (MLRF) it is responsible for the funding of operational and administrative activities of DAFF's Fisheries Branch, including, amongst others, the sections responsible for aquaculture and economic development; fisheries research and development; marine resource management; and monitoring, control and surveillance[5]. A number of challenges have been identified, such as the status of DAFF's research and patrol vessels, poaching and capacity constraints (human, financial and infrastructural).

10.2 Rural development

On 24 July 2013 the Minister of Rural Development and Land Reform (DRDLR) approved the Rural Development Framework (RDF)[6] .In 2009 the Agrarian Transformation Strategy was introduced by means of the Comprehensive Rural Development Strategy (CRDP)[7]. The RDF, to a large extent is an updated and enhanced version of the CRDP, by, amongst others, aligning it with the National Development Plan (NDP) and the 2014-2019 Medium Term Strategic Framework (MTSF) which prioritises 'up-scaled rural development as a result of coordinated and integrated planning, resource allocation and implementation by all stakeholders' (p 10). The RDF states that the vision of the CRDP 'is the creation of vibrant, equitable and sustainable rural communities', and identifies eight foundational governmental activities, the CRDP management system, and a number of rural development measurables (which are phased as follows: meeting basic human needs (shelter, energy, food, water and sanitation); rural enterprise development; and rural industries, markets and credit facilities – p 10-13). With reference to the NDP, the RDF requires that the current marginalisation of the rural poor must be overcome by the availment of social, economic and political opportunities. With this in mind, the DRDLR will develop Rural Development and Land Reform Plans (RDLRPs) which are aligned to the PDP and the three above-mentioned CRDP phases (p 13-15). The RDF establishes a new development support system (p 15–21), consisting of a reformed communal tenure system; a democratised rural administration system; the establishment of a Rural Development Agency (RDA), with a development and a funding component;

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[5]http://www.nda.agric.za/doaDev/sideMenu/fisheries/MLRA%20DOCS/MLRF%20Annual%20Report%20web.pdf.

[6]http://www.ruraldevelopment.gov.za/legislation-and-policies/file/2093-rural-development-framework-policy

[7]http://www.ruraldevelopment.gov.za/about-us/crdp/crdp-documents/file/670-the-comprehensive-rural-development-programme-framework.

A Rural Investment and Development Financing Facility (RIDFF); the National Rural Youth Service Corps (NARYSEC); the Animal and Veld Management Programme (AVMP) (consisting of soil rehabilitation, the re-greening of the village-space, and the deep congestion of the village-space); the revitalisation of the rural towns and villages; and the River Valley Catalytic Programme (RVCP), which is 'a framework for integrating for water planning and management with environmental, social and economic development along the river banks (watershed development)' (p 21).

As regards the proposed reformed communal system (p 15-17) the RV states that currently challenges are experienced in respect of governance economic and social transformation in communal areas. Taking into account that (a) traditional structures (traditional leaders and traditional councils) are prevalent in a large number of traditional community areas; and (b) fully elected CPAs, trusts and other statutorily recognised structures are present in other rural areas, the proposed communal tenure system consists of two models and a transversal framework providing for institutional roles and relationships that are similar to both models (p 15–17).

The Land Tenure Security Policy for Commercial Farming Areas was approved by the DRDLR Minister on 22 July 2013.[8] The policy focuses on farm dwellers and workers, as well as on existing and potential land reform beneficiaries. It identifies a number of key land tenure security and land rights challenges (section 2, p 18-28), consisting of farm dwellers' and farm workers' land rights in commercial farming areas; land tenure and land rights in restituted and redistributed areas; related land tenure conflicts in state, mining, tourism and communal areas; and environmental challenges. The vision of the policy is defined as (para 3, p 28-29):

> The realisation of equitable access to land in terms of race, gender and class; secure rights over land among various categories of persons with vested interests in the land; the economic deracialisation of the agricultural sector in which Black South Africans become capable owners, managers, professionals and well-compensated workers; the sustainable utilization of land to enhance shared growth, food security, employment development; and sustained investments to achieve socially inclusive rural development.

An overview is also given of the purpose and the key principles of the proposed land tenure policy (para 3, p 29-31). Paragraph 4 deals with the proposed land tenure security policy options (p 31), including, amongst others farm owner incentives to provide services to improve farm dweller rights; land

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[8] http://www.ruraldevelopment.gov.za/legislation-and-policies/file/2094-land-tenure-security-policy-for-commercial-farming-areas.

rights and tenure options for redistribution and restitution; the legal protection of rights and alternate dispute resolution; share equity, co-management and other empowerment schemes; the sustainable funding of land rights management programmes; the effective monitoring of land rights and research on tenure in security; and land tenure administration reforms and enhanced institutional capacities (p 31-45). Proposed reforms relating to the land rights management institutions are discussed in section 5, and the new land tenure administration system will consist of (a) the Land Rights Management Board (LRMB); (b) Land Rights Management Committees (LRMCs); and (c) enhanced DRDLR capacity to promote land rights management (p 45-59). Various amendments and additions to the current statutory framework are being considered (para 6, p 60). The policy concludes with an implementation strategy, which comprises (a) the planning mythology; (b) the sequencing of programmes; (c) the monitoring and evaluation plan; and (d) information on the determination of the required resources (p 60).

The DRDLR Annual Report 2012/2013 states that 376 land claims were finalised (inclusive of payment and transfer to the beneficiaries concerned), whilst a further 602 claims were settled by means of approval by the DRDLR Minister (in respect of these claims payment and transfer still need to be effected) (p 19)[9] (). The land audit was not yet fully completed. 243 farms (with a surface area of 157 556 ha) were acquired and distributed, and 421 emerging farmers benefited from capacitation programmes. 200 distressed farms (allocated in terms of the Redistribution Programme) benefitted from the Recapitalisation and Development Programme (p 20). At the policy level and a number of documents were approved (the Policy on Property Valuations; the Land Tenure Security Policy for Commercial Farming Areas and the Restitution Policy) and other policies are being developed. Significant progress as regards meeting envisaged targets was made in respect of (a) the surveying of State land in the former homelands; (b) the verification of the State land register; (c) the provision of socio-economic infrastructure to households; (d) the provision of assistance to rural communities as regards agricultural infrastructure and services; (e) the provision of skills development and the creation of job opportunities; and (f) the settling of land claims (p 24).

According to the DRDLR Strategic Plan 2014-2019, the department will be responsible for five programmes, namely. Administration; National Geomatics Management Services; Rural Development; Restitution; and Land Reform[10]. The Plan aims at implementing 'appropriate policy and programme interventions which

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[9]http://www.ruraldevelopment.gov.za/publications/annual-report/file/2201-department-of-rural-development-and-land-reform-annual-report-1-april-2012-31-march-2013.
[10]http://www.ruraldevelopment.gov.za/publications/strategic-plans/.

respond to the immediate needs of rural residents and rural communities'; and the maximisation of 'development benefits by strengthening cooperation and coordination efforts' that aim 'at making development benefits reach the marginalised through shared resource planning and utilisation for well-targeted development results' (p 8). DRDLR has identified a fourth pillar (function) of land reform, viz 'development of the land' (in addition to restitution, redistribution and land tenure reform – p 13). This new pillar is also translated as the third principal underpinning land reform, viz 'strict production discipline for guaranteed national food security' (which compliments principle 1. 'Deracialisation of the rural economy'; and 2. 'Democratic and equitable land allocation and use across gender, race and class' – p 13).

The DRDLR Annual Performance Plan 2014/15 emphasises its role in the implementation of the Animal Veld Management Programme (AVMP), the Comprehensive Rural Development Plan (CRDP), the SPLUMA, the reopening of the submission of claims for the restitution of dispossessed land, and the National Evaluation Plan.[11] In addition, targeted services will be provided to people residing in the rural areas and skills development will be a priority.

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[11](http://www.ruraldevelopment.gov.za/publications/annual-performance-plans/file/2495-annual-performance-plan-2014-2015).