

# Chapter 48

## Land

### Juanita Pienaar & Jason Brickhill

48.1 Introduction

48.2 Drafting History

48.3 Land Rights

48.4 Interpreting land legislation

48.5 Land, culture and customary law

48.6 FC 25(5): Redistribution

(a) Introduction

(b) Enabling legislation

(i) Land Reform (Labour Tenants) Act 3 of 1996

(aa) Beneficiaries

(bb) Labour tenants' rights

(cc) Redistribution of land — acquisition of land rights under Ch III

(ii) Provision of Land and Assistance Act 126 of 1998

(iii) Transformation of Certain Rural Areas Act 94 of 1998

(c) Policy documents

(d) Redistribution programme: brief evaluation

48.7 FC 25(6): Tenure reform

(a) Introduction

(b) Enabling legislation

(i) Upgrading of Land Tenure Rights Act 112 of 1991

(ii) Interim Protection of Informal Rights Act 31 of 1996

(iii) Communal Property Association Act 28 of 1996

(iv) Extension of Security of Tenure Act 62 of 1997

(aa) Introduction

(bb) Beneficiaries

(cc) The promotion of long-term tenure security

(dd) Occupiers' rights

- (1) General
    - (2) The right to family life
    - (3) The right to freedom of religion and burial rights
    - (4) The right to legal representation
  - (ee) Occupiers' duties
  - (ff) Evictions
    - (1) General
    - (2) Procedural requirements
    - (3) Requirements for eviction
    - (4) Granting an eviction order
    - (5) Urgent eviction proceedings
  - (gg) Mediation and arbitration
  - (hh) Review proceedings
  - (v) Communal Land Rights Act 11 of 2004
    - (aa) General
    - (bb) Application
    - (cc) 'Old order' and 'new order' rights
    - (dd) Procedure for tenure reform
      - (1) First steps: structuring the community and conducting a land rights enquiry
      - (2) The determination phase
    - (ee) Formalisation of tenure rights
  - (c) Tenure reform: brief evaluation
- 48.8 FC s 25(7): Restitution
- (a) Introduction
  - (b) Role players
    - (i) The Commission on Restitution of Land Rights
    - (ii) The Land Claims Court
  - (c) Restitution procedure
    - (i) Formal requirements
    - (ii) Substantive requirements
      - (aa) Standing

- (bb) Dispossession
- (cc) A right in hand
- (dd) After 19 June 1913
- (ee) Discriminatory law or practice
- (iii) The requirements in practice: Richtersveld
- (d) Brief analysis of the restitution programme
  - (i) Tempo of land restitution
  - (ii) Number of claims and progress
  - (iii) Innovation to expedite the process
  - (iv) Budget
  - (v) Sustainable development and agriculture
  - (vi) Community-related problems
- (e) Outstanding claims

---

OS 03-07, ch48-p1

## 25. Property. —

...

(4) For the purposes of this section —

- (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
- (b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).

(9) Parliament must enact the legislation referred to in subsection (6).<sup>1</sup>

## 48.1 Introduction

---

<sup>1</sup> Constitution of the Republic of South Africa, 1996 (Act 108 of 1996) ('Final Constitution' or 'FC').

The land reservation and segregation that formed the core of apartheid and colonial rule in South Africa led Sol Plaatje, the first General Secretary of the African National Congress, famously to exclaim: 'Awaking on Friday morning, June 20, 1913, the South African Native found himself, not actually a slave, but a pariah in the land of his birth'.<sup>2</sup> That date marked the passage of the Black Land Act 27 of 1913. Ever since, the legal regulation of land rights has had a special social, economic and cultural significance in South Africa. Indeed, much of the struggle to end apartheid can be understood as a struggle to regain land rights that were lost through colonial conquest and apartheid forced removals.

The history of apartheid land law<sup>3</sup> and the negotiations over the inclusion of a

---

OS 03-07, ch48-p2

property clause in the Interim Constitution<sup>4</sup> have been exhaustively described elsewhere. The purpose of this chapter is to analyse the constitutional framework for land reform adopted by the Constitutional Assembly in the latter part of the constitutional property clause, FC ss 25(4)-(9). The three central provisions in this framework — FC ss 25(5), (6) and (7) — must be understood as part of the cluster of socio-economic rights in the Final Constitution.<sup>5</sup> Each subsection provides the constitutional basis for a different sub-component of the land reform programme: FC s 25(5) offers the basis for land redistribution;<sup>6</sup> FC s 25(6) provides for tenure

---

2 ST Plaatje *Native Life in South Africa* (1916). On Plaatje's response to the Black Land Act, see B Willan *Sol Plaatje: A Biography* (1984) 143-73.

3 See, for example, C Cross & R Haines *Towards Freehold* (1988); G Budlender & J Latsky 'Unravelling Rights to Land and to Agricultural Activity in Rural Race Zones' (1990) 6 *SAJHR* 155-77; THR Davenport & KS Hunt *Right to Land* (1987); TW Bennett 'African Land — A History of Dispossession' in R Zimmermann & D Visser (eds) *Southern Cross: Civil and Common Law in South Africa* (1996) 65; CG van der Merwe & JM Pienaar 'Land Reform in South Africa' in P Jackson & DC Wilde (eds) *The Reform of Property Law* (1997) 334.

4 See Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution' or 'IC'). The Interim Constitution contained only a limited number of socio-economic rights, whilst IC s 28, the property clause, provided for the protection of rights in property, subject to IC ss 121-123, the framework for land restitution. See G Budlender 'The Constitutional Protection of Property Rights' in G Budlender, J Latsky & T Roux *Juta's New Land Law* (1998) 1-3; E Lahiff & S Rugege 'A Critical Assessment of the Land Redistribution Policy in the Light of the *Grootboom* Judgment' (2002) 6(2) *Law, Democracy and Development* 279-84; AJ van der Walt *The Constitutional Property Clause* (1997) 7-8; AJ van der Walt *Constitutional Property Law* (2005) 1-3. For more on the interpretation of IC s 28, see PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's Law of Property* (4th Edition, 2003) 486-487; H Mostert 'South African Constitutional Property Between Libertarianism and Liberationism: Challenges for the Judiciary' (2000) 60(2) *ZaöRV* 295-330; AJ van der Walt 'Notes on the Interpretation of the Property Clause in the Constitution' (1994) 57 *THRHR* 193.

5 See further, S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33, 33-1-33-2. For purposes of this chapter, FC s 26 is particularly relevant, especially in relation to access to land for housing and eviction. Since these matters are, however, canvassed in detail in the chapter in this treatise on housing, the discussion of housing and eviction in this chapter is limited. See K McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55.

6 Broadening access to land is the main focus of this programme.

reform;<sup>7</sup> and FC s 25(7) engages land restitution.<sup>8</sup> FC s 25(8) provides for the reform of law related to natural resources.<sup>9</sup> This degree of constitutional protection for land and related rights is rather unusual,<sup>10</sup> but nevertheless understandable given the symbolic importance of land in South Africa.

Before proceeding to the main discussion, we proffer a brief history of the drafting of the property clauses. As a further preliminary matter, we also discuss

---

OS 03-07, ch48-p3

the proper approach to interpreting legislation enacted to give effect to the constitutional land provisions, and the relationship between land, culture and customary law.

## 48.2 Drafting history

The Interim Constitution contained positive rights to restitution of land rights in IC ss 121 to 123, but did not provide for rights in respect of redistribution and tenure reform. Indeed, the property clause in IC s 28 did not refer to land or land reform at all. This left land reform measures, especially those falling outside the restitution sub-component of the programme, vulnerable to constitutional challenge under IC s 28. The first draft of the Bill of Rights<sup>11</sup> in the Final Constitution<sup>12</sup> proposed two alternative solutions to this problem: a property clause that included land reform provisions; or no property clause at all.<sup>13</sup> Some submissions thus argued that a

---

7 Providing security of title is the main focus of this programme.

8 Restoring land or rights in land or compensating claimants in certain circumstances is the main focus of this programme.

9 In this regard, reform has occurred and is still taking place in relation to minerals and water. See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg & Schoeman's Law of Property* (5th Edition, 2006) Chapters 23 and 24; H Thompson *Water Law: A Practical Approach to Resource Management and the Provision of Services* (2006).

10 Even Latin American countries, which have been in the forefront of land reform and constitutional mechanisms for providing land reform and agrarian protective measures, have nothing as comprehensive as the South African Bill of Rights. For example, art 171 of the Bolivian Constitution protects the social, economic and cultural rights of indigenous people, especially with regard to communal lands of origin, and guarantees the sustainable utilization of their natural resources, their identity, values, languages, customs and institutions. Article 5 XXVI of the Brazilian Constitution provides merely that small rural properties, when worked by families, cannot be attached in cases of debt.

11 Theme Committee 4 was responsible for drafting the fundamental rights provisions of the Final Constitution and Theme Committee 6 was responsible for drafting the provisions concerning the specialized structures of government.

12 For the historical background to the property clause in the Interim Constitution, see A Eisenberg 'Land' in M Chaskalson, J Kentridge, J Klaaren, G Marcus, D Spitz & S Woolman (eds) *Constitutional Law of South Africa* (1st Edition, RS3, 1998) 40-1-40-5.

13 Theme Committee 4 Draft Bill of Rights (9 October 1995). The right to property was not entrenched in the Constitutional Principles in IC Schedule 4, meaning that the exclusion of the property clause from the Final Constitution was notionally possible.

separate land clause should be included to provide for all the sub-components of the land reform programmes, and not only for restitution.<sup>14</sup> Other submissions recommended that the property clause provide for positive rights to land, including restitution,<sup>15</sup> redistribution and tenure security.<sup>16</sup> The intention behind these latter submissions was that the property clause should strike a balance between the protection of existing property rights and the promotion of socio-economic rights to land and tenure security.<sup>17</sup> Ultimately, it was this view that prevailed.

In addition to the positive provisions on land reform, an affirmative action or restitutionary justice clause was inserted in FC s 25(8). The intention behind this clause appears have been to place beyond doubt the notion that 'land, water and related reform in order to redress the results of past racial discrimination' constitute a protected constitutional purpose.<sup>18</sup>

---

OS 03-07, ch48-p4

### 48.3 Land rights in the final constitution

The White Paper on South African Land Policy sets out the fourfold purpose of land reform: (a) to redress the injustices of apartheid; (b) to foster national reconciliation and stability; (c) to underpin economic growth; and (d) to improve household welfare and alleviate poverty.<sup>19</sup> These policy objectives are inevitably interconnected with FC s 25. In one of the first cases that dealt with property rights, *First National Bank of SA Limited t/a Wesbank v Commissioner for the SA Revenue Services; First National Bank of SA t/a Wesbank v Minister of Finance*, the Constitutional Court held that:

The purpose of section 25 has to be seen as protecting existing property rights as well as serving the public interest, mainly in the sphere of land reform, but not limited thereto, and also as striking a proportionate balance between these two functions.<sup>20</sup>

- 
- 14 Submission by the Land and Agricultural Policy Centre to the Constitutional Assembly Theme Committee 6 Workshop on Issues Associated with Land Rights (DATE).
- 15 IC ss 121-123, which provided for restitution, did not form part of the chapter on fundamental rights.
- 16 In addition to these positive measures it was proposed that land be excluded from the property clause, ie that the property clause be qualified by the provision that it would not apply to land. See Constitutional Assembly Theme Committee 6 *Specialized Structures of Government: Draft Report by Theme Committee 6* (11 September 1995) 22.
- 17 These rights could be used to balance other rights in the Constitution, to test the validity of legislation, as a guide in the interpretation of legislation, and as a criterion to test the justifiability of administrative action. *Memorandum to Theme Committee 6.3 Draft Formulation on Land Rights* (11 September 1995) See also Van der Walt *Constitutional Property Law* (supra) 1-4.
- 18 Budlender 'The Constitutional Protection of Property Rights' (supra) at 1-73.
- 19 Department of Land Affairs *White Paper on South African Land Policy* (1997) v. The publication of the White Paper was preceded by the publication of the Green Paper on Land Reform in February 1997.
- 20 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC) at para 50.

Accordingly, the property clause can be divided into two distinct parts: the first consists of FC s 25(1)-(3), which aims to protect existing property rights and delimit the scope of that protection.<sup>21</sup> The second, FC s 25(4)-(9), deals with land reform and related matters. Whereas the Interim Constitution granted positive rights to restitution only, the Final Constitution grants constitutional protection to land redistribution and tenure reform as well.<sup>22</sup> Although these land rights place legal obligations on the legislator, the exact nature and extent of these obligations are still uncertain. The rights go further than the imposition of negative obligations,<sup>23</sup> and place a positive obligation on the state to enact legislation providing for land redistribution, tenure security and restitution.<sup>24</sup>

In *Government of the RSA v Grootboom*, the Constitutional Court held that the land rights in FC s 25 form part of the cluster of socio-economic rights in the Final Constitution.<sup>25</sup> This idea was further developed in *Minister of Health v Treatment Action Campaign*.<sup>26</sup>

---

OS 03-07, ch48-p5

Even though there is no explicit provision providing for a 'right to land', the second part of FC s 25 provides for inter-connected sub-programmes in which this distinct form of socio-economic right may be realized.<sup>27</sup>

## 48.4 Interpreting land legislation

A plethora of legislation has been enacted to give effect to the constitutional rights underpinning each sub-programme of land reform. We refer to this legislation collectively as 'land legislation' and in this section of the chapter make some brief comments on how the interpretation of this cluster of legislation should be approached.

---

21 For a discussion of the remainder of FC s 25, see T Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46. See also PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's Law of Property* (4th Edition, 2003) 489; Van der Walt *Constitutional Property Law* (supra) at 12-13.

22 But see *Joubert v Van Rensburg* 2001 (1) SA 753 (W) ('*Joubert*') at paras 43-44. This decision was later overturned on appeal. See *Mkangeli v Joubert* 2001 (2) SA 1191 (CC), 2001 (4) BCLR 316 (CC). For further discussion, see § 48.7(b)(iv) infra.

23 A negative obligation entails that the legislator may not enact legislation which would make people landless or threaten their tenure security, except under very limited circumstances. See G Budlender 'Towards a Right to Housing' in AJ van der Walt *Land Reform and the Future of Land Ownership in South Africa* (1991) 45-47.

24 P de Vos 'Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 67.

25 2001 (1) SA 46 (CC), 2000 (11) BCLR 1169 (CC) ('*Grootboom*') at para 19. For more detail, see Liebenberg (supra) at 33-7-33-8 and 33-22-33-23.

26 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) 94. See also Liebenberg (supra) at 33-24-33-32.

27 Liebenberg (supra) at 33-1-33-2.

The first factor that influences the interpretation of land legislation is the historical injustice the legislation seeks to address. These injustices were well captured by Sachs J in *Port Elizabeth Municipality v Various Occupiers*:

[A] cluster of statutes . . . gave a legal/administrative *imprimatur* to the usurpation and forced removal of black people from land and compelled them to live in racially designated locations. For all black people, dispossession was nine-tenths of the law. Residential segregation was the cornerstone of the apartheid policy. This policy was aimed at creating separate 'countries' for Africans within South Africa. Africans were precluded from owning and occupying land outside the areas reserved for them by these statutes. . . . Differentiation on the basis of race was, accordingly, not only a source of grave assaults on the dignity of black people. It resulted in the creation of large, well-established and affluent white urban areas co-existing, side-by-side, with crammed pockets of impoverished and insecure black ones. The principles of ownership of Roman-Dutch law then gave legitimation in an apparently neutral and impartial way to the consequences of manifestly racist and partial laws and policies.<sup>28</sup>

The next major theme relevant to interpreting land legislation is the constitutional context. In terms of FC s 39(2), courts interpreting legislation must promote the spirit, purport and objects of the Bill of Rights. What, then, is the 'constitutional matrix' into which the constitutional land provisions fit? Two types of constitutional provision are relevant: the founding values of the Final Constitution; and the (other) rights in the Bill of Rights.

The Court in *PE Municipality*, interpreting the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act,<sup>29</sup> noted that the 'starting and end point of the analysis must be to affirm the values of human dignity, equality and freedom'.<sup>30</sup> We agree with Budlender that these values are likely to have a 'tilt' effect when interpreting land legislation in favour of an interpretation that gives greater weight to the rights and interests of the vulnerable and landless.<sup>31</sup>

---

OS 03-07, ch48-p6

Relevant founding values also include the rule of law, which the Constitutional Court has stated is crucially important in the land reform process.<sup>32</sup> The Court has emphasized that the Final Constitution is strongly committed to *orderly* land reform, and does not sanction arbitrary seizures of land, whether by the state or by landless people.<sup>33</sup> In *President of the Republic of South Africa & Another v Modderklip Boerdery (Pty) Ltd (AgriSA & Others, Amici Curiae) ('Modderklip')*, the Constitutional Court held that the state is 'required to take reasonable steps . . . to ensure that large-scale disruptions in the social fabric do not occur in the wake of the execution

---

28 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) ('*PE Municipality*') at paras 9-10.

29 Act 19 of 1998 ('the PIE Act').

30 *PE Municipality* (supra) at para 15.

31 Budlender 'The Constitutional Protection of Property Rights' (supra) at 1-69.

32 *PE Municipality* (supra) at para 20.

33 *Ibid.* See also *Grootboom* (supra) at para 92.

of court orders [concerning illegal land occupation], thus undermining the rule of law'.<sup>34</sup>

Another constitutional value relevant to the interpretation of land legislation is *ubuntu*. *Ubuntu* reflects a commitment to communality and the interdependence of the members of a community, a respect for life and human dignity, humanness, social justice and fairness, and an emphasis on reconciliation rather than confrontation.<sup>35</sup> *Ubuntu* and its underlying values are certainly relevant when considering customary law notions of communal ownership of land. Although not expressly referred to in the Final Constitution, the Constitutional Court has on a number of occasions stated that *ubuntu* has a place among the founding values.<sup>36</sup> In *PE Municipality*, the Constitutional Court specifically emphasized the role of *ubuntu* in the land reform process.<sup>37</sup> Although *ubuntu* is a multi-faceted value and courts have emphasized different aspects of *ubuntu* in different cases,<sup>38</sup> in our view it is relevant to land reform in at least two of its dimensions: communality (of land ownership) and a preference for mediation and reconciliation over adversarial confrontation.

The right to dignity in FC s 10 must play a role in the interpretation of land legislation, since FC s 25 seeks to repair the 'grave assaults on the dignity of black people' inflicted by apartheid dispossession.<sup>39</sup> One means of giving effect to the right to dignity when interpreting land legislation is to prefer an interpretation that promotes the autonomy and choice of the landless, whom the legislation seeks to benefit, over an interpretation in terms of which they are to be silent, grateful recipients of whatever benefit the state decides to confer.

---

OS 03-07, ch48-p7

The Court in *PE Municipality* noted the broad overlap between FC s 25 and FC s 26, and remarked that 'the stronger the right to land, the greater the prospect of a secure home'.<sup>40</sup> In *Grootboom*, dealing with the right of 'access to adequate housing' in FC s 26, Yacoob J held that '[f]or a person to have access to adequate housing all of these conditions must be met: *there must be land*, there must be services, there

---

34 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) at para 43.

35 C Himonga & C Bosch 'The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?' (2000) 117 *SALJ* 306, 311-12. See also M Pieterse "'Traditional" African Jurisprudence' in C Roederer & D Moellendorf (eds) *Jurisprudence* (2006) 442.

36 See *Bhe & Others v Magistrate, Khayelitsha, & Others (Commission for Gender Equality as Amicus Curiae)* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at para 45; *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at paras 130, 224-225, 263 and 308; *Azanian Peoples Organisation (AZAPO) v President of the Republic of South Africa* 1996 (4) SA 671 (CC), 1996 (8) BCLR 1015 (CC) at para 19; *Hoffmann v South African Airways* 2001 (1) SA 1 (CC), 2000 (11) BCLR 1211 (CC) at para 38.

37 *PE Municipality* (supra) at para 37.

38 See Pieterse (supra) at 445-47.

39 *PE Municipality* (supra) at para 10.

40 *PE Municipality* (supra) at para 19.

must be a dwelling' (emphasis added).<sup>41</sup> Therefore, land reform is a necessary precondition for the realization of the right of access to adequate housing. In practice, the two programmes complement each other and must be implemented contemporaneously.

Finally, the administrative justice right in FC s 33 (as embodied in PAJA<sup>42</sup>) and the right of access to information in FC s 32 (as embodied in PAIA<sup>43</sup>) will be relevant to the interpretation of the process provisions of land legislation. Decisions taken by organs of state in terms of land legislation may constitute 'administrative action' which may be reviewable in terms of s 6 of PAJA.

FC s 25(5), (6) and (7) (read with FC s 25(9)) provide a constitutional mandate for the enactment of legislation to give effect to the rights contained in these provisions, although each of these subsections does so in different terms. For present purposes, it is sufficient to note that the requirement of super-ordinate legislation has a number of implications. First, the express constitutional mandate for legislation in an area may give that legislation an extra layer of insulation against constitutional attack. Where land legislation implicates conflicting, but constitutionally protected, interests, and the specific Act prioritizes, for example, tenure reform over other property rights, the express constitutional requirement for such legislation may, to some extent, 'tilt' the balance in defence of such a statute, even if not rendering land legislation immune to constitutional challenge.<sup>44</sup> Secondly, the legislation enacted to give effect to constitutional land rights must be interpreted as doing just this. This principle has been established in respect of similar legislation required to give effect to other constitutional rights: the Labour Relations Act 66 of 1995 ('the LRA'), which gives effect to the labour rights in FC s 23; PAJA, which gives effect to the right to lawful, reasonable and procedurally fair administrative action in FC s 33; PAIA, which gives effect to the right of access to information in FC s 32; and the Promotion of Equality and Prevention of Unfair Discrimination Act 2 of 2000 ('PEPUDA'), which gives effect to the right to equality in FC s 9. In relation to these statutes, the Constitutional Court has held that litigants must rely on the relevant Act and may not go behind it and rely directly on the

---

OS 03-07, ch48-p8

constitutional provision.<sup>45</sup> However, litigants may rely on the constitutional provisions to challenge the relevant statute on the basis that it fails adequately to give effect to the constitutional right, and if found wanting the Court may make a

---

41 *Grootboom* (supra) at para 35. See also K McLean 'Housing' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, July 2006) Chapter 55, at 55-34-55-35.

42 Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

43 Promotion of Access to Information Act 2 of 2000 ('PAIA').

44 See Budlender 'The Constitutional Protection of Property Rights' (supra) at 1-69.

45 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC), 2004 (7) BCLR 687 (CC) ('*Bato Star*') at para 25; *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC), 2006 (1) BCLR 1 (CC) ('*New Clicks*') at para 96; *National Education Health and Allied Workers Union v University of Cape Town* 2003 (3) SA 1 (CC), 2003 (2) BCLR 154 (CC) ('*NEHAWU*') at paras 14-16.

declaration of invalidity coupled with any of the usual remedies.<sup>46</sup> Thirdly, the interpretation and application of legislation enacted to give effect to a constitutional right is always a constitutional matter falling within the jurisdiction of the Constitutional Court.<sup>47</sup> This is so even in cases in which the parties do not contend that the relevant land legislation is constitutionally deficient.

## 48.5 Land, culture and customary law

The relationship between land, culture (cultural rights) and customary law is crucial to understanding the constitutional commitment to land reform in FC s 25 and the land legislation. It goes beyond mere interpretive relevance: as we shall see in *Richtersveld*, customary law rights have a substantive affect on the application of FC s 25 and the land legislation.<sup>48</sup>

In 1903, the South African Native Affairs Commission (Langden Commission), which was appointed to determine a 'common understanding' on 'native policy' in the four colonies,<sup>49</sup> recommended the territorial segregation of black and white. It suggested the creation of 'native reserves': distinct territories of exclusively African occupation. The Commission contended that the reserves had a historical and legal basis: natives had 'distinct rights' to the reserved lands as 'ancestral lands held by their forefathers'. These distinct rights of tenure were regarded as a form of communal or group ownership under which the 'Tribal Chief' administered the land in trust for the community. The chiefs, however, had (according to the Report) voluntarily transferred their sovereign rights of administration to the Crown by 'peaceful annexation'.

This account indicates how the colonial authorities set about building a (purported) legal and historical bridge between the existing customary law rights that their occupation had usurped, and a future system based on legislated racial segregation. The Report sought to legitimize this transition and process of dispossession by asserting two main claims: first, that the 'native reserves' to be created were, in fact, the true traditional tribal lands of the black communities;

---

OS 03-07, ch48-p9

and, secondly, that their chiefs had voluntarily surrendered authority and control over those lands to the Crown. Therefore, to the extent that customary law rights in land were not simply ignored, they were subordinated to the common law and to the authority of the colonial state.

---

46 *New Clicks* (supra) at para 96.

47 *PE Municipality* (supra) at para 7; *Alexkor Ltd v Richtersveld Community & Others* 2004 (5) SA 460 (CC), 2003 (12) BCLR 1301 (CC) ('*Richtersveld (CC)*') at para 23. In the context of the LRA and the right to fair labour practices in FC s 23, see *NEHAWU* (supra) at paras 14-15; *National Union of Metalworkers of South Africa & Others v Bader Bop (Pty) Ltd & Another* 2003 (3) SA 513 (CC), 2003 (2) BCLR 182 (CC) at para 15. In the context of the interpretation and application of PAJA, see *Bato Star* (supra) at para 25.

48 See § 48.8(c)(iii) below.

49 For a discussion of the Langden Report, see I Currie & J de Waal *The New Constitutional & Administrative Law* (2001) 51-52.

In *Bhe & Others v Magistrate, Khayelitsha, & Others (Commission for Gender Equality as Amicus Curiae)* ('*Bhe*'), the Court described the place of customary law in the new constitutional dispensation:

Quite clearly the Constitution itself envisages a place for customary law in our legal system. Certain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be accommodated, not merely tolerated, as part of South African law, provided the particular rules or provisions are not in conflict with the Constitution. Sections 30 and 31 of the Constitution entrench respect for cultural diversity. Further, s 39(2) specifically requires a court interpreting customary law to promote the spirit, purport and objects of the Bill of Rights. In similar vein, s 39(3) states that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by customary law as long as they are consistent with the Bill of Rights. Finally, s 211 protects those institutions that are unique to customary law. It follows from this that customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right.<sup>50</sup>

Therefore, customary law rights in land are recognized in the same way as common-law or statutory rights in land, provided that they are consistent with the Final Constitution. The pre-constitutional disdain for customary law rights was condemned in *Richtersveld*:

While in the past indigenous law was seen through the common-law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution.<sup>51</sup>

The Final Constitution therefore seeks to revive customary law in respect of land, which had until 1994, been variously distorted, misinterpreted, ignored and made subordinate to both statute and common law. In addition, customary law, which is a 'living' body of law,<sup>52</sup> has developed in its own right.

In *Bhe*, in the context of the customary law of succession, the Constitutional Court described the customary law of 'ownership' of property as follows:

Property was collectively owned and the family head, who was the nominal owner of the property, administered it for the benefit of the family unit as a whole. The heir stepped into the shoes of the family head and acquired all the rights and became subject to all the obligations of the family head. The members of the family under the guardianship of the deceased fell under the guardianship of his heir. The latter, in turn, acquired the duty to

---

OS 03-07, ch48-p10

maintain and support all the members of the family who were assured of his protection and enjoyed the benefit of the heir's maintenance and support. He inherited the property of the deceased only in the sense that he assumed control and administration of the property subject to his rights and obligations as head of the family unit.<sup>53</sup>

---

50 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 (CC) at para 41 (footnotes omitted).

51 *Richtersveld* (CC) at para 51.

52 *Bhe* (supra) at paras 86-87.

53 *Bhe* (supra) at para 76.

Property is therefore generally owned collectively, although some property is regarded as 'individual property'. Depending on the nature of communal property, collective 'ownership' vests in different units of the community. 'Family' property is managed by the head of the family for the benefit of all members of the extended family; 'house' property is exploited for the sustenance of members of a particular 'house'.<sup>54</sup> Land, too, is common property, allocated to particular community members or family units by chiefs, but remaining the 'property' of the community as a whole.<sup>55</sup> As leaders of their nations, chiefs enjoyed a range of powers over land, including the right to demand a tribute from the harvest or hunt, and to reserve the best land for themselves.<sup>56</sup> Traditionally, they had the power to establish new realms, make out royal homesteads or 'zone' the land for grazing or farming.<sup>57</sup> Today, however, their most important power is to allot plots of land to subjects on which to farm and live, a decision now most often made in practice by local wardheads.<sup>58</sup> The constitutional rights to culture in FC ss 30 and 31, read with FC s 39(3) and FC s 211, which recognize customary law, require the legislature (through land legislation) and the courts to give effect to customary law principles relating to land rights and the roles of traditional leaders and communities in administering communal land.

## 48.6 FC s 25(5): Redistribution

### (a) Introduction

Under FC s 25(5), '[t]he state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.' This subsection has both a positive dimension and a negative dimension.<sup>59</sup> Although it does not specifically provide that everyone has a *right to land*, the requirement that the state 'foster conditions which enable citizens to gain access to land' imposes a positive obligation on the state to

---

OS 03-07, ch48-p11

provide adequate and appropriate assistance to people who do not have access to land. Following *Grootboom*, this obligation may be used to compel the state to act reasonably, especially in relation to meeting the needs of the most vulnerable members of society.<sup>60</sup> At the same time, the duty to 'foster conditions' places the

---

54 Pieterse (supra) at 454; CRM Dlamini 'The Role of Customary Law in Meeting Social Needs' (1991) *Acta Juridica* 71, 82.

55 Pieterse (supra) at 454.

56 T Bennett & C Murray 'Traditional Leaders' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2005) Chapter 26, 26-56-26-57.

57 *Ibid* at 26-57.

58 *Ibid*.

59 E Lahiff & S Rugege 'A Critical Assessment of the Land Redistribution Policy in the Light of the *Grootboom* Judgement' (2002) 6(2) *Law, Democracy and Development* 279, 285.

state under a negative obligation to ensure that there are no impediments to the provision of access to land.<sup>61</sup>

The phrase 'legislative and other means' has been interpreted to mean that the state is under an obligation to take immediate steps towards the realization of the right in question.<sup>62</sup> In international law this formulation is understood to mean that legislation is not mandatory, but that it may nevertheless be highly desirable and in some cases even indispensable.<sup>63</sup> Furthermore, legislation on its own is not sufficient.<sup>64</sup> Other measures include 'administrative, financial, educational and social measures',<sup>65</sup> and 'the establishment of social programmes, the creation of appropriate bodies, and the establishment of other procedures as well as the adoption and implementation of appropriate bodies and detailed plans by the government'.<sup>66</sup>

'[R]easonable legislative and other measures' suggests that measures adopted by the state can be reviewed both for their reasonableness and for the extent to which they make progress in the implementation of the right.<sup>67</sup> In *Grootboom*, the Constitutional Court found that the state has discretion in determining the *nature* of the policies to be adopted, the specific *legislative measures* to be drafted and their

---

OS 03-07, ch48-p12

---

60 See *Grootboom* (supra) at 93. In *Minister of Health v Treatment Action Campaign & Others (No 2)* 2002 (5) SA 721 (CC), 2002 (10) BCLR 1033 (CC) ('TAC') (both declaratory and mandatory orders were given). Lahiff & Rugege contend that poor people with no access to land or whose access is inadequate or precarious may demand that the state implement a programme which makes secure access to land possible. Lahiff & Rugege (supra) at 285.

61 Flemming DJP in *Joubert v Van Rensburg* 2001 (1) SA 753 (W) at para 43.2 interpreted this phrase to mean 'circumstances which make it easier to acquire, for example, subsidised interest rates or purchase prices, or enriched prices for products. It does not mean that a statute may protect an occupier who insists on taking — gratis.'

62 Such steps should be 'deliberate, concrete and targeted as clearly as possible towards meeting the obligations'. UN Committee on Economic, Social and Cultural Rights, General Comment No 3 'The Nature of State Parties' Obligations' (Fifth Session, 1990) UN doc E/1991/23 ('GC 3'). The requirement of immediate steps is reflected in the fact that the drafters omitted to include the qualifying phrase 'towards the progressive realization of the right', which would have given the state the option of achieving the right progressively rather than immediately.

63 Ibid

64 P de Vos 'Pious Wishes or Directly Enforceable Human Rights: Social and Economic Rights in South Africa's 1996 Constitution' (1997) 13 *SAJHR* 67, 67.

65 Constitutional Committee Supplementary Memorandum on the Bill of Rights and party submissions.

66 GC 3 (supra).

67 This obligation is similar to the obligation which will in any event be incumbent on South Africa when it ratifies the International Covenant on Economic, Social and Cultural Rights of 1966. In terms of this covenant, legislative measures are needed to establish the framework and to regulate judicial supervision of these rights (art 2(1)). See also A Pillay 'Reviewing Reasonableness: An Appropriate Standard for Evaluating State Action and Inaction?' (2005) 122 *SALJ* 419, 430.

*implementation*.<sup>68</sup> The Court, however, found that it was imperative that the programme chosen should be capable of facilitating the realization of the right:<sup>69</sup>

The precise contours and content of the measures to be adopted are a matter for the Legislature and the Executive. They must, however, ensure that the measures they adopt are reasonable. . . A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.<sup>70</sup>

The Court made it clear that the reasonableness requirement does not only relate to the way the programme is conceived. The programme must also be reasonable in the way it is implemented: 'The formulation of a program is only the first stage in meeting the State's obligations . . . An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the State's obligations.'<sup>71</sup> Thus, in order to determine whether 'reasonable legislative and other measures' have been taken, the conception and design of a programme as well as the manner, pace and extent of its implementation must be considered. The state's capacity to implement its programmes is also a factor. In this regard, the *Grootboom* Court emphasized the need for co-ordinated action between the different levels of government and the responsibilities of each: a 'reasonable program therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.'<sup>72</sup> Although land matters fall within the functional area of national government, this requirement is equally applicable to FC s 25 in so far as the co-operation of different levels of government is necessary for the effective implementation of land reform.

An internal limitation, similar to the one found in the other socio-economic rights, appears in the form of the phrase 'available resources' in FC s 25(5). This phrase qualifies the state's duty to realize the right.<sup>73</sup> In the words of the *Grootboom* Court:

The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the State to do more than its available resources permit.  
This

---

68 *Grootboom* (supra) at para 41.

69 See S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33, 33-33-33-35.

70 *Grootboom* (supra) at para 41.

71 *Ibid* at para 42.

72 *Ibid* at para 39.

73 Liebenberg (supra) at 33-44, 33-55-33-57.

means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources.<sup>74</sup>

This proviso does not mean, however, that the state has complete discretion to determine the resources available for the realization of the right in question.<sup>75</sup> The term 'available resources' must be understood as referring to the total available resources of a country, including resources available from the international community through co-operation and assistance.<sup>76</sup>

The phrase 'access to land on an equitable basis' is clearly not restricted to measures aimed at delivering ownership, but may encompass other rights to land as well.<sup>77</sup> The formulation 'on an equitable basis' implies that redistribution programmes are especially aimed at redressing historical imbalances in land ownership. Accordingly, the poor are not the sole focus. Everyone who has been marginalized and excluded from land ownership as a result of past racially discriminatory legislation and practices may benefit from the programme. Portions of the community who are not necessarily poor still stand to benefit, for example, from farmer settlement programmes.

The state's sub-programme of land redistribution is embodied both in legislation and in policy measures dealing with grants, subsidies and other forms of financial assistance. According to the White Paper on South African Land Policy<sup>78</sup> the main aim of the redistribution programme is to provide access to land for the landless for both residential and productive purposes.<sup>79</sup> When the redistribution programme was first embarked on, the intention was to assist particularly the urban and rural poor, farm workers, labour tenants and emerging farmers.<sup>80</sup> The legislation enabling redistribution was directed at a very specific category of beneficiaries.<sup>81</sup> Although

---

74 *Grootboom* (supra) at para 46.

75 *De Vos* (supra) at 69.

76 *Ibid* at 72. This is very important because there are extensive foreign funding resources available for land reform.

77 See in this regard the concept of 'new order' rights as provided for in the Communal Land Rights Act 11 of 2004. Although there is no content given to 'new order rights' in this Act, it is clear that not only ownership is intended since some of the use rights that may be acquired can be upgraded to ownership at a later stage. The point of departure seems to be that new order rights have to be secure tenure rights. See § 48.7(b)(v) infra.

78 Department of Land Affairs *White Paper on South African Land Policy* (1997) ('*White Paper on Land Policy*').

79 FC s 25(5) should be read with FC s 26(1) and (2).

80 *White Paper on Land Policy* (supra) at ix.

81 *Ngcobo v Van Rensburg* 1999 (2) SA 525 (LCC), [1997] 4 All SA 537 (LCC) ('*Ngcobo*') (Labour tenants); *Venter v Claasen* 2001 (1) SA 720 (LCC) (Occupiers: a 'specific class of persons that had been exploited in the past and who are still extremely vulnerable in relation to their tenure'.)

access to land may also be linked to the creation of new tenure forms, it is not the main aim of the redistribution programme.<sup>82</sup>

The following section deals with an overview of the enabling legislation and policy measures that have been adopted under the redistribution programme. It

---

OS 03-07, ch48-p14

focuses on the Land Reform (Labour Tenants) Act 3 of 1996 ('the Labour Tenants Act') and the Extension of Security of Tenure Act 62 of 1997 ('the ESTA').<sup>83</sup> Reference will also be made to the Provision of Land and Assistance Act 126 of 1993, as amended by Act 26 of 1998, as well as to the Transformation of Certain Rural Areas Act 94 of 1998 ('the TCRA'). The Communal Land Rights Act 11 of 2004 ('the CLRA'), which is an attempt to give effect both to FC s 25(5) (provision of access to land) and FC s 25(6) (tenure reform) will be dealt with in the tenure reform section below.

## **(b) Enabling legislation**

### **(i) Land Reform (Labour Tenants) Act 3 of 1996**

The main aims of the Act are to (a) provide adequate protection against exploitation and eviction of labour tenants;<sup>84</sup> and (b) to provide access to land by enabling acquisition of land or rights in land by labour tenants in particular circumstances.

#### **(aa) Beneficiaries**

The Act was drafted to benefit a particular category of land user only:<sup>85</sup> a person who presently has, or had in the past, the right to reside on a farm; has or had the right to use cropping or grazing land on the farm or another farm of the owner, and in consideration of such right provides or has provided labour<sup>86</sup> to the owner or lessee; and whose parent or grandparent resided or resides on a farm or had the use of cropping or grazing land on such farm or another farm of the owner; and in consideration of such right provided or provides labour to the owner or lessee. This

---

82 See § 48.7 *infra*.

83 Although the ESTA fits equally comfortably in the redistribution and the tenure reform programmes, it will be discussed in more detail as part of the tenure reform programme. See § 48.7(b)(iv) *infra*. Only the sections dealing with access to land will be mentioned in this section.

84 Sections dealing with the regulation of eviction also provide for tenure security in that the insecure labour tenancy relationship that existed prior to the new land dispensation has been amended by providing secure rights to labour tenants.

85 Labour Tenants Act s 1. *Mosehla v Sancor* 1999 (1) SA 614 (T)(Confirmed that labour tenancy is not a dictionary term, but a technical one and that the facts have to be specified in order to support the allegation of labour tenancy.) See also JM Pienaar 'Labour Tenancy: Recent Developments in Case Law' (1998) *Stellenbosch LR* 311; W Freedman 'Labour Tenants Act: Whom Does it Protect?' (2000) 117 *SALJ* 449.

86 See *Deo Volente Rusoord BK v Shongwe* 2006 (2) SA 5 (LCC)(None of the respondents or their families provided labour to the land owner. However, when they were children they did work for the farm owner during the school holidays or over weekends for which they (and not their parents) were paid daily. The labour they provided did not replace that of their parents. The court found that it was a way of earning pocket money only and that it was not in 'exchange for' the right to reside on the property (at 7F).)

category would embrace a successor of a labour tenant,<sup>87</sup> but exclude a farm worker.<sup>88</sup>

If all of these elements are present,<sup>89</sup> then it is presumed that such a person is a labour tenant.<sup>90</sup> The benefits of labour tenancy may also be utilized by associates<sup>91</sup> or successors of labour tenants. Since it can be very difficult in practice to establish whether a person is a farm worker or a labour tenant, the combined effect of all agreements entered into is taken into account.<sup>92</sup> Why is it so important to distinguish between farm workers and labour tenants if both these categories of tenants fall within the overall redistribution programme, and recent legislative amendments have sought to remove some of the distinctions and instead to bring these forms of tenancy closer together?<sup>93</sup>

Various reasons for still adhering to this category distinction may be offered. First, the historical context of these two tenancy forms differs: labour tenancy is clearly a tenancy that involves second- or third-generation tenants, whereas farm workers qualify for benefits under the ESTA even if they are only first-generation occupiers.<sup>94</sup> In fact, it is possible that new occupiers will continue to settle on land and that the ESTA will apply to them.<sup>95</sup> Secondly, although the broad aims of the two pieces of legislation are very similar, they do not provide identical protection and benefits. For example, only farm workers (or other occupiers under the ESTA) have burial rights.<sup>96</sup> Labour tenants who have applied for land rights do not need similar protection, since

---

87 Labour Tenants Act s 1.

88 Ibid. These occupiers are specifically provided for in the ESTA. See § 48.7(b)(iv) below.

89 Initially there were split decisions concerning whether all of the requirements in paras (a), (b) and (c) had to be met or whether it was sufficient if only two of the three requirements were met. Since the decision in *Ngcobo*, it is clear that only beneficiaries that meet *all* of the above requirements fall within the ambit of the Act.

90 See *Woerman and Schutte NNO v Masondo & Others* 2002 (1) SA 811 (SCA), [2002] 2 All SA 53 (SCA). See also M Euijen & C Plasket 'Constitutional Protection of Property and Land Reform' *Annual Survey of South African Law* (2002) 545.

91 An 'associate' is a family member of a labour tenant or any other person who has been nominated in terms of s 3(4) as the successor of such labour tenant. This becomes relevant when a labour tenant has died or has become mentally ill or is unable to manage his or her affairs due to another disability or when such a labour tenant leaves the farm voluntarily without appointing a successor. An associate is also a family member that has been nominated to provide labour in the labour tenant's stead, eg as provided for in s 4(1).

92 Labour Tenants Act s 2(6).

93 The Land Affairs General Amendment Act 51 of 2001.

94 Special circumstances can, however, lead to a person being proclaimed to be a 'long-term occupier' under s 8(4) of the ESTA which generally enables that person to retire on the farm and remain there until death. In these circumstances the length of occupation is indeed relevant (10 years or more), but it is not linked to generations of occupiers as such. The other requirement for being identified as a long-term occupier is that the person must be 60 years of age (or older).

they are land owners in their own right.<sup>97</sup> Thirdly, the underlying idea of the labour tenancy legislation is that labour tenancy is to be

phased out as a form of land control. The redistributive objectives of the Act are accomplished by enabling labour tenants to apply for land or rights in land and to become land owners themselves.<sup>98</sup> The underlying idea of the ESTA, on the other hand, is not to eradicate the institution of farm workers as such, but to prevent the exploitation of this form of tenancy and to provide protection against eviction. One way of doing so, of course, is through the acquisition of land or land rights. Chapter II of the ESTA provides for this form of redistribution.<sup>99</sup>

In our view, the continued distinctions between various (rural) tenants are not ideal. The different eviction proceedings applicable to each category places an additional burden on applicants to categorize occupiers before instituting eviction proceedings.<sup>100</sup> The lack of progressive development under chapter II of the ESTA (which provides for long-term security), in comparison to chapter III of the Labour Tenants Act, further highlights unjustified discrepancies between the different forms of redistribution contemplated by the two Acts.

Because it may be difficult in practice to determine whether one is dealing with a labour tenant or a farm worker, various guidelines have been developed in the case law. The main difference between a labour tenant and a farm worker is that the latter is paid predominantly in cash or in another form of remuneration, but not predominantly by making use of the property (cropping and grazing rights as well as occupation of land).

---

95 Although possible in theory, it is not the existing practice. Fewer occupiers are being housed on farms today than ever before — especially as farm workers. The question can rightly be asked whether ESTA is succeeding, given that evictions from farms are exacerbating the already backlogged provision of housing in urban and peri-urban areas. See M Wegerif, B Russel & I Grundling *Still Searching for Security: The Reality of Farm Dweller Evictions in South Africa* (2005) (Deals with evictions for the period 1984-2004); W du Plessis, NJJ Olivier & JM Pienaar 'Land Matters' 2005 (2) *SAPR/PL* 435.

96 For more detail, see § 48.7(b)(iv)(ee)(3) *infra*.

97 This proposition holds only if former labour tenants have applied successfully and acquired ownership or other rights in land. In that case, as owners, they are free to utilize their land according to their own needs, within lawful limits.

98 Chapter III of the Labour Tenants Act. See § 48.2(a)(iii) *infra*.

99 Due to the complexity of this procedure and to the fact that numerous role players have to be involved in a successful venture, this method of land redistribution has not been very successful. It would, for example, require a good working relationship and partnership between the land owner, the occupier and invariably also the local authority. Other factors like limited funding, non-availability of land and no or limited capacity on local government level impede its success further.

100 Yet other unlawful occupiers (squatters or persons holding-over) in relation to residential property or constructions being used for purposes of a home are dealt with in accordance with the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ('the PIE Act'). Thus, three different pieces of legislation become relevant when eviction is intended. Unlawful occupation from business premises is still regulated by common law. See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's Law of Property* (5th Edition, 2006) Chapters 11 and 22.

*Landman & Another v Ndlozi; Landman & Another v Gama* held that the evaluation need not necessarily be made from the employee's perspective.<sup>101</sup> Gildenhuis J wrote that in some instances the value (of using the land) would have to be determined from the perspective of the employer, in other instances from that of the employee and in yet other instances by objective standards. The court also found that the whole period of employment had to be considered. In other words, the value of each component for the whole period the person (occupier or labour tenant) ostensibly met the requirements of the relevant Act has to be determined.<sup>102</sup>

---

OS 03-07, ch48-p17

### **(bb) Labour tenants' rights**

A labour tenant has the right to use and occupy a specific portion of land with his or her family.<sup>103</sup> Labour tenants' security of tenure is promoted in that these rights may only be terminated in accordance with the Act. In practice, a labour tenant's use and occupational rights are usually terminated by a waiver of rights, the death of the tenant, the eviction of the tenant once certain substantive and procedural requirements have been met, or when the labour tenant obtains vested rights in land in his or her own capacity, replacing the relationship between labour tenant and owner/employer.<sup>104</sup> Special provision is made for the appointment of successors to labour tenants in certain circumstances.<sup>105</sup> On the other hand, the landowner has the right to demand labour by the labour tenant, in exchange for these occupational and use rights.<sup>106</sup>

The use and occupational rights may only be terminated in accordance with the Act. Eviction obviously results in permanent deprivation. On the other hand, relocation orders result only in temporary deprivation of rights and only apply to a

---

101 2005 (4) SA 89 (LCC) ('*Landman*').

102 Factors in this determination — as set out in *Landman* — include the value of maize that they received per month, the value of being allowed to keep cattle and other animals on the land, the use of structures on the land for housing and other purposes; and the value of having a small vegetable garden on the land. In *Landman*, the value of making use of the property by far outweighed the monetary remuneration that the tenants received per month — thereby establishing labour tenancy. With regard to cropping rights, see *Msiza v Uys* 2005 (2) SA 456 (LCC) (Moloto J held that it was not the value of the *input costs* that were relevant, but the *value of the benefit derived* from the cropping activity that had to be taken into account.)

103 Labour Tenants Act s 3(1). The relevant date for this purpose is 2 June 1995 when the Bill was first published for comment. Since the publication date coincided with large-scale evictions from land it is that date that is relevant and not the date the Act commenced, namely 22 March 1996.

104 See Labour Tenants Act s 3. See also Badenhorst, Pienaar & Mostert *Silberberg* (supra) at Chapter 22.

105 Labour Tenants Act s 3(4). If a labour tenant dies, becomes mentally ill or is unable to manage his or her affairs due to another disability or leaves the farm voluntarily without appointing a successor, then his or her family may appoint a person as his or her successor and shall, within 90 days after being called upon in writing to do so by the owner, inform the owner of the person so appointed. A family member, if acceptable by the owner, may also be appointed as successor. Such an appointment may not be denied unreasonably by the land owner.

106 Labour Tenants Act s 4.

specific parcel of land.<sup>107</sup> Relocation orders are appropriate where the owner needs the specific parcel of land for agricultural purposes or if the land is needed for development which is, according to the court, of public benefit. Nevertheless, relocation orders will not be granted arbitrarily, but only if the court is satisfied that greater hardship will be done to the owner or lessee if the labour tenant is not relocated.<sup>108</sup> A relocation order may also coincide with an order to pay compensation to the labour tenant, in which case the relocation order will not be executed before the compensation has been paid. If the owner has not used the land for the purposes intended one year after the relocation order was granted, an application may be lodged for the reinstatement of the labour tenant to the original parcel of land.<sup>109</sup>

The labour tenant relationship must be terminated before eviction proceedings can take place. Provision is made for normal and urgent eviction proceedings. In normal eviction proceedings, an eviction order will be granted if it is fair and equitable in the relevant circumstances<sup>110</sup> and (a) if the labour tenant (or associate)

---

OS 03-07, ch48-p18

committed a material breach of any obligation to provide labour and has failed to remedy such a breach after one month's written notice; or (b) the labour tenant (or associate) has committed some other act which amounts to a fundamental breach of the relationship that cannot be remedied.

It is not only the landowner who may initiate eviction proceedings. However, the landowner needs to support eviction proceedings instituted by another person.<sup>111</sup> At least two months' written notice must be given to the labour tenant and the Director-General of Land Affairs<sup>112</sup> and the notice must contain the grounds for eviction.<sup>113</sup>

If the court is satisfied that the following requirements have been met, an urgent eviction order may be granted, pending the outcome of a final order:<sup>114</sup> (a) if there is real and imminent danger of substantial damage to the owner or lessee; (b) if there is no other effective remedy available; (c) if the likely harm to the owner, if the order is not issued, exceeds the likely harm to the person against whom the order is sought; and (d) if adequate arrangements have been made for the reinstatement of

---

107 Labour Tenants Act s 8.

108 Labour Tenants Act s 8(4).

109 Labour Tenants Act s 8(5).

110 Labour Tenants Act s 7.

111 Labour Tenants Act s 6(1).

112 Labour Tenants Act s 11(1).

113 Labour Tenants Act s 11(2).

114 Labour Tenants Act s 15.

a person who has been removed, but the final order was not granted. Requirements for urgent eviction orders under labour tenancy legislation and the ESTA are now identical.<sup>115</sup>

Despite the provision for urgent and normal eviction proceedings, evictions are limited in two important respects: the first concerning the circumstances of the labour tenant and the other dealing with the process of land redistribution and how far along in this process the labour tenant has already progressed. In the first instance, a landowner is precluded from initiating eviction proceedings against a labour tenant merely because he or she has become too old (defined as 60 years or older), too frail or ill to provide labour, or is disabled.<sup>116</sup> If the aged labour tenant dies, the exception is also applicable to his or her associates or family members for a period of 12 months after his death, thus enabling them to find suitable accommodation without needing to be worried about eviction proceedings for at least a year. If the landowner is prejudiced by these provisions, he or she may apply for equitable relief.<sup>117</sup> The other limitation on eviction has to do with applications by labour tenants to acquire land or rights in land under Chapter III of the Act. If such an application is pending, the labour tenant generally may not be evicted.<sup>118</sup> Unfortunately, this provision has been exploited in the past, leading to the rule that the court may, despite the prohibition on eviction, order eviction

---

OS 03-07, ch48-p19

if it is satisfied that special circumstances exist which make it fair, just and equitable to do so, taking into account all relevant considerations.<sup>119</sup>

The right to legal representation for persons whose tenure has been threatened or infringed was confirmed in *Nkuzi Development Association v Government of the RSA*.<sup>120</sup> Although the labour tenancy legislation and the ESTA were drafted in order to give effect to FC s 25, the court found, the reality was that:

a very large number of the people for whose benefit the Labour Tenants Act and ESTA were enacted, do not enjoy that entitlement when their right are infringed or threatened with infringement. This is so because they are overwhelmingly poor and vulnerable people with little or no formal education. When their tenure security is threatened or infringed, they do not understand the documents initiating action or the processes to follow in order to defend their rights. On the one hand they cannot afford the fees for a lawyer to represent them because of their poverty. As a result they are quite often unable to defend or enforce their rights and their entitlement under the Constitution, the Labour Tenants Act and ESTA.<sup>121</sup>

---

115 See § 48.7(b)(iv)(hh) infra.

116 Labour Tenants Act s 9(1)(a)-(b).

117 Labour Tenants Act s 9(3). No specific provisions are given regarding this form of relief other than that it has to be just and equitable in the circumstances.

118 *Van der Walt v Lang* 1999 (1) SA 189 (LCC).

119 *Mwelase v Hiltonian Society* 2001 (4) SA 100 (LCC).

120 2002 (2) SA 733 (LCC)(Moloto J).

Consequently many litigants appeared in court unrepresented. The *Nkuzi* court accordingly ordered that indigent persons whose tenure security is threatened or infringed under these statutory measures have a right to legal representation or legal aid at state expense if substantial injustice would otherwise result. The state or its agents are entitled to adopt a screening process to establish whether the person concerned is entitled to legal aid or legal representation.

### **(cc) Redistribution of land — acquisition of land rights under chapter III of the Act**

Labour tenants may lodge an application for an award of land or land rights or for financial assistance.<sup>122</sup> Applicants can apply for ownership of the portion of land they are using and occupying, or another portion of land elsewhere that they or their predecessors used and occupied for a period of at least five years prior to 22 March 1996,<sup>123</sup> and of which they had been illegally deprived.<sup>124</sup> It is also possible for labour tenants to apply for another parcel of land elsewhere on the land on which they are staying, as identified by the landowner. In order to utilize the land effectively, the application may be brought together with an application for other limited real rights, such as servitudes of water or right of way. These additional rights will be granted if they are reasonably necessary or reasonably consistent with the rights previously enjoyed by the labour tenant.<sup>125</sup>

The owner of the land subject to such an application must be informed. If he or she does not dispute the status of the applicant, it is presumed that such a

---

OS 03-07, ch48-p20

person is a labour tenant, until the contrary is proven.<sup>126</sup> If the status is questioned by the landowner, either party is free to approach the Land Claims Court for a ruling on this issue. Once the applicant's status has been clarified, the landowner may approach the Director-General of Land Affairs with other options for an equitable solution to the application, other than granting ownership to the applicant of the land identified.<sup>127</sup> If such a proposal is rejected by the applicant, which he or she is entitled to do, the original claim is continued. In cases where the matter cannot be resolved by the parties, the court may be approached for an order or other appropriate relief.<sup>128</sup>

---

121 Ibid at para 4.

122 See Chapter III. See also s 16. Financial arrangements are provided for in s 26 of the Act.

123 22 March 1996 was the commencement date of the Act.

124 Labour Tenants Act s 16(1)(a)-(b).

125 Labour Tenants Act s 16(1)(c)-(d).

126 Labour Tenants Act s 17(5).

127 Labour Tenants Act s 18.

128 Labour Tenants Act s 17(4).

The Labour Tenants Act therefore seeks in the first place to achieve a negotiated solution to competing land claims in a way that promotes the dignity of all participants. However, if the owner refrains from initiating settlement proposals, or if the offered proposal is rejected by the applicant, or if any agreements reached by the parties are deemed to be unreasonable or inequitable, applications for ownership and other rights in land will be referred to court or arbitration.<sup>129</sup>

The following factors are taken into account when an application for land rights is considered:<sup>130</sup> the achievement of the goals of the Act, the desirability to assist labour tenants to establish themselves on farms on a viable and sustainable basis, and considerations of equity and justice. The willingness of the owner of the affected land and the applicant to make contributions to the settlement of the application is also considered. Lodging an application, as mentioned before, means that applicants may generally not be evicted.

In line with the constitutional considerations set out in the property clause, particularly FC s 25(3), the land owner is entitled to just and equitable compensation to be determined by court or, if necessary, by an arbitrator.<sup>131</sup>

A successful application for land rights results in the applicant's becoming a landowner in his or her own right — achieving the underlying goal of redistribution. Although the Labour Tenants Act has national application, most of the labour tenancy applications to date have been received from Mpumalanga and KwaZulu-Natal.

## **(ii) Provision of Land and Assistance Act 126 of 1993**

In its original form,<sup>132</sup> the Provision of Land and Assistance Act ('PLAA') was a remnant of the pre-constitutional era aimed at designating and subdividing land and settling persons. It was subsequently redrafted,<sup>133</sup> and is currently used as the main mechanism to realize the aims of the redistribution programme.

---

OS 03-07, ch48-p21

Under this Act land is designated by the Minister of Land Affairs for the purposes of redistribution. Both state and privately-owned land may be designated — the latter only after it has been made available by the owner.<sup>134</sup>

Development of privately-owned land may be undertaken by the state or private parties (the land owner or contractor). Afterwards, subdivision of the land takes place. The normal township establishment or subdivision of agricultural land

---

129 Labour Tenants Act s 17(7).

130 Labour Tenants Act s 22(5).

131 Labour Tenants Act s 23.

132 The Provision of Certain Land for Settlement Act 126 of 1993.

133 The Provision of Certain Land for Settlement Amendment Act 26 of 1998.

134 PLLA s 2(1).

provisions<sup>135</sup> are specifically excluded,<sup>136</sup> resulting in subdivision in accordance with a partition plan providing for small-scale farming and residential, public, community or business purposes.<sup>137</sup> Formal requirements include a survey of the area, approval of the plans and diagrams and filing documents at the deeds registry for registration.<sup>138</sup> Once a deed of transfer has been lodged at the deeds registry, registration of ownership takes place in favour of the beneficiary.<sup>139</sup> Settlement on the land may also be conditional.<sup>140</sup>

The following persons may apply for relief:<sup>141</sup> persons who have no land or who have limited access to land and who wish to gain access to land or to additional land, persons wishing to upgrade their land tenure or persons who have been dispossessed of their right in land but do not have a right to restitution under the Restitution of Land Rights Act.<sup>142</sup> Financial assistance may be used for many purposes. Grants and subsidies may also be used to acquire capital assets, to acquire a share in an existing agricultural enterprise or to facilitate planning and development.<sup>143</sup> Funds may be transferred to provincial governments, municipal councils or other organs of state responsible for planning or development.<sup>144</sup> Subsidies or grants may also be used to acquire land to be used as commonage or to extend existing commonages.<sup>145</sup>

The powers of the Minister to acquire land for redistribution purposes are extensive and also include the possibility of expropriation.<sup>146</sup> If expropriation is

---

135 See, eg, the Prohibition of Subdivision of Agricultural Land Act 70 of 1970.

136 PLLA s 2(4).

137 PLLA ss 5-6.

138 PLLA s 7.

139 PLLA s 9.

140 Over the years, however, the practice has been that the subdivision and utilization of land and the consequential settlement thereon are linked to the requirements of the Conservation of Agricultural Resources Act 43 of 1983 and the National Water Act 38 of 1998. It is also quite common that the densification number (of beneficiaries and settlements) and number of livestock are also regulated.

141 The 1998 amendments to the Act have had an impact on the category of beneficiaries. The original Act allowed for the granting of an advance or subsidy 'to any person'.

142 Act 22 of 1994. For more detail concerning the restitution programme, see § 48.8 infra.

143 See PLLA s 10(1)(a)-(b).

144 PLLA s 10(1)(e).

145 PLLA s 10(1)(c).

deemed to be an effective tool to acquire a specific portion of land, the landowner has a right to a hearing<sup>147</sup> and compensation must be paid.<sup>148</sup>

### **(iii) Transformation of Certain Rural Areas Act 94 of 1998**

The Transformation of Certain Rural Areas Act ('the Transformation Act' or 'TCRA') is aimed at persons occupying land located only in the former Coloured rural areas. These areas were established under the Rural Areas Act (House of Representatives) 9 of 1987,<sup>149</sup> and originally comprised 23 pieces of land dispersed within the provincial jurisdictions of the present-day Western Cape, Northern Cape, Eastern Cape and Free State provinces. The Rural Areas Act provided for the separation of residential and agricultural zones — all for the exclusive occupation of persons belonging to the Coloured community.

The underlying idea of the Transformation Act is that the different communities should determine *when* and *how* the new dispensation in land-holding should occur.<sup>150</sup> It was envisaged that change would be effected independently in the different areas,<sup>151</sup> and should, if effective, result in 'negotiated legal reform'.<sup>152</sup> This commitment to the autonomy and choice of communities promotes the constitutional value of (and right to) dignity.

When implemented correctly, the Act should dismantle the existing rural land tenure regime and replace it with measures in line with the overall land reform programme, while also meeting the needs and aspirations of the community concerned. In this sense, the Act is both a redistributive measure<sup>153</sup> and a tenure reform tool.<sup>154</sup>

Two broad categories of land are relevant: (a) land in a township and (b) land in the remainder. The moment the Transformation Act came into operation, trust land

---

146 PLLA s 12(1).

147 PLLA s 12(2). This position is consistent with FC s 25(1) and (2). See T Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46, 46-33–46-35.

148 FC s 25(3).

149 For more detail, see D Carey-Miller & A Pope *Land Title in South Africa* (2000) 449-55; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's Law of Property* (5th Edition, 2006) Chapter 22. Forerunners to this Act included the Rural Coloured Areas Act 24 of 1963 and the Rural Coloured Areas Amendment Act 31 of 1978.

150 Twenty-three former coloured rural areas are identified.

151 TCRA s 10(2)(b).

152 See also P Wisbourg & R Rohde 'TRANCAA and Communal Land Rights: Lessons from Namaqualand' PLAAS Policy Brief (April 2003).

153 Access to land is thereby broadened.

154 It provides more secure tenure.

situated in a township immediately vested in the relevant municipality.<sup>155</sup> This automatic transfer of rights did not affect existing registered or registrable rights in relation to the property concerned.<sup>156</sup> Township areas continued to vest in the relevant municipality.

The Act is open-ended in the sense that it does not prescribe the specific method to be used for the community to express its preferences. A consultation process resulted in the communities being able to vote in advisory referenda on the following three ownership alternatives: (a) communal property association; (b) transfer to the municipality; and (c) option of own choice — including trust ownership and individual title.

The Minister must decide to which entity or (or entities) the land must be transferred, taking into account the community's stated preference. The Minister has the power to assist the municipality or committee in making a decision.<sup>157</sup> This power introduces the possibility of an *extended procedure* since it can entail appointing a person with the specific brief to investigate and assist in writing a report indicating which entity should receive the land.<sup>158</sup> If the Minister is satisfied, after the extended process, then the land is transferred accordingly. If the Minister is still not satisfied, the decision lies with the Minister to which entity the property should be transferred and to take steps accordingly.<sup>159</sup>

Referenda in four of five areas showed a clear preference for communal property associations.<sup>160</sup> The low interest in individualized tenure is interesting, reflecting as it does a cultural preference for community ownership. The municipality was the choice of transfer beneficiary in only one instance.

Once the transitional period lapses, all land not transferred vests in the Minister, who holds the land and is empowered to dispose of it.<sup>161</sup> The transformation process has not yet been completed. In all of the relevant areas an extended procedure had to be embarked on. Although the open-endedness of the Act leaves ample room to address the needs of specific communities, it has also led to the process being drawn out.

---

155 TCRA s 2.

156 Ibid.

157 Subject to the exclusion of the power to make regulations, the Act also provides for the general or particular delegation of powers by the Minister to either the Premier of the province or to any officer in the service of the national government. See also TCRA s 8(1).

158 Such a designated person has a wide range of powers; inter alia, settling any disagreements in relation to land or boundaries between the parties.

159 TCRA s 3(12)(b).

160 Due to internal conflict the other area, Kommagas, never held a referendum.

161 TCRA s 3(13).

### (c) Policy documents

The policy of the first Minister of Land Affairs and Agriculture, Derek Hanekom, focused on the promotion of subsistence farmers through the provision of

---

OS 03-07, ch48-p24

Settlement/Land Allocation Grants (SLAGs).<sup>162</sup> The second Minister, Thoko Didiza,<sup>163</sup> shifted the emphasis to the promotion of black commercial farmers, through an Integrated Programme of Land Redistribution and Agricultural Development (IPLRAD). Despite the emphasis on commercial farming, there was still room in the IPLRAD for subsistence farmers, albeit at the lower end of the subsidy scale. IPLRAD, which is still in force, aims to redistribute 30 per cent of agricultural land to black owners by 2014. Whereas the initial SLAGs were once-off grants of R15 000 per family, the IPLRAD consists of a sliding scale of state grants which must be matched by a proportionate 'own contribution' by the beneficiary. Depending on the circumstances, this contribution may consist of cash, assets or labour. The main problem with the SLAG was the cost of good agricultural land. Households had to pool their resources to buy land. This need to pool resources often led to rushed attempts to form groups that lacked cohesion. The lack of cohesion led, in turn, to problems of co-ordination and over-crowded settlements.<sup>164</sup>

Although the size of grants has been increased in the IPLRAD, other problems persist. For example, grants are mainly accessed by persons who are literate, and have money, transport or political contacts. The Department of Land Affairs' stance in the White Paper that priority would be given to the 'marginalized and the needs of women in particular' has not been realized in practice.<sup>165</sup>

### (d) Redistribution programme: brief evaluation

The period 1995-2005 has seen the redistribution of an estimated 2.9 per cent of agricultural land from white to black ownership.<sup>166</sup> Various reasons have been suggested for the slow pace of delivery. First, projects have not necessarily been

---

162 See E Lahiff & S Rugege 'A Critical Assessment of the Land Redistribution Policy in the Light of the *Grootboom* Judgement' (2002) 6(2) *Law, Democracy and Development* 279, 291-97; AJ Van der Walt *Constitutional Property Law* (2005) 354.

163 Minister Didiza served until 23 May 2006. She was replaced by Minister Lulu Xingwana.

164 Other problems with SLAG included the fact that the initiative had to come from the land reform beneficiary, which made the grant highly dependent on adequate information dissemination. In addition, the grant application procedure did not take regional planning and land reform needs into account. For more detail, see Lahiff & Rugege (supra) at 291-97; JM Pienaar 'Land Reform and Development: A Marriage of Necessity' (2004) 25(2) *Obiter* 269.

165 Lahiff and Rugege argue that the transition from SLAG to IPLRAD has changed the situation dramatically and constitutes a direct reversal of previous policy because an upper limit has now been replaced by a lower limit: '[I]t sends out a strong message to would-be applicants and officials alike that the programme is not aimed at the very poorest, potentially discouraging any applicants and making it unlikely that applications from the very poor will be prioritized.' Lahiff & Rugege (supra) at 313.

166 It is very difficult to establish exactly how much land has in fact been redistributed. Apart from the absence of a reliable tracking and monitoring system, all indications of race on the title deeds have been removed since 1996.

designed in line with the needs and skills of the community they are expected to benefit. Secondly, the Communal Property Association has proven to be a problematic legal vehicle. Thirdly, suitable land for redistribution has been

---

OS 03-07, ch48-p25

hard to find. Fourthly, poor co-ordination between various sectors within the Department of Land Affairs has hindered projects. Fifthly, in many instances the co-operation of traditional leaders has been lacking. Sixthly, the budget for redistribution and tenure reform has decreased in real terms over the past six years. Finally, although government funds have been used to acquire shares in farm enterprises, especially in the Western Cape, the mere transfer of shares to land reform beneficiaries has not contributed significantly to changing historically entrenched power relations in the agricultural sector.

Irrespective of the reasons for the lack of redistribution, there is a real risk that the target of redistributing 30 per cent of agricultural land by 2014 will not be reached. The slow pace of land reform was one of the main themes of a national Land Summit that took place in July 2005. The consensus of opinion was that markets by themselves would not redistribute land at the scale, quality, location and price required. The present situation does not correspond to an ideal 'willing-buyer, willing-seller' market since the state is often the only prospective buyer. This market failure has led to suggestions that the state should intervene more purposefully in the market, using expropriation if necessary.<sup>167</sup>

## 48.7 FC s 25(6): Security of tenure

### (a) Introduction

FC 25(6) provides that a 'person or community whose tenure of land is legally insecure as a result of past discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress'. FC s 25(9) in turn provides that 'Parliament must enact the legislation referred to in subsection (6)'.

The formulation of both FC s 25(6) (tenure reform) and FC s 25(7) (restitution) is unusual in that the two provisions, on the face of it, give the legislature complete discretion to define the scope and content of the rights. FC s 25(9) leaves the legislature with no option: it *must* enact legislation to give effect to the tenure reform and restitution rights. Once enacted, however, such legislation cannot be challenged unless it clearly departs from the spirit and purport of the Bill of Rights.<sup>168</sup>

The need for a tenure reform programme has to be placed in perspective. The South African land control system was not only intrinsically linked to race. It was also inherently fragmented and diverse, resulting in land control forms varying from race group to race group and region to region, often consisting only of

---

OS 03-07, ch48-p26

---

167 See AJ van der Walt 'Reconciling the State's Duties to Promote Land Reform and to Pay "Just and Equitable" Compensation for Expropriation' (2006) 123 *SALJ* 23. Van der Walt emphasizes the constitutional necessity of and justification for expropriation for land reform purposes. Concerning compensation, he shows convincingly that, depending on the relevant factors and circumstances, just and equitable compensation may be below market value.

168 See § 48.4 *supra*.

insecure permit-based rights.<sup>169</sup> This approach resulted in a complex, diverse land tenure system, with the security of individual tenure depending on the specific form of control. The phrase 'past discriminatory laws or practices' refers to this complex system of primary and sub-ordinate legislation setting out land control forms, as well as the practices followed in implementing it. 'Tenure reform' therefore entails replacing existing land control forms with other, more secure tenure forms. In this process the ideal is to move away from a permit-based to a rights-based system, to leave scope for persons to choose, as far as possible, their tenure form according to their needs and to recognize de facto land rights.<sup>170</sup>

Various statutes have been promulgated to meet the state's obligation to provide tenure security or comparable redress, most recently the Communal Land Rights Act 11 of 2004 ('CLRA'). The Upgrading of Land Tenure Rights 112 of 1991, promulgated during the pre-constitutional era, is still a valuable tool in addressing tenure reform. Other noteworthy measures include the ESTA, the Communal Properties Association Act 28 of 1996 and the Interim Protection of Informal Land Rights Act 31 of 1996.

## **(b) Enabling legislation**

### **(i) The Upgrading of Land Tenure Rights Act 112 of 1991('the Upgrading Act')**

The Upgrading Act was initially promulgated to provide for the upgrading and conversion of certain rights into ownership and the transfer of tribal land in full ownership to tribes. The Act has been amended a few times to keep up with new developments in the tenure reform programme.

Rights emanating from leasehold, deeds of grant or quitrent<sup>171</sup> in a formalized township were automatically converted into ownership. Ownership is registered in the name of the person who had the specified right to land immediately before the Upgrading Act commenced.<sup>172</sup> Schedule II rights, consisting of various occupational rights derived from legislative measures<sup>173</sup> and tribal occupational rights in

---

169 See CG van der Merwe & J Pienaar 'Land Reform in South Africa' in P Jackson & DC Wilde *The Reform of Property Law* (1997) 334, 348-50; C Cross & R Haines *Towards Freehold* (1988); G Budlender & J Latsky 'Unravelling Rights to Land and to Agricultural Activity in Rural Race Zones' (1990) 6 *SAJHR* 155; TW Bennett 'African Land — A History of Dispossession' in R Zimmermann & D Visser (eds) *Southern Cross: Civil and Common Law in South Africa* (1996) 65; Carey-Miller & Pope (supra) at 19-21.

170 Department of Land Affairs *White Paper on South African Land Policy* (1997) vi.

171 These rights are also known as Schedule I rights. See Van der Merwe & Pienaar (supra) at 348-52; H Mostert & J Pienaar *Modern Studies in Property Law III* (2005) 323-25.

172 The Upgrading Act also provides in s 2(2) for the necessary entries and endorsements to reflect the conversion to ownership.

173 The following is provided for: (a) any permission granted in terms of reg 5(1) of the Irrigation Schemes Control Regulations 1963 (Proc 5 of 1963) to occupy any irrigation or residential allotment; (b) any permission to occupy any allotment within the meaning of the Black Areas Land Regulations 1969 (Proc R188 of 1969); (c) any right of occupation granted to any registered occupier as defined in s 1 of the Rural Areas Act (House of Representatives) 9 of 1987 (repealed by the Transformation of Certain Rural Areas Act 94 of 1998 (see § 48.6(b)(iii) above); and (d) any right to the occupation of tribal land granted under the indigenous law or customs of the tribe in question.

accordance with indigenous customs and traditions, are not upgraded automatically, but have to go through the procedure set out in s 3 of the Act. This procedure has two requirements. First, where the land is state-owned, conversion will only take place once the Minister is satisfied that the rights and interests of putative holders will be protected. Secondly, where the land is owned by a tribe or has been allocated to a particular tribe for use and occupation, conversion may only take place once a tribal resolution has been reached.

The recently drafted CLRA is therefore not the first Act to provide for the acquisition of tribal (or communal) land by communities or individuals. As long ago as 1991, the Upgrading Act provided that any tribe could obtain ownership in land.<sup>174</sup> The tribe is then able to sell, exchange, donate, let, hypothecate and otherwise dispose of its land.<sup>175</sup> However, the initial commencement of the Act coincided with a general moratorium<sup>176</sup> on disposal to persons other than members of the tribe.<sup>177</sup>

## **(ii) The Interim Protection of Informal Rights Act 31 of 1996 ('the Interim Protection Act')**

Although initially intended to be an interim measure, the slow pace of tenure reform has led to the Interim Protection Act being extended on an annual basis. Although the Act has national application, it is employed mainly in areas that previously formed part of the four national states and six self-governing territories.

Four categories of rights are protected. First, the use or occupation of, or access to land in terms of (i) any tribal, customary or indigenous law or practice of a tribe; or (ii) the custom, usage or administrative practice in a particular area or community where the land at any time vested in the SA Development Trust, the government of any self-governing territory or the former governments of the four national states enjoy protection. The Interim Protection Act also protects the rights or interests in land of trust beneficiaries under arrangements in terms of which the trustee holds a public office, or is a body/functionary established under an Act of Parliament. Beneficial occupation is also protected,<sup>178</sup> provided that it has

---

174 Upgrading Act s 19(1).

175 Upgrading Act s 19(1).

176 The court could consent to the selling or exchanging of tribal land in certain instances only. See Upgrading Act s 19(3).

177 This moratorium period expired in 2001.

178 Defined in s 1 of the Interim Protection Act as being occupation by a person, as if he or she is the owner, without force, openly and without the permission of the registered owner. The two definitions of beneficial occupation in the Interim Protection Act and the CLRA are thus identical. This phrase is also similar to the provisions provided for in the Prescription Act 68 of 1969 in relation to acquisitive prescription. Some of the submissions prior to the passing of the Communal Land Rights Bill voiced concerns that this definition would disqualify women in that their conduct in relation to land was not 'open as if they were the owners thereof' and that this definition would be detrimental to their cause.

endured for a continuous period of not less than five years prior to 31 December 1997. Finally, permission-based 'rights' pertaining to particular units of statutory black land enjoy protection.<sup>179</sup>

### **(iii) The Communal Property Association Act 28 of 1996 ('the CPA Act')**

The legal structures available for common ownership before the commencement of the CPA Act generally entailed complex legal and administrative provisions and ignored the social and economic role communal property plays in traditional communities. Therefore, the use of common or joint ownership, by way of a trust or through a juristic person, was not effectively exploited by certain communities. The CPA Act provides an institutional framework for the registration and functioning of a new juristic structure, namely that of the communal property association.

The CPA Act has been criticized for its complexity and lack of functionality. The process to establish a communal property association is difficult and time-consuming.<sup>180</sup> Registration is dealt with in two phases: the provisional association is registered and then the communal property association is finally registered.<sup>181</sup>

Before the association can be finally registered, the constitution has to be drafted.<sup>182</sup> The constitution must be consistent with the following principles:<sup>183</sup> fair and inclusive decision-making processes; equality of membership; democratic processes; fair access to property of the association and accountability and transparency. The underlying idea is, however, that although certain basic requirements have to be met, the constitution has to reflect the unique needs, values and conditions of the community involved.<sup>184</sup>

### **(iv) The Extension of Security of Tenure Act 62 of 1997 ('the ESTA')**

#### **(aa) Introduction**

The state's constitutional obligation to promulgate legislation dealing with the promotion of secure tenure was in part fulfilled with the enactment of the ESTA in 1997. The aims of the Act are threefold: to promote long-term security

---

OS 03-07, ch48-p29

179 These are set out in Schedule 1 or 2 of the Upgrading Act. This protective category relates to rights listed in the schedules of which the holder is not formally or officially recorded as the rightful holder.

180 See PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's Law of Property* (5th Edition, 2006) Chapter 22; D Carey-Miller & A Pope *Land Title in South Africa* (2000) 461-67.

181 See Cary-Miller & Pope (supra) at 473-85; T Scheepers *A Practical Guide to Law and Development* (2000) 76-79.

182 CPA Act s 6.

183 CPA Act s 9.

184 The final registration takes place by the registration officer once all the formalities have been met. A registration certificate is finally issued that bears the seal of the communal property association after which the association acquires juristic competency. See CPA Act s 8(6)(a).

of tenure; to regulate eviction; and to introduce a set of rights and duties in relation to both occupiers and land owners.<sup>185</sup>

Although the Act has national application, it is limited to rural and peri-urban areas.<sup>186</sup> It is thus clear that the underlying aim is to protect a certain category of rural dwellers: occupiers on farms or farm workers.<sup>187</sup>

### **(bb) Beneficiaries**

Not everyone qualifies as an occupier for purposes of the ESTA. The Act applies to any person residing on land which belongs to another and who has or on 4 February 1997 or thereafter had consent or another right in law to do so; as well as a person who resides on land belonging to another who works for herself and does not employ an outside person.<sup>188</sup> Labour tenants,<sup>189</sup> persons using or intending to use land mainly for industrial, mining, commercial or commercial farming purposes and persons who have a monthly income exceeding R5000 are explicitly excluded from the protection of the ESTA.<sup>190</sup> These exclusions are in line with the main purpose of the Act: to protect vulnerable occupiers.

In some instances persons are presumed to be occupiers: a person who has continuously and openly resided on land for a period of at least one year is presumed to have the consent of the land owner. With regard to persons who occupied the land before 4 February 1997, 'consent' also includes that of the previous land owner. In *Landbounavorsingsraad v Klaasen*, the court held that consent is more than a mere indication of the inclination of the grantor: it creates

---

185 *Prize Trade 44 (Pty) Ltd v Isaac Tefo Memane* (unreported, LCC Case No 35/01, 21 August 2003) (Confirmed that one of the main functions of the Act is to ensure that evictions are conducted equitably in the interests of both parties.)

186 ESTA s 2.

187 See *Venter v Claasen* 2001 (1) SA 720 (LCC). Limiting the application of the Act to rural areas in general has increasingly led to farm workers being settled in urban areas, thereby avoiding the impact of the Act. This unintended and untoward consequence has been curbed, to some extent, by making the Prevention of Illegal Eviction and Unlawful Occupation of Land Act 19 of 1998 ('the PIE Act') applicable to all forms of residential occupation — irrespective of location. Although the full force of the ESTA may thus be avoided, the substantive and procedural requirements related to evictions in general, still need to be complied with. See *Joubert v Van Rensburg* 2001 (1) SA 753 (W) at paras 35-38 (Flemming DJP considered the fact that the Act does not affect all landowners equally, but only owners of farm land as one of the aspects that contributed to the Act being declared unconstitutional. Since the constitutionality of the Act was not in issue in *Joubert*, the Supreme Court of Appeal and the Constitutional Court concluded that Flemming DJP's finding regarding the unconstitutionality of the ESTA was to be disregarded. See *Mkangeli v Joubert* 2001 (2) SA 1191 (CC), 2001 (4) BCLR 316 (CC).)

188 ESTA s 1.

189 Their tenure position had already been dealt with under the Land Reform (Labour Tenants) Act 3 of 1996.

190 ESTA s 1(1)(x)(c).

legally enforceable rights and obligations.<sup>191</sup> Thus the person claiming rights as an occupier must be or must have been a party to the consent agreement.<sup>192</sup> All

persons residing on land would therefore not necessarily qualify as occupiers for purposes of the ESTA — there has to be a legal nexus between that person and the owner or person in charge of the property. Family members residing in the house with occupiers therefore do not automatically qualify as occupiers — they only qualify if there is a legal connection.

Apart from 'ordinary occupiers', s 8(4) of the ESTA also recognizes 'long term occupiers'. Long-term occupiers are persons who have occupied land for a period exceeding ten years and who are 60 years of age or older,<sup>193</sup> or are employees or former employees of the owner or person in charge and are unable to provide labour as a result of ill-health, injury or disability.

### **(cc) The promotion of long-term tenure security**

The ESTA's record in promoting long-term security has thus far been disappointing. Chapter II, which deals with this issue, is phrased in general terms and lacks detail concerning the tenure options available. Given that the ESTA is constitutionally mandated legislation, which is required to provide a framework for tenure reform, one would have expected more substantive provisions.<sup>194</sup> The ESTA nevertheless creates two mechanisms for promoting long-term tenure security: on-site development and off-site development.<sup>195</sup> Off-site development entails occupiers acquiring independent tenure rights on land belonging to someone other than the owner of the land on which they are residing. In cases of off-site development, reasons must be given why the development cannot be undertaken on the farm where the occupiers are residing, especially if the occupiers indicate a preference for on-site development.<sup>196</sup> This in-built preference for on-site development has not, however, led to large-scale developments on farms. In fact, quite the contrary: land owners are very hesitant to make land available for housing on farms.<sup>197</sup> Off-site development has not been that successful either. This form of long-term tenure

---

191 2005 (3) SA 410 (LCC)('Landbounavorsingsraad').

192 Ibid at paras 21-23.

193 The courts have interpreted the age requirements strictly. See *Rashavha v Van Rensburg* 2004 (2) SA 421 (SCA)(The court had to determine whether, when interpreted 'correctly', ages of 58 or 59 would also be included under the 60 years of age provision, especially if the long period of employment (in this instance 20 years) was also kept in mind. The court found that the wording was quite clear and that no interpretation — generous, purposive or otherwise — could change the meaning (at para 14).) Other case law has also found that the use of an identity document was not the only method to determine age that would be acceptable in court. Other methods also included testimony to the date of birth, as long as the evidence is reliable. See in this regard *Mpedi v Swanevelder* 2004 (4) SA 344 (SCA).

194 See FC s 25(5); § 48.6 supra. It is also problematic if compared to the regulation of redistribution measures in the Labour Tenants Act and the relative success that Act has had in practice.

195 ESTA s 4(1).

196 ESTA s 4(2)(c).

security requires a good working relationship between land owners and local government, as well as commitment and funding, which are often lacking. In short, the ESTA has proven more effective at protecting against arbitrary eviction and

regulating the day-to-day relationship between land owners and occupiers than in promoting long-term security.<sup>198</sup>

In order to promote long-term security, the Minister of Land Affairs and Agriculture has equivalent powers to those exercised under the Expropriation Act 63 of 1975. As soon as the expropriation of land or rights is initiated, a hearing must be held and compensation paid.<sup>199</sup>

## **(dd) Occupiers' rights**

### **(1) General**

The fundamental rights listed in s 5 of the ESTA apply to occupiers. Apart from these rights, additional rights and duties are also listed in s 6. These rights must be balanced with the rights of owners or persons in charge. Apart from the rights that emanate from the Act itself, parties are free to include particular rights in the agreement that forms the foundation of the occupier's status.

### **(2) The right to family life**

The right to family life was a somewhat controversial omission from the Bill of Rights, but is included in the ESTA. Not many of the rights provided for in ss 5 and 6 have been adjudicated on. The right to family life was, however, one of the focal points in *Conradie v Hanekom*.<sup>200</sup> In terms of the agreement with the land owner, both the husband and wife stood to lose their residential rights when either spouse's employment contract was cancelled. In contravention of his employment contract, the husband threatened and injured persons on the land and caused damage to property. He was dismissed after a disciplinary hearing. This dismissal also led to the termination of the wife's employment. On review under s 19(3) of the ESTA, the wife was reinstated on the basis that the provision linking the termination of her employment to the conduct of her husband was unreasonable. She could therefore not be evicted for this reason. In addition, on the basis of her right to family life, her husband was allowed to join her on the premises. The court accordingly set both eviction orders aside and ordered that other remedies be sought in respect of the conduct of the husband. The court did not give any indication as to what these remedies might be.

---

197 M Wegerif, B Russel & I Grundling *Still Searching for Security: The Reality of Farm Dweller Evictions in South Africa* (2005).

198 See FC s 25(5) and FC s 26(3). See also S Liebenberg 'The Interpretation of Socio-Economic Rights' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 33.

199 ESTA s 26(2).

200 1999 (4) SA 491 (LCC), [1999] 2 All SA 525 (LCC) ('Conradie').

The right to family life in accordance with the cultural background of the family was raised in *Wichmann v Langa*.<sup>201</sup> Applications for the eviction of the long-term occupier's sons and grandson were contested on the basis that leaving

the grandmother would be unacceptable in terms of Zulu culture and tradition. The extended family set-up entailed that the different generations should live together.<sup>202</sup> The court responded that no expert evidence supported the claims made in relation to Zulu customs and culture and that, even if it were true, the respondents had all fallen foul of s 10 (dealing with irreconcilable breach) of the ESTA. On the facts, the conduct of the respondents displayed a blatant disregard for the lives and property of the other employees and owners. The right to family life was thus trumped by the safety and other interests of the rest of the occupiers and owner. In both this decision and *Conradie*, the courts failed appropriately to balance competing rights. In *Conradie*, the right to family life was upheld, ruling out the possibility of an eviction order, without seeking to give effect to the rights of the land owner and other occupiers. On the facts the only real difference between the two cases is that *Conradie* dealt with a husband and wife and the link to family life in that regard, whereas *Wichmann* dealt with parent-child and grandparent-grandchild relationships and an alleged custom that could not be proven. Unfortunately, neither case provides useful guidelines on how to balance the right to family life, on the one hand, and the interests of land owners, on the other. In seeking to balance the right to family life and the (property) rights of land owners, it may be appropriate for courts to seek creative remedies, such as interdicts precluding certain conduct on the part of occupiers, without an order for eviction; alternatively, granting eviction but awarding compensation or other redress to occupiers.<sup>203</sup>

### (3) The right to freedom of religion and burial rights

As originally drafted, the ESTA did not provide for burial rights but for the right to visit graves. In *Serole v Pienaar* the applicants argued that the right to visit graves included the right to bury deceased family members, given that the custom of indigenous black people requires the dead to be buried close to the living.<sup>204</sup> The court held that permission to establish a grave would amount to a servitude over the property, which would be different in nature to the kind of right which the legislature intended to grant occupiers.<sup>205</sup> The court accordingly dismissed the application.

---

201 2006 (1) SA 102 (LCC) ('*Wichmann*').

202 *Wichmann* (supra) at para 24.

203 See *President of RSA & Another v Modderklip Boerdery (Pty) Ltd & Others (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC) (Court awarded constitutional damages to the landowner because it was unable to order eviction.)

204 2000 (1) SA 328 (LCC), [1999] 1 All SA 562 (LCC) ('*Serole*').

205 *Ibid* at para 16.

*Nkosi v Bührman* focused on the right to freedom of religion as protected by ss 5 and 6 of the ESTA, before their amendment in 2001.<sup>206</sup> The applicants argued that they were entitled to bury a deceased family member on the land without the

---

OS 03-07, ch48-p33

landowner's consent, on the basis of their religious freedom, which was not an independent right, but an element of the occupier's security of tenure. The court held that the right to freedom of religion had internal limits and did not confer unfettered ability to choose a gravesite or to take a gravesite without the consent of the owner.<sup>207</sup> The court also emphasized that the kind of rights bestowed on occupiers, namely residential and use rights, did not detract *permanently* from the substance of the land, whereas a gravesite would do exactly that. Consequently, 'use' was use in association with the right of residence which did not confer any right to, or in, the land itself.<sup>208</sup> This reliance on 'permanence', in our view, was misplaced. The impact of indefinite rights of occupiers to occupy land on a land owner's rights may amount to an equally significant deprivation as the establishment of a gravesite.

In 2001 the ESTA was amended to provide for burial rights in certain instances. In terms of a new s 6(2)(dA), an occupier now 'has the right to bury a family member who resided on the land at the time of his or her death, in accordance with their religion or cultural belief, if an established practice in respect of the land exists'. And, according to s 6(5), 'family members of a long-term occupier have the right to bury the occupier on the land on which he or she was resident at the time of death'.

An 'established practice' in relation to the land is defined in s 1(1) as meaning a practice in terms of which the owners or persons in charge (or their predecessors in title) *routinely* gave permission to people residing on the land to bury deceased family members, in accordance with their religious and cultural beliefs. The practice furthermore relates to the land in question and not the specific family.<sup>209</sup> This provision accordingly recognizes the establishment of custom through practice: that is, living customary law.

*Nhlabathi v Fick* was the first case to be decided under the amended version of the ESTA.<sup>210</sup> The court considered whether s 6(2) was unconstitutional due to its impact on landowners' rights.<sup>211</sup> Two arguments were advanced in attacking the provision: first, that s 6(2)(dA) fell foul of the protection given to property under FC s 25; and, secondly, that it intruded into the functional area of exclusive local

---

206 2002 (1) SA 372 (SCA), 2002 (6) BCLR 574 (SCA) ('*Nkosi*').

207 *Nkosi* (supra) at para 49.

208 *Ibid* at paras 5 and 51.

209 See *Dlamini v Joosten* 2006 (3) SA 342 (SCA) (The concept that the practice relates to the land as such and not the particular family, was again confirmed.)

210 [2003] 2 All SA 323 (LCC) ('*Nhlabathi*').

211 For an in-depth discussion of this case, see J Pienaar & H Mostert 'The Balance Between Burial Rights and Landownership in South Africa: Issues of Content, Nature and Constitutionality' (2005) 122 *SALJ* 633 ('The Balance').

government legislative competence, contravening FC s 44(1)(a)(iii). In view of the focus of this chapter, we consider only the first line of attack.<sup>212</sup>

The respondent argued that the appropriation of a grave deprives the landowner of property. The court thus had to determine if a deprivation or an

---

OS 03-07, ch48-p34

expropriation had taken place. Deprivations will pass constitutional muster if they result from a law of general application which does not permit arbitrary limitation. Impositions amounting to expropriation must additionally be for a public purpose or in the public interest. Also, expropriation requires the payment of just and equitable compensation, the amount of which must be agreed on or determined by court. Impositions on property generally have to adhere to the requirement of proportionality.<sup>213</sup>

After *First National Bank t/a Wesbank v Commissioner for the SA Revenue Services*,<sup>214</sup> it is generally accepted that an imposition on property rights will be 'arbitrary' for purposes of FC s 25 when the legislative measure employed does not give *sufficient reason* for the particular deprivation in question or is procedurally unfair.<sup>215</sup> The existence of sufficient reason for the deprivation or imposition can be assessed by a 'means-ends' analysis and a consideration of a complexity of relationships. The connection between the purpose of the deprivation and the affected property-holder and the nature of the property, are also included in this exercise. The proportionality review, as foreseen by FC s 36(1), refers to an assessment of the justifiability and rationality of a particular imposition on property. The separate concepts of non-arbitrariness and proportionality do overlap, however, even if their functions within the constitutional property enquiry vary considerably. In *Nhlabathi*, the court listed four grounds upon which it had to base its finding relating to arbitrariness:

- The right to appropriate a grave has to be balanced with the rights and interests of the land owner or person in charge;<sup>216</sup>
- The burial is only permitted where there is an established practice in this regard;<sup>217</sup>

---

212 Ibid at 644-659.

213 FC s 36(1). See also PJ Badenhorst, J Pienaar & H Mostert *Silberberg and Schoeman's Law of Property* (5th Edition, 2006) Chapter 21; H Mostert & PJ Badenhorst 'Property and the Bill of Rights' in Y Mokgoro & P Tlakula (eds) *Bill of Rights Compendium* (Issue 18, June 2006) concerning deprivations: 3FB40-70 and expropriations: 3FB71-93.

214 2002 (4) SA 768 (CC), 2002 (7) BCLR 702 (CC).

215 *Nhlabathi* (supra) at para 100. See T Roux 'Property' in S Woolman, T Roux, J Klaaren, A Stein, M Chaskalson & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, December 2003) Chapter 46.

216 *Nhlabathi* (supra) at para 26(a).

217 Ibid at para 26(b).

- The establishment of the grave and visiting and maintaining it will in most cases only constitute a minor intrusion into the landowner's property rights;<sup>218</sup> and
- The right to burial was introduced by legislation as part of the constitutional mandate to ensure legally secure tenure.<sup>219</sup>

With regard to an established practice, the facts in *Nhlabathi* are especially noteworthy. Two members of the Nhlabathi family had already been buried on the farm previously. The respondent argued that those burials resulted from his 'indulgence'; and that no burial plot as such had been allocated to the family. Despite this averment, the family clearly regarded those plots as their burial grounds and several other burial plots for other families also existed on the land. The court found that the established practice was not in relation to a particular family, but to the land in question.<sup>220</sup> The potential arbitrariness of the provision was therefore tempered by limiting the burial right to certain instances only.

Concerning the extent to which the appropriation of a grave site diminishes the rights of the land owner, *Nhlabathi* differs radically from previous case law. In contrast to initial declarations in *Serole v Pienaar* that granting a grave site would result in a *permanent* diminution of ownership, in *Nhlabathi*, the court referred to 'minor intrusions' only. This finding has a definite impact on whether FC s 25(1) or (2) comes into play and whether compensation needs to be paid. The court in *Nhlabathi* ultimately held that, although the establishment of a grave amounts to a servitude without the permission of the land owner, compensation is not payable.<sup>221</sup> In our view, the court reached the correct decision on the facts. However, there may be cases in which compensation ought to be payable.

With regard to the arbitrariness enquiry, the court indicated that the constitutional mandate to ensure legally secure tenure is a decisive factor.<sup>222</sup> It furthermore held that burial enables occupiers to live in accordance with their cultural and religious beliefs, which, connected with the underlying purpose of the ESTA, provides sufficient reason to justify an inroad into the landowner's rights. The obligation placed on the landowner is thus reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>223</sup> During the balancing act however, the court envisages that the right of the landowner may outweigh that of the occupier in some instances.

---

218 Ibid at para 26(c). This holding constitutes a major departure from the stances taken in previous case law.

219 ESTA s 25(6), *Nhlabathi* (supra) at para 26(d).

220 Also confirmed in *Dlamini v Joosten* 2006 (3) SA 342 (SCA).

221 *Nhlabathi* (supra) at paras 27-30.

222 Ibid at para 26(d).

223 This conclusion is reminiscent of the minority judgement of Ngoepe J in *Nkosi. Nkosi* (supra) at 1161C.

Finding that the right to burial amounts to a servitude<sup>224</sup> required the court to deal with the argument that establishing such a servitude without consent amounted to expropriation contrary to FC ss 25(2) and (3). *Nhlabathi* supports the view that expropriations, being a subspecies of deprivation, need to comply with all the requirements for deprivations set out in FC s 25(1) as well as the additional requirements in FC ss 25(2) and (3).<sup>225</sup> Impositions on property are

---

OS 03-07, ch48-p36

regarded as unconstitutional deprivations when they are achieved by way of a law that is not of general application, are arbitrary or cannot pass the proportionality test under FC s 36. A constitutional expropriation would have to meet additional requirements: it must be in the public interest or for public purposes and compensation must be paid. In *Nhlabathi*, the court tested the provision for proportionality. Given that the court had already confirmed that the provision was not arbitrary, proportionality review was perhaps superfluous. Nevertheless, the court found that there might be instances where the absence of the right to compensation on expropriation is reasonable and justifiable and in the public interest. In the light of the nation's commitment to land reform, granting a burial right need not lead to compensation being paid to the land owner.<sup>226</sup>

#### **(4) The right to legal representation**

The right to legal representation and legal aid, as developed in *Nkuzi Development Association v Government of RSA*,<sup>227</sup> applies to occupiers whose tenure is threatened or infringed.<sup>228</sup>

#### **(ee) Termination of rights**

Occupiers may be evicted only when certain substantive and procedural requirements have been met. This protection is strengthened by an automatic review procedure in terms of which all eviction orders granted by lower courts are reviewed by the Land Claims Court before the eviction is carried out.<sup>229</sup> The eviction of a person, other than in terms of the Act,<sup>230</sup> constitutes an offence.<sup>231</sup>

The ESTA establishes two groups of occupiers: those who already occupied the land when the Bill was published for comment, that is, on 4 February 1997, and those who became occupiers after this date. The latter group is in a slightly better

---

224 In 'The Balance', Pienaar and Mostert argue that the right to burial is a statutorily defined right and not a servitude since none of the traditional property law requirements dealing with servitudes are met in this instance. If the court had found that these rights are indeed statutory burial rights as determined and set out in ESTA itself, there would have been no need to explain the lack of provision for compensation. Pienaar & Mostert 'The Balance' (supra).

225 *Nhlabathi* (supra) at para 29.

226 See M Euijen & C Plasket 'Constitutional Protection of Property and Land Reform' (2003) *Annual Survey of South African Law* 437-38.

227 2002 (2) SA 733 (LCC).

228 See § 48.6(b)(i)(bb) supra.

229 ESTA s 19(3).

position, especially in relation to the landowner's responsibility to provide suitable alternative accommodation. Apart from these normal eviction proceedings, the ESTA also provides for urgent eviction proceedings.

Generally, irrespective of the date of occupation, evictions may take place on any legal ground,<sup>232</sup> including intentional threats against, intimidation of or harm or damage to other occupiers on the land; assisting persons unlawfully to erect dwellings on the land; breach of a material and fair term of any agreement reached by the parties where the owner or person in control of the land did not breach the agreement; and a fundamental breach of the relationship between the occupier and the owner which is impossible to remedy.<sup>233</sup>

A further ground for eviction concerns the situation where the occupier was an employee whose right of residence arose solely from her employment and she voluntarily resigned in circumstances that did not amount to a constructive dismissal in terms of the Labour Relations Act 66 of 1965.<sup>234</sup>

## **(ff) Evictions**

### **(1) General**

The majority of reported cases under the ESTA have dealt with eviction proceedings. The ESTA is a good example of 'social legislation'. It takes a far less formalistic and adversarial approach to, for example, costs orders<sup>235</sup> and condonation of procedural irregularities.<sup>236</sup>

Depending on the date of occupation, an application for eviction may be lodged under s 10 (if the person was an occupier on 4 February 1997) or s 11 (when the occupier became an occupier after that date). Urgent applications are dealt with under s 15. The right to legal representation when being faced with an eviction

---

230 Keep in mind that, at this stage, a relocation order does not constitute eviction for purposes of the Act. Although it might be argued that a relocation order affects vested rights of long-term occupiers, the Act does not specifically require that such relocation 'arrangements' be reviewed by the Land Claims Court under s 19(3). See *Nomthandazo Chagi v Singisi Forest Products* (LCC13/05); *Pharo's Properties v Kuilders* 2001 (2) SA 1180 (LCC), [2001] 2 All SA 309 (LCC); *Pretorius v Beginsel* 2002 JOL 9238 (LCC). *Drumearn v Wager* confirmed that a relocation order does not constitute an eviction for purposes of ESTA. 2002 (6) SA 500 (LCC). It has, however, also confirmed that the relocation should be to 'suitable alternative accommodation' as contemplated in the Act.

231 ESTA s 23(1).

232 ESTA s 8(1).

233 ESTA s 6(3).

234 ESTA s 19(1)(d). In such circumstances, both the employment and the occupational agreement have to be terminated before an eviction order will be considered. See *Landbounavorsingsraad v Klaasen* 2005 (3) SA 410 (LCC), *Jaco Hough Boerdery Trust v Smith* (unreported, LCC Case No 15R/04, 3 March 2004).

235 *De Wit v May* [2003] JOL 11195 (LCC); *SA Baard Boerdery v Grietjie Pofadder* (unreported, LCC Case No 97R/04, 26 October 2004).

application has been clearly established.<sup>237</sup> Under s 19(3) of the ESTA, all eviction orders are automatically referred to the Land Claims Court for review before an eviction order is finally confirmed and executed.<sup>238</sup>

## (2) Procedural requirements

The owner<sup>239</sup> or person in charge of the property has to give the occupier, the municipality in whose area of jurisdiction the land is situated and the head of the relevant provincial office of the Department of Land Affairs not less than two calendar months' written notice of her intention to obtain an eviction order.<sup>240</sup> The notice must contain the grounds for eviction and must be detailed enough so that no recipient should have any doubt concerning their rights and the consequences of a failure to protect those rights.<sup>241</sup> The notice has to be in a language that is understood by the occupiers.<sup>242</sup>

## (3) Requirements for eviction

Two sets of considerations are relevant to the question whether to grant an eviction order: first, specific legal requirements and, secondly, the general requirement of fairness. The specific legal requirements include whether the occupation has been terminated in accordance with the Act;<sup>243</sup> whether procedural requirements have been complied with and whether a probation report has been submitted. The purpose of a probation report is to enable the court to determine whether the

---

236 The question whether a late notice of appeal should be condoned was decided with reference to (a) the possibility of a successful appeal, as well as (b) the particular circumstances of the client in *Rashavha v Van Rensburg*. 2004 (2) SA 421 (SCA). With regard to the latter, the court found that the appellant was an illiterate, impecunious and uneducated woman with no knowledge of the workings of the legal system and that she could not be refused condonation solely on the ground that her legal advisers had been negligent in the performance of their work (at para 9).

237 *Nkuzi Development Association v Government of the Republic of South Africa* 2002 (2) SA 733 (LCC); *Maas Transport BK v Beukes* [2002] JOL 9804 (LCC).

238 Review proceedings in the Land Claims Court are decided by a single judge. He or she can confirm the order in whole or in part, set it aside, substitute it or remit it to the magistrate. Appeal against a confirmation of a review lies to the Land Claims Court (two judges) and thereafter to the Supreme Court of Appeal. See *Magodi v Van Rensburg* [2001] 4 All SA 485 (LCC), [2001] JOL 8502 (LCC).

239 It has to be clear from the documents that the applicant is indeed the owner of the land. See *Henri du Plessis Trust v Kammies* (unreported, LCC Case No 77R/01, 3 September 2001)(If the owner is a trust, the necessary information concerning the trustees has to be set out clearly in the documents); *Remhoogte Boerdery Edms (Bpk) v Mentoer* [2001] JOL 9018 (LCC)(Where the owner is a legal person, the person acting on behalf of the owner has to prove his or her authorization to do so); *Sparrow v Morementsi* (unreported, LCC Case No 116R/03, 25 February 2004)(The Court confirmed that a farm manager cannot institute proceedings under his own name, but would have to set out his authority to do so, or that he is acting on behalf of the owner.)

240 ESTA s 9(2)(d).

241 *African Charcoal (Pty) v Ndlovu* [2002] 2 All SA 19 (LCC), [2000] JOL 6271 (LCC).

242 *Denleigh Farms v Mhlanzi* 2000 (1) SA 225 (LCC).

conditions for eviction have been met.<sup>244</sup> The report should be submitted within a reasonable time,<sup>245</sup> and should provide information relevant to the requested eviction, including the availability of suitable alternative accommodation; the possible impact the eviction might have on affected persons (including children and their education); and the possible hardship it may cause the occupier. On the basis that alternative accommodation and hardship caused were issues to be addressed in each eviction application, Moloto J held in *Valley Packers Co-operative Ltd v Dietloff*<sup>246</sup> that a probation report is a requirement whether the application for eviction is under s 10<sup>247</sup> or s 11 of the ESTA. However, the impact of

---

OS 03-07, ch48-p39

the *Valley Packer* decision has been tempered somewhat by *Theewaterskloof Holdings (Edms) Bpk, Glaser Afdeling v Jacobs*. The *Jacobs* court held that a mere request for a probation report would meet that requirement.<sup>248</sup> However a mere request for the report would not enable the court to reach conclusions regarding alternative accommodation or the hardship to be faced by the parties. It would, in fact, defeat the purpose of the submission of the report.

In our view, although an urgent eviction order may, in limited circumstances, be granted without the court studying the probation report, a final order should not be granted in such circumstances.<sup>249</sup> Although the ESTA specifically refers to the position of the occupier when the report is drafted, case law has indicated that the report should reflect the position of *both* the occupier and the land owner.<sup>250</sup> The report should thus, in principle, be a balanced report and interviews have to be held with both the landowner (or person in charge) and the occupier. With regard to the landowner's interests, the report could, for example, include facts such as having to lease other accommodation and the cost of transporting workers when occupiers refuse to vacate the land.

---

243 See the whole of ESTA s 9.

244 ESTA ss 10 and 11.

245 'Reasonable time' would depend on the particular circumstances of each case. See *Western Investments Company (Ltd) v Van Reenen* (unreported, LCC Case No 05R/02, 12 February 2002) (Gildenhuys J found that waiting six months for a probation report would be 'unreasonably long'.)

246 [2001] 2 All SA 30 (LCC), [2001] JOL 7828 (LCC) ('*Vallet Packers*') at para 8.

247 ESTA s 10(1) provides for voluntary termination of employment, in which case a probation report would not be necessary. *Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simons* [2000] 3 All SA 279 (LCC). This decision was later overturned in *Valley Packers*.

248 2002 (3) SA 401 (LCC).

249 See *Gili Greenworld Holdings (Pty) Ltd v Shisonge* [2002] JOL 9930 (LCC) (The court found that it would not have to wait for an unreasonable length of time for the report to be submitted in urgent eviction proceedings.)

250 *Terblanche NO v Flippies and Others* [2001] JOL 9930 (LCC).

In considering the general requirement of fairness, relevant factors include the period the occupier resided on the land; the fairness of any agreement or provision of any law on which the owner or person in charge relies,<sup>251</sup> the conduct of the parties giving rise to the termination, the interests of the parties and the fairness of the procedure followed by the owner or person in charge. For persons who were occupiers on 4 February 1997, the court will also consider the efforts of the owner or person in charge to secure alternative accommodation for the occupier, as well as the interests of the parties, including the comparative hardship to the owner and/or person in charge and occupier(s) if an order for eviction is not granted. With regard to persons who became occupiers after that date, s 11(3) provides a list of factors to be taken into account concerning whether eviction would be just and equitable. These factors include whether suitable alternative accommodation is available and the reason for the eviction. Suitable alternative accommodation must be safe and generally not less favourable than the previous situation. The mere fact that accommodation is available is therefore not sufficient.<sup>252</sup>

---

OS 03-07, ch48-p40

In *PE Municipality*, the Constitutional Court considered the analogous provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, and the factors to be taken into account when considering an eviction application. The Court emphasized that the set of statutory factors is not a closed list, and that the Court has a broad discretion concerning what factors to take into account and what weight to attach to each.<sup>253</sup> The Court stated that technical questions, such as onus of proof, should not play an unduly significant role.<sup>254</sup> Sachs J characterized the nature of the enquiry in this passage:

The court is not resolving a civil dispute as to who has rights under land law; the existence of unlawfulness is the foundation of the enquiry, not its subject-matter. What the court is called upon to do is to decide whether, bearing in mind the values of the Constitution, in upholding and enforcing land rights, it is appropriate to issue an order which has the effect of depriving people of their homes.<sup>255</sup>

This passage tends to suggest that the enquiry is not a legal question at all, but a moral question based on the Final Constitution's value system, a question located

---

251 The provisions of the relevant agreements may also be considered in this regard. See *De Wit v May* [2003] JOL 11195 (LCC)(One of the provisions entailed that the occupier would be responsible for any costs involved should the occupier be evicted. Apart from the fact that the ESTA is social legislation, meaning that costs orders are generally not made, the provision of the agreement was also found to be unfair in the circumstances.)

252 See, eg, *Botha v Morobane* (unreported, LCC Case No 35R/04, 30 April 2004)(The eviction order granted was set aside on review on the basis that the alternative accommodation offered was not acceptable. In this case the occupier ostensibly had a house that was not occupied by her, but was being let. On that basis the eviction order was granted in the magistrate's court. However, on review, it became clear that the house was a mere shack, was already occupied, and was located far from the evictee's workplace. The eviction order was consequently set aside.)

253 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC) ('*PE Municipality*') at paras 30-31.

254 *Ibid* at para 32.

255 *Ibid*.

somehow outside (constitutional) land law.<sup>256</sup> However, in our view, the passage is best read, not as suggesting that the eviction enquiry is an extra-legal question, but instead as authority for three propositions. First, proof of unlawful occupation alone is not a sufficient basis on which to grant eviction, though it is a prerequisite. Secondly, the statutory factors relevant to granting eviction orders must be interpreted and applied bearing in mind underlying constitutional values, and are not a closed list. Finally, the court has a broad discretion, both as to procedure and substance, when considering eviction cases.

#### (4) Granting an eviction order

Once the court is satisfied that all the procedural requirements have been met and that it is indeed fair in the circumstances, an eviction order will be granted. The order has to contain two distinct dates: the date on which the house or dwelling has to be evacuated; and the date on which the eviction order will be carried out if the occupiers have not left the land of their own accord.<sup>257</sup> Both dates have to be fair. The Land Claims Court has indicated its dissatisfaction with lower courts granting eviction orders without providing for the two relevant dates.<sup>258</sup> The date has to be determined so that it leaves sufficient time for the automatic review

---

OS 03-07, ch48-p41

proceedings to be completed.<sup>259</sup> Depending on the circumstances, the eviction order may also include an order granting compensation for structures and buildings erected by the occupier or for improvements or crops planted by the occupier.<sup>260</sup> If there are outstanding wages to be paid, these wages may also be reflected in an eviction order.

Sometimes, eviction applications are overtaken by events. In *Modderklip*, the Constitutional Court showed its willingness to fashion creative remedies to solve apparently intractable conflicts over land.<sup>261</sup> In this case, the three key players, the land owner, the 40 000 unlawful occupiers and the state, were all in impossible positions: the land owner could neither evict the occupiers nor use its land; the occupiers had no alternative land; and the state could not (as a practical reality) enforce the eviction order or provide alternative land for the occupiers. The Court awarded constitutional damages to the land owner, noting that this remedy resolved the impasse: 'It compensates Modderklip for the unlawful occupation of its property

---

256 The passage suggests a 'natural law' theory of land law in which law is not law unless it is just. See WB le Roux 'Natural Law Theories' in C Roederer & D Moellendorf *Jurisprudence* (2006) 25ff.

257 ESTA s 12(1).

258 See also *McKenzie NO & Another v Lukas & Others* (unreported, LCC Case No 11R/04, 22 April 2004).

259 *Eggersgluz & Another v Trayishile Kethese & Others* (unreported, LCC Case No 13R/99, 6 April 1999); *Spies v Mahlangu* (unreported, LCC Case No 19R/00, 22 March 2000); *Vooraus Beleggings (Edms) Bpk v Molefe* (unreported, LCC Case No 9R/00, 7 March 2000).

260 ESTA s 13(1)(a).

261 *President of RSA & Another v Modderklip Boerdery (Pty) Ltd & Others (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC).

in violation of its rights; it ensures the unlawful occupiers will continue to have accommodation until suitable alternatives are found and it relieves the State of the urgent task of having to find such alternatives.<sup>1262</sup>

## (5) Urgent eviction proceedings

Section 15 of the ESTA provides for urgent eviction proceedings. Such an order may be granted in identical circumstances to those provided for under the Labour Tenants Act considered above.<sup>263</sup> Although urgent, reasonable notice still needs to be given to the municipality in the jurisdictional area and the relevant office of the Department of Land Affairs.<sup>264</sup> 'Real and imminent danger', as contemplated in s 15(1)(a), relates to both the occupier and the land owner.<sup>265</sup> Although never a final order, urgent orders will only be granted if the court is satisfied that all of the requirements have been met. Applicants should thus have clear evidence of threatening conduct,<sup>266</sup> and applications based on mere assumptions and speculation will not be granted.<sup>267</sup>

---

OS 03-07, ch48-p42

## (gg) Mediation and Arbitration

As we noted above, the constitutional value of *ubuntu* provides support for an interpretation of land legislation that prefers mediated solutions to adversarial confrontation.<sup>268</sup> Section 21 of the ESTA provides for mediation proceedings in certain circumstances. Although the decision of Sachs J in *PE Municipality* dealt with eviction proceedings under PIE, it is clearly relevant to evictions in general. The *PE Municipality* Court made it clear that whether mediation had occurred or not would be one factor when considering whether the eviction would be fair in the circumstances.<sup>269</sup> If there has been no attempt at mediation, negative inferences may be drawn as regards the fairness of the eviction. A mediator may be appointed by either of the parties<sup>270</sup> or the Director-General of Land Affairs.<sup>271</sup> Disputes may also be referred to arbitration under s 22 of the ESTA, in which case the general provisions of the Arbitration Act 42 of 1965 will apply.

---

262 Ibid at para 59.

263 See § 48.6(b)(i) supra.

264 ESTA s 15(2).

265 *Grand Valley (Edms) Bpk v Nkosi* (unreported, LCC Case No 73/99, 25 June 1999).

266 *Inhoek Varkboerdery (Edms) Bpk v Kok & Others* (unreported, LCC Case No 03R/05, 4 February 2005).

267 *Gili Greenworld Holdings (Pty) Ltd v Shisonge* [2002] JOL 9930 (LCC).

268 See § 48.4 supra.

269 *PE Municipality* (supra) at para 43.

270 ESTA s 21(1).

## **(hh) Review proceedings**

Although the initial idea was that automatic review proceedings would only be an interim measure while all the relevant parties and the court functionaries were still unfamiliar with the workings of the ESTA, s 19(3) has not been repealed.

The purpose of automatic review proceedings is to ensure that only evictions that have met all of the substantive and procedural requirements are carried out. Recent case law has confirmed that new evidence, facts or correspondence may not be introduced in these proceedings.<sup>272</sup> In cases where new evidence comes to the fore on review, the case is usually remitted to the magistrate.

## **(v) The Communal Land Rights Act 11 of 2004 ('the CLRA')**

### **(aa) General**

Although the CLRA is the embodiment of government's commitment to tenure reform, as set out in FC s 25(6) and (9), various sections also fit within the redistribution programme.<sup>273</sup> The mechanism used to achieve the objectives of redistribution, and tenure security in particular, is to enable 'new order rights' to replace 'old order rights' in communal areas. These rights may be held individually or communally.

---

OS 03-07, ch48-p43

### **(bb) Application**

The CLRA is principally applicable to communal land, namely land occupied or used by a community or its members subject to rules of that community.<sup>274</sup> If land falls within the ambit of s 2, the Act applies and communities have no choice but to participate.<sup>275</sup>

The broad categories of land set out in s 2 all relate to some extent to the pre-1991 land control system.<sup>276</sup> State land that is beneficially occupied<sup>277</sup> and that has

---

271 ESTA s 21(2).

272 *Eikenbosch Farm (Pty) Ltd v Matthews* 2003 (4) SA 283 (LCC).

273 For the aims and functioning of the redistribution programme, see § 48.6 supra. See also H Mostert & J Pienaar *Modern Studies in Property Law III* (2005) 317-22.

274 See CLRA s 2. 'Community' is defined in the CLRA and the Restitution of Land Rights Act 22 of 1994 as a group of persons whose rights to land are derived from shared rules determining access to land held in common by the group. See also *Richtersveld Community v Alexkor Ltd* 2001 (3) SA 1293 (LCC) at 1330A-B; GJ Pienaar 'The Land Titling Debate in South Africa' (2006) *TSAR* 435, 441-45; GJ Pienaar 'The Meaning of the Concept Community in South African Land Tenure Legislation' (2005) 16 *Stellenbosch LR* 60.

275 The default provisions come into effect when the community refrains from constituting a juristic person as determined in ss 3 and 9 of the CLRA.

276 The list of repealed legislation refers to the land legislation promulgated in the former Bophuthatswana, Venda, Ciskei, QwaQwa, KwaNdebele and Transkei, and amends various sections of the KwaZulu Ingonyama Trust Act of 1994.

vested at any time in the governments of the former self-governing territories<sup>278</sup> or national states<sup>279</sup> form one such broad category. This category also includes non-disposed<sup>280</sup> state land that vested in the SA Development Trust and certain other trusts.<sup>281</sup>

The categories of land to which the CLRA applies reflect its primary application to traditional communal areas. However, the CLRA also goes beyond the pre-1991 land regime by providing that it applies to 'beneficiaries of communal land or land tenure rights in terms of other land reform laws' and by catering for a number of 'new' categories of communal land.<sup>282</sup> Significantly, it also applies to 'any other land, including land which provides equitable access to land to a community as contemplated in section 25(5) of the Constitution'.<sup>283</sup> Under the

---

OS 03-07, ch48-p44

redistribution programme (and tenure reform programme) it has become possible for communities to become land owners via a communal property association.<sup>284</sup>

### **(cc) Old order' and 'new order' rights**

Section 4 of the CLRA gives effect to FC s 25(6) by confronting the issue of rights that are legally insecure as a result of past racially discriminatory laws or practices. In addressing this issue, the rights and relations of the 'old South Africa' come into play — hence the reference to 'old order rights'. To move from 'old order' rights to

277 Beneficial occupation entails occupation by a person or community for a continuous period of not less than five years prior to 31 December 1997 as if that person was the owner, without force, openly and without the permission of the owner.

278 QwaQwa, KwaNdebele, Gazankulu, KwaZulu, Lebowa and KaNgwane.

279 Transkei, Ciskei, Venda and Bophuthatswana.

280 Under the State Land Disposal Act 48 of 1961. Land that was listed in the Schedule to the Black Land Act before it was repealed and land listed as 'released areas' under the Development Trust and Land Act are also included. Finally, it also relates to land subject to the KwaZulu-Natal Ingonyama Trust.

281 Development and Trust Land Act 18 of 1936. The SA Development Trust (SADT) was disestablished in March 1992 and land held by the Trust was transferred to the (then) Administrators of the former Transvaal and Orange Free State provinces, to the Minister of Regional and Land Affairs and the governments of the former self-governing territories (Proc R28 in GG 13906 of 31 March 1992). The dismantling of the SADT was a necessary consequence of the White Paper on Land Reform of 1991 and of the impending unification of South Africa's borders under the new constitutional dispensation.

282 CLRA ss 39 and 2(1)(c) and (d). For example, it incorporates 'land acquired by or for a community whether registered or not'.

283 Ibid s 2(1)(d).

284 See § 48.7(b)(iii) supra. Although s 2(2) of the CLRA states that the Minister will determine the extent of the land affected by this provision by way of notice in the *Government Gazette*, s 2(2) confuses the scope of the CLRA and CPA Act since the provisions may impact on the same land. The implications of s 2(1)(c) and (d) read with s 39 are much more far-reaching than initially meets the eye.

'new order' rights, the CLRA provides for the transfer, confirmation or cancellation of these rights.

'Old order rights' include 'any tenure rights *in communal land* or any other rights *over communal land* whether formal or informal, registered or unregistered, derived from or recognized by law (including customary law, practice and usage)'.<sup>285</sup> This definition excludes rights of occupancy,<sup>286</sup> labour tenancy,<sup>287</sup> sharecropping,<sup>288</sup> or rights in terms of an employment contract.<sup>289</sup>

'New order rights', although not clearly defined, generally involve a tenure right in communal or other land which has been confirmed, converted, conferred or validated by the Minister under s 18 of the Act.<sup>290</sup>

Communal land is generally held by the state.<sup>291</sup> The tribal head or 'chief' (or traditional leader) manages the land in trust for the community and allocates land to individual families via the family head. Accordingly, community members occupy the land on a communal basis under the overall authority of traditional leaders. Land allocated to community members usually consists of two parcels of land: one to be utilized for residential and the other for agricultural purposes.<sup>292</sup>

---

OS 03-07, ch48-p45

Other 'informal rights' also prevail in relation to the commons and include water and grazing rights. *All of these rights* fall within the ambit of 'old order rights' since they are derived from customary law, practice and usage.<sup>293</sup>

---

285 CLRA s 1 — interpretation clause (emphasis added).

286 This understanding of occupancy would include instances where occupancy is purely on a contractual basis, with the assumption that the occupancy can be terminated in accordance with the agreement.

287 These rights have already been dealt with in the context of the Labour Tenants Act. See § 48.6(b)(i) *supra*.

288 Sharecropping was a form of labour tenancy and has thus also been dealt with under the labour tenancy legislation. See JM Pienaar 'Farm Workers: Extending Security of Tenure in Terms of Recent Legislation' (1998) 2 *SAPR/PL* 423.

289 Occupancy may also coincide with employment. The ESTA will deal with these instances. See the discussion above in § 48.7(b)(iv). Occupiers whose rights may be terminated at any stage are also included in this category.

290 CLRA s 18 constitutes an executive act of the Minister. See § 48.7(b)(v)(dd)2. *infra*.

291 IC s 229 provided that all land that previously vested in the governments of the national states or self-governing territories would, after 26 April 1994, vest in the Republic of South Africa.

292 See IP Maithufi 'Law of Property' in JC Bekker, JMT Labuschage & LP Voster (eds) *Introduction to Legal Pluralism in South Africa: Customary Law* (2002) 56-59; TW Bennett *Human Rights and African Customary Law* (1995) 37-139.

293 See § 48.5 *supra*.

The legislature has, however, in the past also intervened in the recognition and regulation of rights in relation to communal land.<sup>294</sup> Proclamation R188 of 1969 provides for two forms of tenure, namely quitrent and permission to occupy.<sup>295</sup> *Quitrent* refers to the registered occupation of surveyed land for which an annual fee is payable. These portions of land are classified as agricultural, commercial or residential. The *permission to occupy* is a statutory form of land control which involves the occupation of unsurveyed communal land. Use of the land is guaranteed with the payment of rental. As mentioned above,<sup>296</sup> the Upgrading Act provides for the conversion of quitrent and deeds of grant to full ownership. Since these rights relate to surveyed land, the conversion is automatic. Permission to occupy, being over unsurveyed land, falls under Schedule II of the Upgrading Act and may only be upgraded by means of a registration process, and therefore usually takes much longer to achieve. Tenure security has, to some extent, already been provided for in the Upgrading Act in relation to quitrent and permission to occupy. Despite this provision, these rights also fall within the ambit of 'old order rights' for purposes of the CLRA.<sup>297</sup> Moreover, it appears that the CLRA will generally prevail in respect of such rights.

'Old order rights' also include informal land rights. In the former national states and self-governing territories with abundant communal land, land rights were invariably granted outside the prescribed procedures. This resulted in families occupying and using land for generations without a legal basis for such

---

OS 03-07, ch48-p46

allocation. The breakdown of the land administration in these areas has also resulted in many grants not being recorded at all or records being lost or destroyed. Since 1996 these rights have, however, been protected by the Interim Protection Act, as

---

294 See CG van der Merwe & J Pienaar 'Land Reform in South Africa' in P Jackson & DC Wilde *The Reform of Property Law* (1997) 348-52.

295 Ibid.

296 See § 48.7(b)(i) *supra*.

297 None of the provisions providing for the upgrading of tenure rights have been repealed or amended by the CLRA. In fact, the whole of s 3, which provides for the conversion of land tenure rights mentioned in Schedule 2 of the Upgrading Act, is also still intact. Because of certain conditions, these rights are not automatically converted into ownership. The fact that these rights usually relate to unsurveyed land or that additional requirements are needed, such as tribal resolutions, mean that these rights are probably still in the process of being transformed. Apart from permission to occupy, Schedule 2 rights also include 'any right to the occupation of tribal land granted under the indigenous law or customs of the tribe in question'. Section 3 of the Upgrading Act provides for the conversion of Schedule 2 rights into ownership by the Registrar of Deeds through registration of such an erf or piece of land in the name of the applicant. It then proceeds by setting out the required procedure. Significantly, s 3(1)(a)(ii) and (b) refer to conversions being conditional on the obtaining of a tribal or community resolution. These rights are exactly the kind of rights that are being dealt with in the CLRA. The tribal areas and related rights affected by both the Upgrading and the CLRA are identical. Under s 39 of the CLRA, it seems as if the latter will prevail. If this is the case, the continued function of those portions of the Upgrading Act that currently also provide for the conversion of tribal land rights to ownership is unclear. Why would there be two different procedures in place? Perhaps, due to the promulgation of the CLRA, the relevance of the Upgrading Act has now been restricted to Schedule I rights?

discussed above.<sup>298</sup> Because these rights have been recognized by law they also fall within the ambit of 'old order rights' for purposes of the CLRA.<sup>299</sup>

## **(dd) Procedure for tenure reform**

### **(1) First steps: establishing the community and conducting a land rights enquiry**

Before the process of formalizing or securing tenure rights can begin, the community has to be established as a juristic person.<sup>300</sup> The actual registration of land in the name of the community only takes place once community rules have been adopted and registered. Should the community fail to adopt rules, which would stall the transformation process, the Minister responsible for Land Affairs is empowered to draft standard rules for the community.<sup>301</sup> Once it is clear that a particular portion of land is affected by the CLRA and the community rules have been finalized, the Minister announces a land rights enquiry.<sup>302</sup> The land rights enquirer, an official of the Department of Land Affairs or another suitable person,<sup>303</sup> has to conduct an investigation into the situation of a particular community or piece of land, in order to recommend to the Minister whether any existing old order rights need to be transferred, validated, cancelled or recognized.<sup>304</sup> The enquiry must deal with 'all old order and other land rights, including conflicting rights.' The broad powers of the enquirer probably extend to investigations into limited real rights vested in the property. The enquirer will have to deal with conflicting rights: conflicts between family members, conflicting tribal affiliations and boundary conflicts. 'Conflicting rights' may also refer to the effect of possible restitution claims on the land and existing rights and interests.<sup>305</sup>

In selecting from among the 'options available for securing rights',<sup>306</sup> it is necessary to consider the rights at stake as well as all available options. As the

---

298 See § 48.7(b)(ii) supra.

299 Ibid, for the four categories of rights that are protected under this Act.

300 CLRA s 3, read with s 9.

301 CLRA s 19(5).

302 CLRA s 14(1). A notice to that effect is published in the *Government Gazette*.

303 CLRA s 15(1).

304 In order to do that successfully, the person (including persons who assist him or her) may, having regard to constitutional rights, compel the provision of written and verbal evidence; enter and search premises and take possession of documents and articles and convene and attend meetings. See, in general, CLRA s 17.

305 CLRA s 14(2)(a).

306 CLRA s 14(2)(c).

tenure reform programme has as one of its basic points of departure that beneficiaries

*should be able to choose* their particular form of tenure, the preferences of the particular person or community must be taken into account. The enquiry must also look into the provision of land on an equitable basis,<sup>307</sup> and gender equity.<sup>308</sup> The CLRA has been criticized for allowing traditional structures to perform the functions of land administration committees.<sup>309</sup> The role of women in these structures is limited, and there is a real risk that female interests will not be considered.

Spatial planning, land use management and land development<sup>310</sup> make up other essential aspects of the enquiry. The enquirer must obtain the co-operation of local government structures, including traditional leadership structures in conducting the inquiry.

Once the enquiry has been completed a notice is published containing the results of the enquiry.<sup>311</sup> The publication of the results ostensibly introduces a phase of community participation.<sup>312</sup> However, the CLRA does not envisage any appeal procedure against the findings of the enquirer once the final results have been published. Therefore the only option open to affected communities is to participate *during* the enquiry phase. The community's ability to participate in negotiating their own future will probably depend on the extent to which the land rights enquirer involves them in the enquiry process.

## (2) The determination phase

Once the land rights enquirer has lodged his report with the Minister, the Minister exercises her discretion to make a determination in terms of the pivotal s 18 of the CLRA. The process of determination is aimed at identifying the best possible solution for every holder of an 'old order' right. If the Minister is satisfied that all the requirements have been met, she may make the determination taking into account the relevant report, all relevant laws (relating to spatial planning, local government

---

307 CLRA s 14(2)(d).

308 CLRA s 14(2)(g).

309 See A Claassens 'Women, Customary Law and Discrimination: The Impact of the Communal Land Rights Act' (2005) *Acta Juridica* 42ff.

310 CLRA s 14(2)(e).

311 CLRA s 16(b).

312 CLRA s 17(1).

and agriculture),<sup>313</sup> the 'old order rights of all affected holders',<sup>314</sup> and the need for the promotion of gender equity.<sup>315</sup>

When making the determination, the Minister also has to take into account the Integrated Development Plan of each municipality.<sup>316</sup> After consultation with the

---

OS 03-07, ch48-p48

Minister of Local Government, municipalities or other land use regulators, the Minister may also decide to reserve a right for the state (or municipality) and stipulate any land use or other conditions which are necessary for public purposes or which are in the public interest; or to protect the affected land, rights in land, an owner of such land or the holder of such rights; or to give effect to the CLRA.<sup>317</sup>

Where applicable, the location and extent of the land to be transferred to a community or person has to be determined.<sup>318</sup> Boundary conflicts must be settled by the Minister. Nothing in the CLRA compels the Minister in such an event to consult or gain the co-operation of the affected communities. However, it is likely that any such decision by the Minister will constitute administrative action in terms of PAJA. If so, affected persons will be entitled to a fair process (including a hearing) leading up to the decision,<sup>319</sup> to request reasons for the decision,<sup>320</sup> and, where applicable, to apply to court for the review and setting aside of the decision.<sup>321</sup>

Section 18(3) of the CLRA determines that in confirming, converting or cancelling 'old order' rights, the Minister may determine that communal land has to be surveyed and subdivided into sections which are then registered either in the name of the community, individuals or the state.<sup>322</sup> The CLRA does not deal with

---

313 This places an almost impossible burden on the Minister. It is inconceivable that she would be able to make such a determination in light of the plethora of existing legislation dealing with the matters listed. It is envisaged that this function would probably be delegated to other functionaries.

314 Many of these old order rights have not been captured in records, databases or other official documents. Use rights bestowed on women would be especially difficult to 'track down' if holders do not come forward and participate in the enquiry.

315 CLRA s 18(1).

316 CLRA s 18(4).

317 CLRA s 18(4).

318 CLRA s 18(2).

319 PAJA s 3.

320 PAJA s 5.

321 PAJA s 6.

322 Probably reserved to the municipality that will be providing services.

restrictions on the subdivision of land prescribed by the Prohibition on the Subdivision of Agricultural Land Act ('the Prohibition Act').<sup>323</sup> This legislative silence may simply reflect the anticipation of the repeal of the latter Act. But it may also have been envisaged that the Minister could consent to grant an exemption from the Prohibition Act, as provided for in that Act, while making the determination in terms of s 18 of the CLRA. This simultaneous application of the CLRA and the Prohibition Act is by no means textually self-evident.

The constitutional call for tenure reform is especially relevant with respect to s 18(3)(d). Section 18(3)(d) deals with the fate of 'old order' rights. The determination may *confirm* the right,<sup>324</sup> *convert* it into ownership or another new order right, or *cancel* the right, whereupon the land to which such right relates will be incorporated into the land held by a community and the holder awarded comparable redress. The CLRA does not give any indication of the *type* of rights that may be *confirmed*. Confirmation could for instance entail that a right in the form of permission to occupy land will be surveyed and registered, or that 'informal' use rights will be formalized and registered. Confirmation could also, however,

---

OS 03-07, ch48-p49

refer to rights which are already secure, but which nevertheless must go through the determination process because of s 18(3)(a). It is also unclear whether confirmation will result in an 'old order' right being embodied in a new form, or whether such rights continue to exist unaltered. 'New order rights' must, however, be sufficiently secure to give effect to the constitutional imperative of FC s 25(6).

Because section 18(3)(d)(ii) provides for conversion into either ownership and/or new order rights, it implies that not all 'new order' rights will necessarily be ownership. The Act here anticipates diversification of secure rights to land control and holding.<sup>325</sup> However, different signals are sent by other sections of the Act.<sup>326</sup>

The relationship between ss 12 and 13 with regard to a cancellation of rights under s 18(3)(d)(iii) is also unclear. In the case of s 18 cancellations following a ministerial determination, the land will be incorporated into existing communal land and the holder of the cancelled right will then be awarded comparable redress.<sup>327</sup> On the other hand, s 12 refers to cancellation subsequent to an *application by the holder of a right* contemplated in FC s 25(6) to the Minister. Section 12(2) further indicates the kind of redress that may be considered: (a) land other than land to which the old order rights relate; (b) compensation in money or in any other form; or (c) a combination of (a) and (b). The Act gives no indication of the factors determining when security will be considered 'impossible', how comparable redress

---

323 Act 70 of 1970. If the land in question is not classified as 'agricultural', the Act is in any event not relevant in this context.

324 CLRA s 18(3)(d)(i).

325 For example, a permission to occupy can be converted into ownership or a new order right that is something less than ownership, but is still formalized, registered and secure — perhaps an occupational right?

326 See, eg, CLRA s 9.

327 CLRA s 18(3)(d)(iii).

will be determined and at what stage it will be paid, or whether it is payable to communities or to individuals only.

Section 18(4)(b) aims to promote gender equality by providing that a 'new order' right can be conferred on a woman who is a spouse of a male holder of an old order right so that the new order right can be held jointly;<sup>328</sup> or on a woman who is a widow of a male holder of an old order right or succeeded to that right,<sup>329</sup> or that such right can be granted to a woman in her own right.<sup>330</sup> This section attempts to recognize and to develop the customary law rule under which a woman could not hold rights in property so as to bring it into line with the Final Constitution — and in particular, the right to equality in FC s 9.

Finally, during the determination phase, the Minister may validate an old order right that was acquired in good faith or invalidate an old order right that was acquired *mala fides*. Once the old order right has been validated, it presumably has

---

OS 03-07, ch48-p50

to be converted into a new order right. It is presumed that this section is aimed at addressing those categories of 'informal' rights, which were granted *de facto* in the absence of any legal basis, and which currently already enjoy protection under the Interim Protection Act.<sup>331</sup>

### **(ee) Formalization of tenure rights**

Security of tenure is one of the main aims of the Act, and is achieved by way of registration.<sup>332</sup> Once the Minister has made the determination under s 18, registration is the next step. This process results in the community's becoming the lawful holder of rights and obligations in respect of land and can be reflected in the deeds registry. As set out above, the community acquires juristic personality in order to gain legal capacity to deal with the land once the necessary community rules have been registered.<sup>333</sup> It is the Minister's task to ensure that the transfer and registration requirements have been met and it is the task of the land administration committee to ensure that new order rights are then allocated to community members and registered.<sup>334</sup>

### **(c) Tenure reform: brief evaluation**

328 CLRA s 18(4)(b)(i).

329 CLRA s 18(4)(b)(iii).

330 CLRA s 18(4)(b)(iii). The sentence structure of this clause is nonsensical. It is further evidence of the apparent haste with which the text of the CLRA was drafted.

331 See § 48.7(b)(ii) *supra*.

332 CLRA s 5(2). See H Mostert & J Pienaar *Modern Studies in Property Law III* (2005) 332-334, 336.

333 See § 48.7(b)(v)(dd)61 *supra*.

334 The land administration committee represents the community that owns the communal land and is empowered to allocate new order rights, once determined by the Minister, to community members. It also has to ensure that the communal land is registered. See CLRA s 25.

Since embarking on the tenure reform programme, only one Act, the ESTA, has been constitutionally challenged. In view of the interests of both land owners and occupiers and the concomitant balancing of these rights and interests, as well as the fact that burial rights may only be exercised in prescribed circumstances and once various conditions have been met, the court held, in *Nhlabathi v Fick*, that the Act was constitutionally sound.<sup>335</sup> Before this decision, in *Joubert v Van Rensburg*,<sup>336</sup> Flemming DJP remarked obiter on the constitutionality of the ESTA, stating that the Act was not generally applicable,<sup>337</sup> and that it allowed arbitrary deprivation of property,<sup>338</sup> which could not be justified in terms of FC s 36(1).<sup>339</sup> Flemming DJP's decision has been criticized in the academic literature for showing a lack of understanding of the effects of apartheid land law,<sup>340</sup> and for failing to consider the impact of tenure security statutes on the development of the common law.<sup>341</sup> On appeal, neither the SCA,<sup>342</sup> nor the Constitutional Court,<sup>343</sup>

---

OS 03-07, ch48-p51

considered the constitutionality of the ESTA. Both courts expressed their displeasure at the way in which this issue had been dealt with in the court a quo.<sup>344</sup>

---

335 *Nhlabathi v Fick* [2003] 2 All SA 323 (LCC).

336 2001 (1) SA 753 (W).

337 *Ibid* at para 41 (It only applied in rural areas.)

338 *Ibid* at paras 26-44.

339 *Ibid*. See AJ van der Walt *Constitutional Property Law* (2005) 340-42.

340 M Euijen & C Plasket 'Constitutional Protection of Property and Land Reform' (2001) *Annual Survey of South African Law* 439ff.

341 Van der Walt *Constitutional Property Law* (*supra*) at 342.

342 *Mkangeli v Joubert* 2002 (4) SA 36 (SCA) ('*Mkangeli (SCA)*').

343 *Mkangeli v Joubert* 2001 (2) SA 1191 (CC), 2001 (4) BCLR 316 (CC) ('*Mkangeli (CC)*').

344 See *Mkangeli (SCA)* at para 27. Brand AJA states that 'statements made by the learned Judge in the Court a quo such as those that I have referred to may give the impression that he failed to approach the question regarding the applicability of ESTA in an intellectually disciplined way and with an open mind. These statements should therefore have been avoided.' In the Constitutional Court Chaskalson P wrote: 'Appeals are brought against orders made by a court and not against comments made in the course of a judgement'. *Mkangeli (CC)* at para 12. The *Mkangeli* Court continued:

The finding made by Flemming DJP that the Tenure Act is inconsistent with the Constitution was not the basis for the orders made by him. The finding is moreover of no force and effect. That is clear from the Constitution and there is no need for this Court to make a declaration to that effect or to hear the appeal for purpose of saying so. Should the constitutionality of the Act become a relevant issue in these or other proceedings it can be brought before this Court in accordance with the proper procedures.

*Ibid* at para 14.

The constitutional principles of equality and democracy lie at the heart of the CLRA. These principles inform the constitutions of the respective communities to be transformed into juristic persons. The principle of equality requires that one-third of the boards and committees must be women.<sup>345</sup> Furthermore, one member of the committee must represent the interests of vulnerable community members, including women, children and the youth, as well as the elderly and the disabled. Although the committee is generally appointed in accordance with community rules, a recognized traditional council may also fulfil these functions if the relevant community has such a council.<sup>346</sup> When recognized traditional councils perform the functions of land administration committees, one member has to safeguard the interests of women, children, the elderly and the youth. In this situation, despite sweeping provisions in the CLRA providing for gender equity, there is a real risk that land-related issues that affect the vulnerable — especially unmarried women — may be overlooked.<sup>347</sup>

Finally, although the CLRA, when it commences, will play an important role in the formalization of insecure land tenure rights, securing title to communal land by means of registration is by no means uncontroversial. Some authors have argued that the land titling paradigm that informs the legislation is inappropriate and is likely to undermine rather than secure land rights for residents.<sup>348</sup> The poor fit between the CLRA and the core features of African land tenure means that it

---

OS 03-07, ch48-p52

does not provide adequately for the recognition and protection of existing rights of occupation and use; is likely to undermine the rights of female members of households who are not spouses; reinforces distortions of traditional authority bequeathed by colonial and apartheid policies; is likely to generate boundary disputes; and does not adequately address the range of situations, needs and problems in relation to communal land that currently exists.

## 48.8 FC s 25(7): Restitution

### (a) Introduction

FC s 25(7) provides that a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to

---

345 CLRA s 22(3).

346 CLRA s 21(3).

347 See B Cousins "'Embeddedness" Versus Titling: African Land Tenure Systems and the Potential Impact of the Communal Land Rights Act 11 of 2004' (2005) 16 *Stellenbosch LR* 488 ('Embeddedness') 507-08. For an exposition of recent developments dealing generally with access to land by African women, see JM Pienaar 'Broadening Access to Land: The Case of African Rural Women in South Africa' (2002) *TSAR* 177; JC Bekker & LN van Schalkwyk 'All African Women May at Last Own Property' (2005) 38 *De Jure* 395; AM Janse van Rensburg 'The True Capacity of Women under Customary Rule to Acquire Land: An Exposé on the Law, Land and Rules of Succession' (2003) 14 *Stellenbosch LR* 282.

348 Cousins 'Embeddedness' (supra) at 488-513 (Makes reference to tenure reform examples in Mozambique (1997) and Tanzania (1999) which recognize and protect existing occupation and use of communal land and give them the status of property rights, but without requiring their conversion to Western notions of private ownership.).

the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

The date 19 June 1913 is crucial to the restitution programme. The notorious Black Land Act, which commenced at that time, divided the country into scheduled areas (reserved for the exclusive occupation of black persons) and other land available to the white, coloured and Indian populations respectively. Twenty-three years later, the area available for black occupation was extended by the South African Development Trust and Land Act 18 of 1936.<sup>349</sup> In order to effect the division between black and 'other' land, communities were uprooted and moved all over the country — invariably by force. The various Group Areas Acts further entrenched the racially-based land control system.<sup>350</sup>

In terms of IC s 121 and FC s 25(7), the restitution process must be regulated by an Act of Parliament. The Restitution of Land Rights Act 22 of 1994 ('the Restitution Act') was enacted shortly after the transition to democracy, and has remained in force, although subject to several amendments, under the Final Constitution.<sup>351</sup> The preamble to the Restitution Act refers to the constitutional right to restitution and states the aim of the Act as being to promote the advancement of persons, groups or categories of persons disadvantaged by unfair discrimination, in order to promote their full and equal enjoyment of rights in land. The two main role players in the restitution process are the Commission on Restitution of Land Rights<sup>352</sup> and the Land Claims Court.<sup>353</sup>

---

OS 03-07, ch48-p53

## **(b) Role players**

### **(i) The Commission on Restitution of Land Rights**

The Commission on Restitution of Land Rights consists of the Chief Land Claims Commissioner (appointed by the Minister of Land Affairs), a Deputy Land Claims Commissioner and a number of regional land claims commissioners.<sup>354</sup> The general functions of the Commission are to receive claims lodged under the Restitution Act; to assist claimants in the preparation and submission of claims and to advise claimants of the progress of their claims.<sup>355</sup>

---

349 For background to the Act, see JM Pienaar 'Farm Workers: Extending Security of Tenure in Terms of Recent Legislation' (1998) 2 *SAPR/PL* 423, 423-428; R Haines & CR Cross 'An Historical Overview of Land Policy and Tenure in South Africa's Black Areas' in CR Cross & RJ Haines (eds) *Towards Freehold? Options for Land and Development in South Africa's Black Rural Areas* (1988) 73-92.

350 The Group Areas Act 41 of 1950; the Group Areas Act 36 of 1966.

351 See T Roux 'The Restitution of Land Rights Act' in G Budlender, J Latsky & T Roux *Juta's New Land Law* (Original Service, 1998) Chapter 3; V Jaichand *Restitution of Land: A Workbook* (1997) 53-76; D Carey-Miller & A Pope *Land Title in South Africa* (2000) 313-97.

352 See Restitution Act Chapter II.

353 See Restitution Act Chapter III.

354 Restitution Act s 4(3).

The role of the Commission is investigative,<sup>356</sup> facilitative and mediatory.<sup>357</sup> It is further authorized to monitor and to make recommendations regarding the implementation of orders made by the Land Claims Court, to make recommendations to the Minister with regard to claimants who do not qualify for relief under the Restitution Act, to apply to court for a declaratory order regarding a question of law, and to ensure that priority is given to claims which affect a substantial number of persons.<sup>358</sup> The Commission also has the power to conduct investigations and to demand particulars or documents relevant to restitution claims.

## (ii) The Land Claims Court

The Land Claims Court has national jurisdiction, similar to that of a provincial division of the High Court in civil proceedings, as well as all the ancillary powers necessary or reasonably incidental to the performance of its functions.<sup>359</sup> Although some cases can be referred to the Court by the Commission, claimants are also able to approach the Land Claims Court directly.<sup>360</sup> Generally the Land Claims Court has the following powers:<sup>361</sup> to determine the restitution of any right in

---

OS 03-07, ch48-p54

land in accordance with the Act; to determine compensation; to determine the person entitled to ownership; to grant a declaratory order with regard to a question of law relating to any matter in respect of which the court has jurisdiction; and to determine all matters that need to be determined under IC ss 121-123.

In order to accommodate as many (*bona fide*) claims as possible and to expedite matters, it was decided that any evidence, including oral evidence, would be

---

355 Restitution Act s 6(1).

356 See *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs* 2005 (4) SA 212 (SCA) ('*Transvaal Agricultural Union*') at para 71 (The nature of the investigation undertaken by the Commission prior to the publication of the s 11 notice was investigated. It was found that the phase before publication of the said notice was investigative and not adjudicative and that none of the procedural steps which might culminate in a hearing before the Land Claims Court was clothed with absolute finality.)

357 *Farjas v Regional Land Claims Commissioner, KwaZulu-Natal* 1998 (2) SA 900 (LCC), 1998 (5) BCLR 579 (LCC), [1998] 1 All SA 490 (LCC).

358 See PJ Badenhorst, J Pienaar & H Mostert *Silberberg and Schoeman's Law of Property* (5th Edition, 2006) ('*Silberberg 5th Edition*') Chapter 22, Carey-Miller & Pope (supra) at 334-39.

359 Restitution Act ss 22-38. See Badenhorst, Pienaar & Mostert *Silberberg 5th Edition* (supra) at Chapter 22, Carey-Miller & Pope (supra) at 367-88. Provision was made for the establishment of the court in s 123 of the Interim Constitution and the operation of the court is currently regulated by Chapter III of the Restitution Act.

360 Restitution Act s 38A. See Carey-Miller & Pope (supra) at 388; *Department of Land Affairs v Witz: In re Various Portions of Grassy Park* 2006 (1) SA 86 (LCC). When the court is approached directly, it is not necessary to lodge a claim with the Commission as well.

361 Restitution Act s 22(1).

admissible.<sup>362</sup> The test is whether the evidence is relevant and cogent to the matter being heard, irrespective of whether the specific evidence would ordinarily be admissible in other courts. In some instances, a pre-trial conference may be convened to expedite matters.

When considering claims, the court will have regard to many factors,<sup>363</sup> including the desirability of providing for the restitution of rights; the desirability of remedying past violations of human rights; the requirements of justice and equity; the feasibility of specific restoration; the desirability of avoiding (another) major social disruption; the amount of compensation or other consideration paid when the dispossession occurred; the history of the dispossession, the hardship caused and the current use of the land; and any other factor that the court considers relevant and consistent with the spirit of the Final Constitution.

The court may order restoration of the claimed land or alternative land or rights in land, award compensation or order that a claimant be declared a beneficiary of a state support programme, or any combination of these orders.<sup>364</sup> Court orders can also be granted conditionally.<sup>365</sup>

### **(c) Restitution procedure**

All restitution claims are first screened by the Land Claims Commission. Disqualified claims are ignored and validated claims processed. This screening process entails the issuance of a compliance certificate and drafting a case report that sets out the basis of acceptance. Aggrieved claimants can at this stage approach the Land Claims Court for review of the Commission's conduct. The aim, however, is to attempt to solve as many claims as possible by way of administrative and mediation procedures. As we noted above, this non-confrontational approach promotes the constitutional value of *ubuntu*.<sup>366</sup> As a result, the majority of claims are handled by the Commission. Only the complicated claims or those claims that cannot be finalized by way of mediation are referred to the Land Claims Court for adjudication.<sup>367</sup>

---

OS 03-07, ch48-p55

### **(i) Formal requirements**

---

362 Restitution Act s 30.

363 Restitution Act s 33. See Badenhorst, Pienaar & Mostert *Silberberg 5th Edition* (supra) at Chapter 22, Carey-Miller & Pope (supra) at 373-74.

364 Restitution Act s 35(1)(a)-(e).

365 Restitution Act s 25(2)(a). See eg *In re: Kranspoort Community 2000* (2) SA 124 (LCC).

366 See § 48.4 supra.

367 Restitution Act s 14(2).

A person's claim will be disqualified if:<sup>368</sup> the claim was not lodged between 1 May 1995 and 31 December 1998;<sup>369</sup> the applicant received just and equitable compensation when the dispossession occurred;<sup>370</sup> or any other form of just and equitable consideration.<sup>371</sup> Once the *formal* requirements have been considered, the second phase of the process, in which the *substantive* requirements are considered,<sup>372</sup> commences. Once all the requirements have been met, the claim is accepted and processed.

## (ii) Substantive requirements

In *Richtersveld (CC)*, the Court set out the requirements to found a restitution claim as follows:

- (a) that the Richtersveld Community is a 'community' or 'part of a community' as envisaged by the subsection;
- (b) that the Community had a 'right in land' as envisaged;
- (c) that such a right in land continued to exist after 19 June 1913;
- (d) that the Community was, after 19 June 1913, 'dispossessed' of such 'right in land';
- (e) that such dispossession was the 'result of past racially discriminatory laws or practices'; and
- (f) that the Community's claim for 'restitution' was lodged not later than 31 December 1998.

Before *Richtersveld (CC)*, the lower courts had placed a fairly restrictive gloss on these requirements. The Constitutional Court reversed many aspects of this parsimonious approach.

---

368 Restitution Act s 2(1)(a).

369 At the end of 2003 it became clear that about 1000 land claims, lodged with the Eastern Cape Land Claims Commissioner, were erroneously rejected. The Minister of Land Affairs confirmed that no further extension of the period for lodgement of claims would be possible. The Minister is currently considering other forms of relief for these persons, *inter alia* as beneficiaries of the land redistribution programme.

370 'Just and equitable' refers to the term as set out in FC s 25(3). In most instances compensation was paid, but it was hardly 'just and equitable'. See Roux 'The Restitution of Land Rights Act' (*supra*) at 3A20-3A22.

371 Expropriations under the Expropriation Act 63 of 1975 are also excluded. These expropriations were for public purposes and included the expropriation of land for the building of roads, schools and hospitals. See *Ndebele-Ndzundza Community v Farm Kafferskraal No 181 JS 2003 (5) SA 375 (LCC)*, [2003] 1 All SA 608 (LCC) ('*Ndebele-Ndzundza*') at para 29 (It was argued that the farm to which the claimants were removed constituted compensation for purposes of the Restitution Act, thereby disqualifying the claim since it did not meet the threshold requirement. The court found that it did not constitute compensation since no compensation was computed at the 'time of dispossession'. Furthermore, the farm had been provided as part of an envisaged homeland consolidation plan (into the subsequent Lebowa homeland) which constituted a discriminatory act in itself: 'to accept as compensation, land given in furtherance of such policies would be tantamount to buttressing the very acts the Constitution and [Restitution] Act are intended to undo.')

372 These requirements are also set out in Restitution Act s 2.

## (aa) Standing

The following persons qualify as applicants: persons, communities or part of communities that had been dispossessed of land or rights in land on or after 19 June 1913.<sup>373</sup> A community is any group of persons whose rights in land are derived from shared rules determining access to land held in common by members of the group,<sup>374</sup> and includes part of a group. These persons' descendants would also qualify as applicants. A spouse or partner in a customary marriage qualifies as a descendant for this purpose.<sup>375</sup> Any person, irrespective of race, may institute a claim as long as all of the requirements in s 2 are met. In principle, no category of citizens is excluded from the Restitution Act.<sup>376</sup>

## (bb) Dispossession

The Restitution Act contains no definition of 'dispossession'. It has thus been up to the courts to interpret the concept. Recent case law has indicated that dispossession must be broadly interpreted.<sup>377</sup> It is not a requirement that the claimant have lost actual physical occupation of the property.<sup>378</sup> Nor is a forced removal required.<sup>379</sup> In *Ndebele-Ndzundza Community v Farm Kafferskraal No 181 JS*, the court found that the *cumulative effect* of various laws and practices eroded the rights of the claimants and that this directly or indirectly induced them to vacate the farm.<sup>380</sup> A

---

373 See Badenhorst, Pienaar & Mostert *Silberberg 5th Edition* (supra) Chapter 22; Carey-Miller & Pope (supra) at 327-30; Roux 'The Restitution of Land Rights Act' (supra) at 3A9-3A13.

374 This definition is identical to the definition of 'community' for purposes of the CLRA.

375 Customary marriages were thus recognized for this purpose even before their official recognition in the Recognition of Customary Marriages Act 120 of 1998.

376 *Department of Land Affairs v Witz: In re Various Portions of Grassy Park* 2006 (1) SA 86 (LCC), 101A-D; *Randall v Minister of Land Affairs*; *Knott v Minister of Land Affairs* 2006 (3) SA 216 (LCC) ('*Randall*'). Both these cases involved restitution claims instituted by white persons.

377 *Prinsloo & Another v Ndebele-Ndzundza Community & Others* 2005 (6) SA 144 (SCA) ('*Prinsloo*') at para 46.

378 See *Dulabh v Department of Land Affairs* 1997 (4) SA 1108 (LCC), [1997] 3 All SA 635 (LCC) ('*Dulabh*'). (Decided under IC s 121, the question was whether the claimants would qualify as applicants under the Act when they had never lost physical possession of the property concerned. In this instance, the court found that the claimants never indicated their willingness to let go of the property — leasing the property for over 20 years was a clear indication of the family's determination to remain in physical control. It was found that the prohibition on the transfer of property to an heiress and the subsequent sale thereof to the Development Board constituted a dispossession of her right in land, more specifically her right to inherit and take transfer of the property.)

379 See *Ex parte Pillay* (unreported, LCC Case No 1/99, 13 September 2004) at para 9; *Abrams v Allie & Others* 2004 (4) SA 534 (SCA), 2004 (9) BLLR 914 (SCA), [2004] 2 All SA 99 (SCA) ('*Abrams*') at para 11. See also *Prinsloo* (supra) at para 48 (Court found that the loss of control over the area over which for many decades the community had unrestricted access and control amounted to dispossession.)

specific date of dispossession is also not required,<sup>381</sup> since dispossession may occur over a period of time.<sup>382</sup>

Depending on the circumstances, it can be difficult to ascertain whether dispossession took place. For example, what if owners sold their properties, after a particular area had been proclaimed a group area, for fear of its being expropriated? Would that constitute dispossession? In *Ex parte Pillay*,<sup>383</sup> the property was sold to a private individual (and not an organ of state) two years prior to the declaration as a group area. Here it was clear that the area had been earmarked to be declared a group area. The court found that a sale of property could still constitute a dispossession if 'some outside agency' or some 'element of compulsion' was involved.<sup>384</sup> The emphasis should not be on the party *to whom* the property was sold, but rather *what* prompted the sale. The court found that the loss of possession was a result of outside pressure from a racially discriminatory law or practice, which constituted dispossession for purposes of the Act.<sup>385</sup>

*Department of Land Affairs v Witz: In re Various Portions of Grassy Park*<sup>386</sup> and *Randall v Minister of Land Affairs; Knott v Minister of Land Affairs*<sup>387</sup> relate to (white) owners selling properties in terms of the Group Areas Act and legislation regulating the consolidation of national states respectively. In the first case, various properties were affected by a Group Areas Act declaration transferring the properties from a white group area to a coloured group area. A permit allowed the owner to subdivide the properties and to sell them within a period of one year. However, the family concerned managed to sell off the properties piecemeal over a period of 11 years, with the help of an estate agent. Here the court emphasized that the initial owner *elected* to acquire the properties to sell them under a permit he *voluntarily applied* for, keeping in mind that, as a disqualified person, he was in principle prevented from handling the properties at all.<sup>388</sup> In these circumstances the court found that there had been no dispossession.

380 2003 (5) SA 375 (LCC) at para 21.

381 *Richtersveld (CC)* eliminated the specific date requirement. But see *Jacobs v Department of Land Affairs* (unreported, LCC Case No 3/98, 28 February 2000)(Court held that there must be a particular moment in time from when the dispossessed person (or community) did not have a particular right anymore.)

382 *Mpehla* contradicts the finding in *In re Kranspoort Community* 2000 (2) SA 124 (LCC)(Court decided that dispossession could not take place over a period of time.)

383 *Ex parte Pillay* (supra).

384 *Ibid* at para 9. See also *Abrams* (supra) at para 12 (The threat of expropriation if the property was not sold to the Development Board induced transactions in the areas involved, making the land transactions not voluntary.)

385 *Ex parte Pillay* (supra) at para 11.

386 2006 (1) SA 86 (LCC).

387 2006 (3) SA 216 (LCC).

In *Randall* and *Knott*, owners were forced to sell off properties under homeland consolidation provisions. In these cases both the *manner* in which properties were acquired<sup>389</sup> and the *structure of purchase prices* were problematic. A portion of the purchase price was paid in the form of a registered stock certificate and the balance was paid in cash. Not only did the owners not have a choice in how the funds were to be paid, but the government stock did not bear interest at a

---

OS 03-07, ch48-p58

competitive rate.<sup>390</sup> The court found that these circumstances hardly qualified as a 'willing-buyer-willing-seller' offer,<sup>391</sup> and thus constituted dispossession for purposes of the Restitution Act. Although these cases seem very similar, the *Witz* family had far more freedom in alienating their properties, managed to do it over a period of time and were able to get the best prices possible.

### **(cc) A right in land**

The dispossession of any of the following rights, registered or not, will qualify for purposes of the Act:<sup>392</sup> any right in land, including the interest of a labour tenant, a customary interest, the interests of a beneficiary owner or a trust arrangement, including beneficial occupation of a continuous period of no less than ten years prior to the dispossession in question.<sup>393</sup>

The definition of 'right in land' is thus very broad.<sup>394</sup> It bears emphasizing that ownership is not the only right or interest that qualifies, and that customary law rights in land must be recognized.

### **(dd) After 19 June 1913**

---

388 *Department of Land Affairs v Witz: In re Various Portions of Grassy Park* 2006 (1) SA 86 (LCC), 98E-F 99A-C ('*Department of Land Affairs*') ('Put another way, his election resulted not in his dispossession, but on the contrary in his (taking) *possession* of the properties and being accorded the opportunity to sell with the possibility of realizing their investment potential, the purpose for which the properties were in any event purchased. The subsequent failure of the purchase price to meet the expected investment potential, if indeed that is what occurred, cannot in my view constitute a dispossession as contemplated by the Act.')

389 *Randall* (supra) at 22E-226D.

390 *Randall* (supra) at 224E-G. In *Knott's* case the balance was paid in cash over a period of 12 months without any interest.

391 *Ibid* at 226I-J.

392 See P Badenhorst, J Pienaar & H Mostert *Silberberg and Schoeman's Law of Property* (4th Edition, 2003) Chapter 22, Carey-Miller & Pope (supra) at 330-31; Roux 'The Restitution of Land Rights Act' (supra) at 3A13-3A16.

393 Restitution Act s 1. In order to succeed with a claim based on beneficial occupation, the claimants must prove (a) that they derived some benefit from occupation; and (b) that they had the intention to derive benefit (in other words, it is insufficient if the benefit was coincidental or by accident). See *Kranspoort Community In Re: The Farm Kranspoort* 2000 (2) SA 124 (LCC) (Court found that the community's use and enjoyment rights constituted beneficial occupation and that they had been dispossessed thereof.)

In a Constitution that seeks to right historical wrongs, it is inevitable that cut-off dates must be plucked from among the many past injustices and these will therefore be, to some extent, arbitrary lines that decide how far back the Constitution will cast its gaze. Although many dispossessions and deprivations had occurred under colonial rule before this date, the 1913 date was the one agreed on during negotiations preceding the promulgation of the Interim Constitution. This date was consequently confirmed in the Final Constitution and the Restitution Act.<sup>395</sup>

---

OS 03-07, ch48-p59

However, as we shall see, the Constitutional Court in *Richtersveld (CC)* used fairly creative legal reasoning to prevent this cut-off date from depriving the community of a claim.<sup>396</sup>

### **(ee) Discriminatory law or practice**

The dispossession has to be both the *factual* and *legal* result of a racially discriminatory law or practice.<sup>397</sup> From 1999 the three-step approach set out in *Minister of Land Affairs v Slamdien*<sup>398</sup> was followed in order to determine whether dispossession falls within the ambit of the Restitution Act.<sup>399</sup> This approach required asking:

1. Was the relevant legal measure that enabled the dispossession a 'racially discriminatory law' as referred to in s 2(1)(a) and defined in s 1 of the Restitution Act?<sup>400</sup>
2. Was the conduct a 'racially discriminatory practice'? and
3. Was the dispossession of the property 'as a result of' the law referred to in (a) or the practice referred to in (b)?<sup>401</sup>

---

394 See TW Bennett & CH Powell 'Restoring the Land: The Claims of Aboriginal Title, Customary Law and the Right to Culture' (2005) 16 *Stellenbosch LR* 431-45 (The authors investigate and ultimately reject the right to culture as a basis for the institution of land claims. They argue that the right to culture as a basis for claiming rights in land would be too restricted and if based on the aboriginal land rights approach, would effectively only benefit cultures that are currently under threat. In the South African set-up it would effectively only benefit Khoisan communities since African culture is thriving.)

395 Restitution Act s 2. The case sequence of the Richtersveld community has also indicated that the court is not willing to reject that date as the relevant date for restitution purposes.

396 § 48.8(c)(iii) *infra*.

397 *Boltman v Kotze Community Trust* [1999] JOL 5230. See Badenhorst, Pienaar & Mostert *Silberberg 5th Edition* (*supra*) Chapter 22, Carey-Miller & Pope (*supra*) at 331-32; Roux 'The Restitution of Land Rights Act' (*supra*) at 3A17 — 3A20.

398 1999 (4) BCLR 413 (LCC), [1999] JOL 4491 (LCC) ('*Slamdien*').

399 See JM Pienaar 'Racially Discriminatory Law or Practice' for Purposes of the Restitution of Land Rights Act 22 of 1994: Recent Developments in Case Law' (2005) 38 *De Jure* 195.

400 In this instance it was the Group Areas Act 36 of 1966.

Apart from these questions, two further requirements had to be met: namely that the measure or practice had to relate to the exercise of land rights and that it had to be linked with creating spatial racial segregation.<sup>402</sup> In this respect, the court in *Slamdien* adopted a purposive approach. This approach entailed examining the *historical context* of the statutory measure as well as the *underlying purpose* of the Restitution Act. The court concluded:

The history of the Restitution Act and section 2(1)(a), as set out above, strongly points to its underlying purpose being *to address dispossessions of land rights which were the result of a particular class of racially discriminatory laws and practices, namely those that sought specifically to achieve the (then) ideal of spatial apartheid*, with each racial and ethnic group being confined to its particular racial zone. These would then be those laws and practices which discriminated against persons on the basis of race in the exercise of rights in land in order to bring about that racial zoning. It does not, in my view, include any racially discriminatory law or practice whatsoever, regardless of the particular area of human activity where the discrimination had its impact.<sup>403</sup> [emphasis added]

This rather rigid approach required claimants to satisfy at least five criteria in order to show that a measure or practice was in fact racially discriminatory. In

---

OS 03-07, ch48-p60

addition, *Slamdien* construed the purpose of the Restitution Act narrowly (as concerned only with laws and practices that sought to achieve spatial apartheid). One of the considerations when formulating this 'test' was that a less strict test might open the floodgates<sup>404</sup> and allow many claimants a second 'bite at the cherry'.<sup>405</sup> After being followed in several subsequent cases, the *Slamdien* approach was largely abandoned by the Supreme Court of Appeal in *Richtersveld Community v Alexkor Ltd.*<sup>406</sup>

### (iii) The requirements in practice: the Richtersveld scenario

The legal battle for the Richtersveld community began in 2001 when the community instituted a claim against the registered land owners, Alexkor Ltd and the state. The land at the heart of the dispute was a narrow strip of land in the Northern Cape along the west coast from the Gariiep River (formerly the Orange River) in the north to Port Nolloth in the south. This area formed part of tribal land that had historically been occupied for centuries by the Richtersveld community and its ancestors.

---

401 *Slamdien* (supra) at para 11.

402 This requirement was articulated in the first decision of *Richtersveld Community v Alexkor Ltd.* 2001 (3) SA 1293 (LCC), 1338D-H, 2004 (8) BCLR 871 (LCC) ('*Richtersveld (LCC)*'). It was rejected in the Supreme Court of Appeal and Constitutional Court decisions.

403 *Slamdien* (supra) at para 26.

404 *Slamdien* (supra) at para 10.

405 Pienaar 'Racially Discriminatory Law' (supra) at 195 ff.

406 2003 (6) SA 104 (SCA), 2003 (6) BCLR 583 (SCA) ('*Richtersveld (SCA)*') at para 97 (The Court found that the *Slamdien* approach was 'too restrictive'.)

In its first decision in this case,<sup>407</sup> the Land Claims Court confirmed that the community's ancestors had a form of control over the land in question which constituted beneficial occupation,<sup>408</sup> but found that they had lost that control in 1847 when the land was annexed and proclaimed Crown land.<sup>409</sup> Actual dispossession, according to the Land Claims Court, thus took place long before the 1913 Act commenced, resulting in the claim falling outside the ambit of the Restitution Act. The court also concluded that the community had failed to show that dispossession had occurred as a result of discriminatory laws or practices, and rejected the claim.<sup>410</sup>

---

OS 03-07, ch48-p61

The Richtersveld community appealed successfully to the Supreme Court of Appeal.<sup>411</sup> The court found that the annexation in 1847 in no way meant the end of the community's control over or occupation of the land. Instead, the community remained on the land, used it for pasture, resided on it, had control over water rights and even granted mineral rights to outsiders. This control over the land continued until diamonds were discovered in the 1920s, after which the area was declared to be a security area and the community was relocated.<sup>412</sup> The land was finally registered in the name of the respondent in 1994.<sup>413</sup> The court concluded that the community's rights to land (including minerals and precious stones) were akin to

---

407 For more detail, see H Mostert 'The Case of the Richtersveld Community: Promoting Reconciliation or Effecting Division?' (2002) *TSAR* 160.

408 In that the community derived benefit from their occupation (hunting there and gathering materials in order to survive) and that the occupation occurred at least ten years before the dispossession of the land.

409 Here the court confirmed that the doctrine of aboriginal title did not form part of South African law. For a detailed discussion concerning the benefits and drawbacks of the doctrine and whether it applies in the South African situation, see K Lehman 'Aboriginal Title, Indigenous Rights and the Right to Culture' (2004) 20 *SAJHR* 86. In this article, Lehman specifically analyses the different approaches to the concept of 'indigenous' and the possible consequences for the spirit of national unity and reconciliation that the Final Constitution seeks to achieve.

410 The court found that the removal of the community resulted from the area being declared a security area. No one, irrespective of race, was allowed access. This conclusion was reached with reference to the *Slamdien* approach. *Slamdien* required that three questions be answered in the affirmative and that there be a clear-cut indication that the measures or practice impacted on the exercise of land rights in furtherance of the purpose of achieving spatial racial segregation. When these requirements were applied to the facts in the first *Richtersveld* case, none of them were satisfied. Accordingly the court found that the measure isolating the Richtersveld community to one portion of the original land was not racially discriminatory. The fact that the community was deemed not to be 'civilised enough' to acquire and hold land rights in the area was not discussed in the initial case. Cf Pienaar 'Racially Discriminatory Law' (*supra*).

411 See H Mostert & P Fitzpatrick 'Living in the Margins of History on the Edge of the Country — Legal Foundation and the Richtersveld Community's Title to Land' (2004) *TSAR* 309-23 for an in-depth discussion of the SCA and Constitutional Court decision. See also AJ van der Walt *Constitutional Property Law* (2005) 293-96.

412 *Richtersveld (SCA)* (*supra*) at para 61.

413 Alexkor is a public company established in terms of the Alexkor Limited Act 116 of 1992. It is owned by the second respondent, the South African government and conducts business in the diamond mining sector.

those held under common-law ownership and constituted a 'customary law interest'.<sup>414</sup> This interest satisfied the requirement that the community be the holder of 'rights in land'. When diamonds were discovered, the state conveniently ignored these rights and instead granted full ownership in the land to Alexkor. Thus, dispossession after 1913 had also been established. Finally, the court found that the manner in which the community had been dispossessed of their customary law interest amounted to a racially discriminatory practice in as much as the state had taken the view that the community was not 'civilized' enough to have rights in land.<sup>415</sup>

The SCA considered the three-step approach that was first developed in *Slamdien* to determine whether the dispossession in question had occurred under a racially discriminatory act or practice.<sup>416</sup> When these requirements were applied to the Precious Stones Act,<sup>417</sup> a seemingly racially neutral act, no dispossession could be shown. However, the SCA in *Richtersveld* held that there was no indication in the Final Constitution or the Restitution Act that claims should be limited to 'spatial segregation' cases.<sup>418</sup> Accordingly, the SCA overruled *Slamdien* and, on an expanded understanding of dispossession, held that all the requirements of s 2 had been met.

Following the Richtersveld community's success in the SCA, Alexkor Ltd appealed to the Constitutional Court. Alexkor argued that the SCA had erred

---

OS 03-07, ch48-p62

when finding that the community's rights in land had survived the 1847 annexation; and in holding that dispossession resulted from a racially discriminatory law or practice.<sup>419</sup> Consequently, the Constitutional Court had to determine the nature of the rights in land which the community held before the annexation; and whether these rights survived annexation.

The Court approached the problem with reference to indigenous or customary law,<sup>420</sup> and emphasized that the content of these rights could not be determined by reference to common law. The Court re-emphasized the importance of customary law as a legal source: 'In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.'<sup>421</sup>

---

414 *Richtersveld (SCA)* (supra) at paras 28-29. See also Bennett & Powell (supra) at 438-41; Lehman (supra) at 86.

415 Discriminatory practices also include indirect discrimination. In this case it refers to the fact that this community's rights were treated differently to the rights of the white community. *Intention* or a *motive* to discriminate on a racial basis is not required.

416 *Richtersveld (SCA)* (supra) at paras 96-110.

417 Act 44 of 1927.

418 *Richtersveld (SCA)* (supra) at para 101.

419 *Richtersveld (CC)* (supra) at para 10.

420 *Ibid* at paras 49,55

The Court stressed that customary law was unwritten, practised and passed on from generation to generation,<sup>422</sup> and that it had its own norms and values.<sup>423</sup> Since the focus in this instance was on the Richtersveld community, the *nature* of its rights had to be determined with reference to the *history* and *usages* of this specific community. Undisputed evidence showed that the community always had a communal approach to land holding and that the prospecting of minerals had always been part and parcel of the land rights package.<sup>424</sup> In light of this, the Court concluded that the real character of the title of the community was a

right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. It follows therefore that prior to annexation the Richtersveld Community had a right of ownership in the subject land under indigenous law.<sup>425</sup>

The Court held that it was 'satisfied that under the indigenous law of the Richtersveld Community communal ownership of land included communal ownership of the minerals and precious stones'.<sup>426</sup>

It was thus quite clear that the community had a 'right in land' as required by s 2. The next questions to be answered were whether any rights in land survived the annexation, and if so what the nature of these surviving rights was. In this regard the Court found that there was nothing that suggested that annexation extinguished existing land rights.<sup>427</sup> On the contrary, there were clear indications

---

OS 03-07, ch48-p63

that the community continued to grant grazing and mineral leases to outsiders after the annexation.<sup>428</sup> The community furthermore continued to occupy the land, and to claim and exercise rights of ownership over the whole of the Richtersveld area. The Court concluded that 'the indigenous law ownership . . . remained intact as at 19 June 1913'.<sup>429</sup>

---

421 Ibid at para 51.

422 Ibid at para 53.

423 The Court here correctly held that the customary law recognized by the Final Constitution is the 'living' customary law, not the 'official' customary law found in case law and textbooks. See the discussion of customary law in § 48.5 supra.

424 *Richtersveld (CC)* (supra) at para 61 (Outsiders were not entitled to prospect or extract minerals in the area concerned.)

425 Ibid at para 62.

426 Ibid at para 64.

427 Ibid at paras 68-69.

428 *Richtersveld (CC)* (supra) at para 77.

The promulgation of the Precious Stones Act 44 of 1927 was a direct consequence of the discovery of diamonds in the subject land. This Act did not recognize rights of owners of land under indigenous law. Only registered rights were recognized. Holders of unregistered rights immediately lost their right to occupy and exploit the land when the Act commenced. The process of dispossession thus began in 1927, although the community was finally dispossessed at the end of 1993 when Alexkor became the registered owner of the land. The 'dispossession' as required by the Restitution Act consequently occurred *after* 19 June 1913.

But was it a result of racially discriminatory laws or practices? As mentioned above, when the Precious Stones Act commenced, only registered, common law rights were recognized and protected, while customary law rights were ignored. Inevitably, the impact of this approach was racially discriminatory since only black persons were holders of indigenous rights and such rights were not recognized:

Although it is correct that the Precious Stones Act did not form part of the panoply of legislation giving effect to 'spatial apartheid', its inevitable impact was to deprive the Richtersveld Community of its indigenous law rights in land while recognizing, to a significant extent, the rights of registered owners. In our view, this is racially discriminatory and falls within the scope of the Act.<sup>430</sup>

The three-step approach as applied in *Slamdien* has thus been abandoned. Instead, the focus has shifted to the *impact* of the particular measure. A seemingly racially neutral legislative measure may still have a racially discriminatory impact.<sup>431</sup> This new approach accords with the Constitutional Court's approach to unfair discrimination in FC s 9, where the focus is also on the impact of discrimination.<sup>432</sup>

This decision represents the first occasion on which the Constitutional Court

---

OS 03-07, ch48-p64

has placed such a high degree of emphasis on indigenous (or customary) law — not only as a general source of law, but as the origin of ownership or real rights. In so doing, the Court has shown its determination to move away from the narrow, common-law or 'Western' approach to land rights. This shift in emphasis is likely to be significant in cases where the determination of whether there was a 'right in land' is crucial to the success of the claim.

---

429 Ibid at para 81.

430 Ibid at para 99.

431 Since the *Richtersveld (CC)* decision, this approach has also been followed in *Khumalo v Minister of Land Affairs* 2005 (2) SA 618 (LCC). Here, a provision in the Black Administration Act 38 of 1927 led to the claimant's family losing property when a certificate was issued by the Commissioner after an investigation and a payment of R2.00. The argument was that the Black Administration Act was a general regulatory measure and that it did not provide for racial zoning or the exercise of land rights as such. The court confirmed that the *Slamdien* approach was too narrow and focused on the impact of the measure instead. Section 8 of the Black Administration Act had the effect of depriving registered owners of ownership, 'but only if the registered owner was a Native' (at para 19). Because the same result would never have occurred had the owner been a white person, the Act was found to be a racially discriminatory law or practice, thereby meeting the requirement of s 2 of the Restitution Act.

432 See, generally, C Albertyn & B Goldblatt 'Equality' in S Woolman, T Roux, J Klaaren, M Chaskalson, A Stein & M Bishop (eds) *Constitutional Law of South Africa* (2nd Edition, OS, March 2007) Chapter 35.

## **(d) Brief analysis of the restitution programme**

### **(i) Tempo of land restitution**

Initially the process of land restitution was slow and the implementation of the Restitution Act problematic. The establishment of regional commissions was hindered by budgetary constraints, capacity problems and staff issues. Government initially adopted a judicial approach to processing land claims, and all claims were referred to the Land Claims Court for adjudication. It soon became clear that a court-driven process was painstakingly slow and antagonistic.<sup>433</sup> Since the commencement of the Restitution Act, it has been amended seven times. Each amendment has been aimed at streamlining the process and ironing out problem areas.<sup>434</sup> South Africa has been on a steep learning curve.<sup>435</sup>

### **(ii) Number of claims and progress**

Approximately 79 000 restitution claims were lodged before the close of the claims submission process.<sup>436</sup> At the end of March 2006 71 645 of these claims had been settled,<sup>437</sup> and 1 067 152 hectares transferred to 1 003 551 beneficiaries comprising 196 667 households. The largest percentage of settled claims is in the Eastern Cape, with Mpumalanga and the Free State sharing the lowest number of settled claims. Urban claims have mainly been settled by way of financial compensation and comprise 93 per cent of the settled claims. It is projected that all outstanding urban claims (1076) will be settled by the end of 2007 and that 3103 rural claims will be settled by the end of 2007 and a further 2251 by the end of 2008.<sup>438</sup> There are a further 1621 'residual' outstanding claims that have to be settled. These claims have been referred to the Land Claims Court as a result of legal issues, links with community or family disputes, where the claimants are untraceable, or where there are still delays in submitting required information or documentation.

---

OS 03-07, ch48-p65

Urban claims are usually individual claims linked to separate title deeds.<sup>439</sup> Rural claims are fewer in number, but are more complicated since they affect vast tracts of land of which large portions have been extensively cultivated or have well-

---

433 See E Stoddard & H Osodo 'Hunger for Land Grows' *This Day* (14 January 2004) 11-12.

434 See § 48.8(d)(iii) *infra*, for discussion of the latest amendment to the Act.

435 Other jurisdictions dealing with land claims have faced similar problems. In Namibia, the goal was to finalize 40 000 claims by the end of 2001. Only 2000 claims have been finalized to date. In Australia 45 out of 540 claims were finalized over a period of 10 years.

436 T Milazi 'Quick Change and a Two-Sided Coin' *Financial Mail* (16 January 2004) 21.

437 *Commission on the Restitution of Land Rights Annual Report* (2006) 56.

438 *Ibid.*

439 There are some well-known community claims, like the District Six claims in Cape Town and the Cato Manor claims in Durban.

developed infrastructure. Conflicting land claims, in which documentary evidence is vague or non-existent, are also quite common in rural areas.

It is very difficult to ascertain whether, if at all, racial imbalances in the ownership of land have been addressed since the start of the land reform programme.<sup>440</sup> After 1996, title deeds in South Africa have not recorded the race of the rights-holder.<sup>441</sup> Although the Department of Land Affairs can give some indication of the tracts of land that have been restored, the overall picture is incomplete since land may also have been acquired by black persons through the market. Although some sources say that three per cent of land has been transferred since 1994,<sup>442</sup> others claim that this amount only relates to farm land<sup>443</sup> and that these statistics do not accurately reflect reality.

### (iii) Innovation to expedite the process

The target date for the finalization of land claims has been extended to the end of 2008. The most recent development in attempting to meet that deadline is the promulgation of the Restitution of Land Rights Amendment Act 48 of 2003. Before this amendment, claims that could not be solved via mediation or the administrative procedure provided for in the Restitution Act were referred to the Land Claims Court for adjudication. The Land Claims Court would then, if necessary, grant an order that the land or right in land be expropriated and compensation determined. The need to go to court caused delays in the restitution process.<sup>444</sup>

The publication of the Amendment Bill in 2003 was met with fierce criticism from agricultural unions claiming that it was opening the door to the 'Zimbabwe scenario' and that constitutional principles were being sacrificed.<sup>445</sup> The new s 42E provides for the purchase, acquisition in any manner or expropriation of land or a right in land by the Minister of Land and Agriculture — without a court order. These options are available to the Minister in two instances: first, when a valid restitution claim has been lodged and the expropriation is linked to the restoration

---

OS 03-07, ch48-p66

or awarding of such land, portion of land or right in land; and, secondly, where no such claim has been lodged, but the acquisition is *directly related* to or *affected by* such claim, and the acquisition promotes the purpose of restitution.

---

440 Before the land reform programme began, it was generally agreed that 87 per cent of the land was held by the white minority population, whereas the black majority possessed only 13 per cent of the land.

441 G Coetzee 'Grondsake Wil Rasaanduiding op Aktes Sien' *Die Burger* (5 February 2004) 2.

442 R Hall & P Jacobs 'Another Look at Land Reform' *This Day* (24 October 2003) 13-14.

443 Stoddard and Osodo mention 2.3 per cent. It is widely acknowledged that less than 5 per cent of the land has been transferred.

444 See ss 35(5) and (5A) of the Restitution Act, now repealed.

445 M Louw 'Besware Stuit Nie Wet Oor Grond se Onteining' *Die Burger* (3 February 2004) 10; J Joubert 'Staat Kan Grond Vat Al sê Boer Nee' *Die Burger* (18 September 2003) 4.

Apart from the outcry from landowners that the provision was unconstitutional, concerns were raised that the implementation of s 42E would damage investor confidence and economic and agricultural development. The Department of Land Affairs, however, emphasized that the expropriation powers would be used as a last resort and that the amendments to the Act would expedite the process of restitution.<sup>446</sup>

In terms of the new s 42E, expropriation can take place without the court having granted an order to that effect. If a valid land claim has been instituted, the expropriation has as its purpose restoring or awarding such land, portion of land or right in land to the claimant.<sup>447</sup> These 'acquisition powers' are not, however, limited to valid restitution claims only. Land may also be acquired even if there is no valid restitution claim, but the acquisition of the land is directly related to or affected by a restitution claim.<sup>448</sup> Bearing in mind that the rule of law is a key value to be promoted in interpreting FC s 25(7) and land legislation (and in testing land legislation against FC s 25), permitting expropriation without a court order must raise constitutional eyebrows.

To curb the effect of these provisions, the Amendment Act provides that the *amount* of compensation, as well as the *time* and *manner* of payment, have to be determined by agreement or by the Court in accordance with FC s 25(3). FC s 25(3), which provides that compensation must be just and equitable. The procedure in the determination process is also governed by rules issued under s 32 of the Restitution Act. Although the power to expropriate land now lies with the Minister, aggrieved parties remain free to approach a court in relation to the amount of compensation and to the manner and time of payment.<sup>449</sup> These acquisitions must also serve the aims of the restitution programme, which should

---

OS 03-07, ch48-p67

ensure that acquisitions and expropriations will not occur in a haphazard manner. As administrative action, the whole process is also subject to review by a court in terms of PAJA. In addition, the Minister only needs to fall back on these 'last-resort' powers

---

446 See T McLachlan 'Landmark Expropriation Deal' *Daily Dispatch* (26 April 2006) 10 and T McLachlan 'Land Reform Landmark' *Sowetan* (26 April 2006) 27 (With regard to the first case where a farmer received an expropriation notice relating to his farm in the North West province. The notice was published after years of unsuccessful negotiations. However, before the land could be expropriated, the land owner accepted an offer of R2 million. According to the Department of Land Affairs this case is a clear indication that expropriation will only be employed as a last resort). The second expropriation notice issued was in June 2006 in the Mpumalanga province after three years of unsuccessful negotiations. See S Yende 'Expropriation Talk Put on Hold' *City Press* (11 June 2006) 4.

447 ESTA s 42(1)(a)(i).

448 ESTA s 42(1)(b).

449 N Wilson 'Lawyer Allays Fear of Land Grabs' *Business Day* (28 January 2004) 8. Academic authority suggests that market value is not an overriding factor, but only *one* of the many factors to be taken into account in determining the amount of compensation. See AJ van der Walt 'Reconciling the State's Duties to Promote Land Reform and to Pay "Just and Equitable" Compensation for Expropriation' (2006) 123 *SALJ* 23, 23-40. It is thus quite possible that the final amount to be paid could be below market value — depending on the particular circumstances. It has also been suggested that it would be quite legitimate for the legislature to set down a general land reform discount for compensation — provided that the legislature leaves room for adjustments based on individual circumstances.

if the usual mediation procedures fail. For these reasons, s 42E in our view passes constitutional muster under FC s 25, or is saved by the restitutionary justice provision in FC s 25(8) read with the general limitations clause in FC s 36.

#### **(iv) Budget**

The funds allocated for land reform have increased from R770 million in the 2000/2001 fiscal year to R1.7 billion in 2003/2004. Expectations are that funding for the restitution programme alone will increase to R1.4 billion by 2006/2007.<sup>450</sup> In the 2004 budget, R933 million was allocated to restitution alone. That increase can probably be ascribed to the fact that 2005 was the initial target date for the completion of restitution claims and that government was hoping that the deadline would be met by allocating more money at that stage.

Despite these increases, critics have commented that the budget is still a 'Cinderella budget'.<sup>451</sup> They point out that national increases do not correlate with the increased operational costs of the Department of Land Affairs and the Land Claims Commission. In the past, the combined budgets for redistribution and restitution have added up to 0.4 per cent of the total national budget. Though the allocation to land reform has increased, it still remains less than 1 per cent of the total budget.

Land restitution for the period 1995-2005 has cost the government approximately R2.8 billion. In comparison to other departments, the Department of Land Affairs is doing very well at spending its funds, with an average of 98 per cent of the budget having been spent, of which about 80 per cent has been spent on land reform.

As set out above, the claims that still have to be settled are sizeable. The cost of settling these claims is conservatively estimated at between R2-billion and R10-billion. It is clear that the current and envisaged budgets fall far short of what is required.

#### **(v) Sustainable development and agriculture**

It is estimated that 30-35 per cent of all farm land in South Africa is subject to land claims.<sup>452</sup> This accounts for 20 per cent of land nationally, with two provinces (Mpumalanga and Limpopo) facing land claims that affect about 50 per cent of

---

OS 03-07, ch48-p68

agricultural land. Concern has been voiced over the decline in agricultural production levels after resettlement, and that food production may be compromised. In order to address this issue, government introduced the Agricultural Strategic Plan in 2001 and, in February 2004, announced a new comprehensive agricultural support programme.<sup>453</sup> It is imperative that the redistribution and restitution of land coincide with the redistribution and transfer of capacity and skills.<sup>454</sup> It is abundantly

---

450 An additional R750 million over the next three years was also allocated towards supporting newcomers to the agricultural sector forming part of the redistribution and agricultural development initiatives of government.

451 *Mail & Guardian* (20 February 2004).

452 See, eg, W Hartley 'Land Claims 'No Risk to Food Security' *Business Day* (8 January 2004) 3.

clear that allocating land alone is no longer a guarantee for successful farming in the 21st century.<sup>455</sup>

### **(vi) Community-related problems**

Six years after the Elandsloof restitution claim was settled, hardly any development has taken place on the land. This failure has mainly been due to in-fighting in the community and a lack of skills. The community, consisting of 300 persons, is unable to decide on the priorities to be included in its development plan. Because the community is the owner of the land, the municipality is not part of the initial development process and cannot (or will not) get involved. Recent infighting in Ndabeni, Cape Town, has also resulted in no benefits being provided to persons to whom land was allocated in 2001.<sup>456</sup> These examples highlight a few shortcomings in the process: communities need assistance in drafting development plans and getting the development process up and running. In order to achieve that, the Department of Land Affairs has to remain involved in the communities and should consider implementing monitoring procedures. Merely settling communities on the land after finalization of claims cannot be the end of the process or of the Department's involvement.

### **(e) Outstanding claims**

The outstanding restitution claims to be settled self-evidently include some of the most difficult claims. It remains to be seen whether s 42E of the Restitution Amendment Act will expedite the process so that unnecessary delays in the determination of compensation can be avoided.

The outstanding claims are not only legally complex, but are bound to be costly as well. The implementation of the CLRA will also have an impact on available funding. It has been estimated that the implementation of that Act will cost government about R68.3 million. The real cost however, seems closer to R500 million. Competition for adequate funding within the Department of Land Affairs among the three individual reform programmes is thus envisaged.

---

453 The programme centres on the Comprehensive Farmer Support Programme (CASP) and is aimed at the following beneficiaries: LRAD beneficiaries, emerging entrepreneurs, those whose services have collapsed (food production) and beneficiaries of the household food production programme.

454 For more detail regarding the relationship between land reform and sustainable development, see JM Pienaar 'Land Reform and Sustainable Development: A Marriage of Necessity' (2004) *Obiter* 269.

455 The overall picture is more disconcerting when one considers that the funding for agricultural and related research has declined from R338 million in 1997/98 to R262 million in 2002/2003.

456 W Roelf 'Infighting, Bogus Claims, Buck-Passing, Bureaucracy Snarl Ndabeni Land Restitution' *Cape Times* (12 July 2006) 4.